

The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law

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THERE ARE MANY ASPECTS of the idea of human dignity that are questionable and uncertain.¹ One thing, however, seems clear: the law of dignity at the national (constitutional, sub-constitutional or quasi-constitutional), supra- or international level² cannot be expected to disappear, turning out to be one of those ephemeral normative whims and fashions that—after catching the attention for a while—have no lasting impact on the reality of the law. The law of dignity is by now too firmly established as a building block of international human rights law for that. In addition, dignity has a distinct political dimension that points in the same direction: whatever the changing currents of ethical and legal debates may be, it is hard to imagine that any serious political initiative aiming to reform international human rights law by removing references to human dignity would have any chance of success.

So, even if one is sceptical about the merits of the idea, the task at hand is to make human dignity a workable legal concept, with a shape that fosters its central aims: the protection of the autonomy, equality, and respect that every human being is entitled to, while steering clear of illiberal ideologies or particularistic political agendas. In principle, this task is not new: it is the familiar task posed by any concept central to human rights law and the political order of democratic, national, and international constitutionalism—from liberty to democracy, from equality to the rule of law. Like dignity, each of these concepts is of crucial and persistent importance, in need of concretization, and

¹ As an excellent starting point for any reflection on dignity, see the list of questions identified by Christopher McCrudden, Chapter 1, this volume.

² For an overview, see Christopher McCrudden, 'Human dignity and judicial interpretation of human rights', *European Journal of International Law*, 19 (2008), 655–724, at 664; M. Mahlmann, 'Dignity and autonomy in modern constitutional orders', in M. Rosenfeld and S. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012), 370–96.

therefore in danger of being abused politically. To make some progress on this task ahead, six topics that merit particularly close attention will be considered.

Problems of genealogy

The first issue of importance for a constructive account of human dignity is the problem of genealogy. The question is: where does the idea of dignity come from? Has it deep roots in the history of ideas, in Stoicism, perhaps,³ or some other ancient source,⁴ and do these roots extend beyond the European context?⁵ Or is dignity of more recent origins, dating from the humanism of the Renaissance⁶, or the Enlightenment?⁷ Or is it a very modern idea, as some argue, possibly bound up (as other human rights are supposed to be) with the rise of statehood and the nation?⁸ The question of genealogy is a standard question in current debates, and not only because of the widespread purely historical curiosity about the trajectories of the history of ideas.⁹ It has a specific undertone, the meaning of which is significant because it shows that the question of genealogy is intertwined with two different problems: the problem of the content of human dignity and of its legitimacy. The origin of dignity is of such intense interest because of the widespread assumption that a genealogical reconstruction will tell us something about the meaning of this difficult concept, as well as whether or not it is justifiably regarded as a centrepiece of human rights law. The cognitive interests differ: some look for the reasons for its strange appeal; others, on the other hand, attempt to reveal some darker secrets hidden in the corners of its history that may even tie it to certain suspi-

³ See M. Pohlenz, *Die Stoa: Geschichte einer geistigen Bewegung*, 7th edn (Göttingen, Vandenhoeck & Ruprecht, 1992), 137; M. Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (Baden-Baden, Nomos, 2008), 108ff.

⁴ For example, Greek tragedies; see Mahlmann, *Elemente*, 105ff.

⁵ A standard reference point from Confucianism is Mencius: see Mahlmann, *Elemente*, 115.

⁶ Standard references are P. della Mirandola, *De hominis dignitate* (Hamburg, Meiner, 1990); F. Petrarcha, *De remediis utriusque fortunae* (München, Fink, 1975); G. Manetti, *De dignitate et excellentia hominis* (Hamburg, Meiner, 1990); see Mahlmann, *Elemente*, 136ff.

⁷ Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (Berlin, Akademie Ausgabe, vol. 4, 1903), 428ff; see Mahlmann, *Elemente*, 144ff.

⁸ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, Belknap Press of Harvard University Press, 2010), 30.

⁹ See Samantha Besson and Alain Zysset, 'Human rights theory and human rights history: a tale of two odd bedfellows', *Ancilla Iuris* (2012), 204–19, for a review of contemporary discussion on human rights in general.

cious creeds or content.¹⁰ The question of genealogy, however, concerns all these competing perspectives.

Of particular importance, currently, is the idea that human dignity is an important example of political theology: although apparently a political and legal term, it is to some a secularized theological idea.¹¹ This thesis can serve very different aims: to legitimize dignity by religious metaphysics or, on the contrary, to delegitimize it, because of its supposedly particularistic religious content. This thesis serves as well as the basis of the argument that certain cultures and religions (say, to take the most important example, Islam) have not developed and cannot develop this concept drawing on the internal resources of their cultural heritage and the doctrines of their faith.¹² Given these far-reaching implications, a clear understanding of the theoretical parameters of the genealogical reconstruction of dignity is of great importance.

But how to proceed? One crucial precondition of any historical reconstruction is a theoretical understanding of what one is actually looking for. This is important for the historical study of any subject, but is perhaps of particular importance for understanding dignity. This means that one should not look only for the *term* dignity (*dignitas*, *Würde*, *kavod*, etc.) but for historical manifestations of the *idea* designated by these terms. In these manifestations, the idea may not be called dignity at all. This may be the case because the same or a similar idea can be expressed by many different linguistic means and, of course, not necessarily according to the linguistic expectations of posterity. A language may even lack a term for what is referred to in English by the word ‘dignity’. This is, however, of no importance, because the absence of such a term in a language is no indication that the idea is absent from the minds of the speaker or the listener in the relevant speech community. The theory of language has taught us that the relationship between language and thought is much more complicated than that.¹³ In addition, there are modes of expression beyond language that may be quite relevant; for example, art. One

¹⁰ Some even proposed a connection to Nazi ideology: James Q. Whitman, ‘On Nazi “Honour” and the New European “Dignity”’, in C. Joerges and N. Galeigh (eds), *Darker Legacies of Law in Europe* (Oxford, Hart, 2003), 243ff.

¹¹ On the idea of political theology with dubious conclusions, see Carl Schmitt, *Politische Theologie*, 2nd edn (München, Duncker & Humblot, 1934), 49ff.

¹² On the latter see Axel von Campenhausen, in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte*, vol. 6/1 (Heidelberg, C. F. Müller, 2010), 136, paras 104–12: rights are intrinsically connected to the Christian, and less so the Judean, tradition, but are alien to Islam.

¹³ For example, Noam Chomsky, *New Horizons in the Study of Language and Mind* (Cambridge, Cambridge University Press, 2000), 147ff.

can learn a lot about human dignity from Goya's etchings or Giacometti's sculptures.¹⁴ If one wants to understand the history of human dignity, therefore, one has to look at many forms of human expression.

On the other hand, one should not be led astray by the use of the term dignity in contexts that are unrelated to questions of human rights—say, discussions about the dignity of institutions as such, because this may produce considerable confusion: whatever sense it may make to speak of the dignity of an institution, the content of this term in this context is evidently very different from the content of dignity as a right attaching to human persons.

A further point worth stressing is how important it is to steer clear of *intellectual elitism* in such an historical reconstruction, because this may turn out to lead to a theoretically and historically severely impoverished vision of the intricacies and the depth of what the idea of dignity is about. There is a danger in thinking that what Cicero, Aquinas, Kant, or Nietzsche said about human dignity is the thread from which the history of this concept is woven. But this is far from true, and not only because of the contribution that art has made. Take the example of the abolition of slavery, more particularly the slave narratives written at that time.¹⁵ These narratives are loaded with powerful claims about the worth of a person, laying the ground for the abolition of an institution that involved 500 years of subjugation, death, and suffering, and without doubt (despite philosophical defences from Aristotle to Locke) one of the great injustices of human history.

That these claims of shared, equal personhood and worth were able to play a decisive role in shattering this massive social institution (though other factors were of great importance as well) indicates an important property of human dignity: it is subversive; it poses a radical challenge to illegitimate power, hierarchy, and privilege.

As importantly, these subversive ideas of the intrinsic worth of human beings were formed by enslaved persons without the need to have read (and, of course, any possibility of reading) Aquinas or Kant. This is hardly surprising. One does not have to be literate to know what dignity means. On the contrary, some of the most impressive illustrations of the content of human dignity are found in the lives of those quickly forgotten by history, those who nevertheless manifest courageously what the idea of dignity is really about.

¹⁴ On Giacometti, see M. Mahlmann, *Le Chariot—Bemerkungen zu den Grundlagen des Rechts*, *Zeitschrift für Schweizerisches Recht* 131(2012), 123–44.

¹⁵ See, for example, Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (New York, Penguin Press, 1845, 1982), 107ff. Another example is furnished by the preamble to the decree abolishing slavery in the French empire; see R. J. Scott, Chapter 2, this volume.

Abolitionism, the working class and women's movements, post-colonial struggles, or the fight against apartheid were not following simple, single-purpose, monolithic political agendas. As with any mass movement, their actions were marked by competing claims, ideals, and internal contradictions. They sometimes pursued aims, as a matter of tactics or strategy, that were not reconcilable with human rights in general or dignity in particular. But their rich and complicated histories embody claims about the intrinsic worth of individuals, irrespective of colour, of social status, of poverty, or of sex that it is important to recognize, however much they are sometimes made invisible by layers of ideology and political doctrine. We would not understand much about dignity without reflecting closely about these contributions,¹⁶ because it is the fight for the freedom of slaves, for justice for the working class or the poor, for equality for women, and the everyday manifestations of what human life is about, that fill the concept with thick meaning rather than the language of Petrarch, Pico, Manetti, or the prose of the *Grundlegung zur Metaphysik der Sitten*, as majestic as these may certainly be.

For historical studies, this requires broadening perspectives, studying not only texts but also social practices, and particularly for a term like dignity the investigation of the axiological content of human struggles. Thus, to study the history of the idea of dignity one cannot focus only on terminologically expressive use; one has to look at the implicit presence of the idea of dignity. The history of human dignity is therefore rich indeed, and any simple account is prone to fail. This is particularly true for any essentialist theory of dignity that sees it as intrinsically connected to one culture or religion. Such arguments are rarely not tainted with a touch of partisanship, because the culture or religion that is regarded as the 'true' source of dignity is more often than not the one the genealogist of dignity herself belongs to. With an appropriately broad perspective, it quickly becomes evident that these arguments point in the wrong direction, because the idea of intrinsic worth belongs to the heritage of more than one faith and culture, however tentative, incomplete, and lacking consistent application,¹⁷ forming nothing but a beginning, a step to the full reflective appropriation of this idea by human thought and practice.

¹⁶ Moyn, *The Last Utopia*, 84ff. rightly draws attention—for example—to national independence as an aim of post-colonial movements. There was, however, more at stake, too, namely the right of *individual persons* not to be subjugated by foreign powers, thus to political autonomy and self-determination. These rights often drowned in post-colonial dictatorships; but this is no reason not to remember their significance.

¹⁷ Good and classical examples are furnished by Kant, for example his account of the death penalty: *Die Metaphysik der Sitten* (Berlin, Akademie Ausgabe, vol. 6, 1907), 331ff.; of limited political rights of women and servants: *Die Metaphysik der Sitten*, 314; or on ethnic groups: *Vorlesungen über An-*

Problem of content

But what is this idea really about? This leads to the next problem, the problem of content. As with any term, dignity can be used in many ways and in many contexts. There are also many theories of dignity that invest it with a plethora of nuances of meaning.¹⁸ However, the core idea behind the term for the human rights context is, it seems, that human beings, irrespective of other characteristics, possess an inalienable, supreme, intrinsic worth because of their humanity alone, and for no other reason than that. Human beings are last-order purposes of human (individual and institutional) action. This implies the protection of their status as autonomous subjects, as end-in-themselves, and respect for their humanity. It necessitates, furthermore, the prohibition of their instrumentalization, reification, or objectification.

These tenets describe the normative core meaning of the idea of human dignity. This core content *morally* binds individuals as much as institutions. These normative entitlements and constraints are partly or fully mirrored *in law* through the subjective (claim) rights of individuals, the obligations of (state or international) public authorities, the (direct or indirect) horizontal effect of human rights norms between private parties, and the duties to protect individuals against certain qualified harms, which are derived in different legal systems from dignity guarantees, the details depending on their respective legal framework.¹⁹

There are many possible examples to illustrate the normative point and meaning of this delineation of the content of human dignity. The fight for the abolition of slavery is one: at its core it was about the idea that human beings are to be respected as autonomous subjects, and that they cannot be legitimately turned into tools for the service of others, into the heteronomously dominated objects of exploitation for slave-holders. The women's movements furnish other examples. One normative centrepiece of the struggle for the emancipation of women was, and still is, the demand that women should not be reified or used as things for sexual gratification, domestic exploitation, political guardianship, or reproductive services, but respected as subjects.

thropologie. Die Vorlesung des Wintersemesters 1781/82 (Berlin, Akademie Ausgabe, vol. 27, 1997), 1187, which are not reconcilable with his own account of human dignity.

¹⁸ For some examples see McCrudden, Chapter 1, this volume, and for a review of influential modern theories see Mahlmann, *Elemente*, 248ff.

¹⁹ See Mahlmann, 'Dignity and autonomy in modern constitutional orders', 370ff. According to J. Habermas, 'Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte', *Deutsche Zeitschrift für Philosophie* 58 (2010), 343–57, at 347, human dignity forms the central connection of an egalitarian-universalist morality and law.

Virginia Woolf dryly demanded money and ‘a room of one’s own’, a claim succinctly symbolizing this space for the lived subjectivity of women, not as an act of grace but as a right based on their intrinsic worth as human beings.²⁰

This delineation of the content of dignity can form a critical yardstick for assessing normative arguments based on this idea, since it provides relatively precise tools with which to identify conceptions of dignity that are legally unsuitably or loaded with dubious ideology. A good example of its potential is the critique of theories that assert an axiological priority of goods over individual well-being, say the interest in the procreation of the human species to justify unequal treatment of homosexual and heterosexual couples.²¹ Arguments of this sort have a distinctly bewildering character, because there is no reason to worry about the continuation of the human race, not least because of the joy that children give. But, this apart, to ascribe individual well-being second rank behind such aims is to violate the dignity of individuals, as they are not regarded as ends-in-themselves but rather as means that are subservient to supra-individual purposes like procreation. This kind of critique can have important practical legal implications, as is illustrated by the example of the conceptual and doctrinal sharpening of anti-discrimination law against unequal treatment of gay people through its interpretation and conceptualization in the light of dignity,²² including the right to enjoy a legally recognized and protected form of partnership with the same rights (and duties) as heterosexual couples.

This idea of dignity can also furnish directions in the maze of genealogical reconstructions. It can help to calibrate research and help to distinguish ideas of lasting potential from those that wither away with the contingent prejudice that produced them—as the example of Kant’s defence of the death penalty, the disenfranchisement of women, or the supposedly distinct properties of different ethnicities vividly illustrates.²³ All these positions are most succinctly criticized on the base of the dignitarian concept of protected human subjectivity, which Kant himself helped to formulate in clear and distinct terms.

This critical function shows why it is important to determine the positive content of dignity, and not only rest content with identifying (clear) violations

²⁰ Virginia Woolf, *A Room of One’s Own* (London, Hogarth Press, 1929).

²¹ For an example—now overruled by the Federal German Constitutional Court—from the German jurisprudence, BGH, 14 February 2007—IV ZR 267/04 para. 22; BVerwG 25 July 2007—6 C 27/06 para. 43.

²² See, for example, SACC, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* (CCT 10/99) [1999]; ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

²³ See Kant, *Die Metaphysik der Sitten*, 314, 331ff.; *Vorlesungen über Anthropologie. Die Vorlesung des Wintersemesters 1781/82*, 1187; see note 17, this chapter.

of dignity, such as indignity produced by humiliation. Although the latter approach has much heuristic and practical force and is successfully utilized in legal argument,²⁴ one has to have as clear as possible an understanding of its substantive content in order to be able to meet the many challenges dignity faces from genealogy and from the critical assessments of potentially highly politicized and ideologized dignity claims.

Interestingly, despite the variety of different approaches, many theoretical understandings and, from an international comparative perspective to a surprising degree, international case law and legal doctrine coalesce in certain crucial respects explicitly or implicitly around certain ideas: autonomous subjectivity, basic respect, non-instrumentalization, non-objectivication, and non-reification.²⁵ It is therefore far from true that dignity is in practice devoid of identifiable content, or has become an ‘empty signifier’,²⁶ or a rallying cry that accommodates all different points of views.

The historical record of the creation of the modern law of dignity also tells more complicated lessons in this respect than is sometimes recognized. When norms constitutive of modern dignity law were drafted, their content was certainly open to many questions and future interpretations.²⁷ A plurality of background ideas—from humanism, socialism and social democracy, to Christian personalism—played roles that are not easy to decipher and disentangle.²⁸ Post-war human rights are in any case deeply embedded in strategies of power, not least of Cold War politics, and ornamental rhetoric accompanying it and human dignity is not an exception to this. But the complex history of the creation of central norms of the new law of dignity, the machinations

²⁴ An example is the idea current in German legal doctrine of a determination of the content of dignity by its violation, *Inhaltsbestimmung vom Verletzungsvorgang her*. The first decision of the German Federal Constitutional Court on dignity proceeded this way, see BVerfGE 1, 97 (104).

²⁵ Mahlmann, ‘Dignity and autonomy in modern constitutional orders’, 370ff.

²⁶ As Costas Douzinas formulated in the conference discussion.

²⁷ See, for the example of the Universal Declaration of Human Rights (1948), J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, PA, University of Pennsylvania Press, 1999); M. A. Glendon, *A World Made New* (New York, Random House, 2002).

²⁸ It is therefore not convincing to ascribe one particular perspective, say Christian personalism, a decisive role. See, for example, E. Roosevelt’s explanation of the lack of reference to God in the Universal Declaration, quoted in Glendon, *A World Made New*, 147f. for background. On the plurality of influences, which even were made explicit by the drafters (including prominent Christian Democrats like Süsterhenn) in the case of the German Grundgesetz, see the review of the historical records of the drafting process in Mahlmann, *Elemente*, 246 and notes. On the thesis of the central role of Christian personalism, see S. Moyn, ‘Personalism, community, and the origins of human rights’, in S.-L. Hoffmann and S. Moyn (eds), *Human Rights in the Twentieth Century* (Cambridge, Cambridge University Press, 2011), 85ff, which has a very distinct political edge: ‘human rights need to be closely linked, in their beginnings, to an epoch-making reinvention of conservatism’, 87.

and plots of (sometimes ethically not particularly inspiring) actors,²⁹ the selectivity of political representation, and the exclusion of many people in colonized and externally dominated parts of the world from the drafting of modern human rights law,³⁰ did not prevent important seeds from being sown that had the potential to grow into something meaningful beyond the narrow-minded intentions and expectations of some of those who played an important role in their development.³¹ The ascertainment of the worth of human beings created the normative nucleus for a crucial limitation of any relativizing of the value of individual human lives, whether by assertions of the supremacy of state power, the greatness of the nation, the importance of class interests, or the superiority of a race.³² This was the message sent by the Universal Declaration and the constitutions where dignity gained a prominent place. And this was in spite of the particularistic and dubious motives of some, despite how difficult it was and is to be to draw practical conclusions from this idea in the legal, political, and social spheres, despite how endangered dignity is by moral and legal regressions (as in the international debate about torture), and despite how winding the path was from these seeds of subversion to the development of a more or less convincing doctrine of dignity law.³³

²⁹ A prominent example is Jan Smuts and his influence on the Preamble of the UN Charter; see M. Mazower, *No Enchanted Palace* (Princeton, NJ, Princeton University Press, 2009), 28ff.

³⁰ Only a fraction of the states member of the UN today were part of the founding fifty-one states (including Poland). The drafters of the Universal Declaration were not representing more than a fraction of world cultures.

³¹ Not surprisingly perhaps—legal texts are sometimes cleverer than their authors; see G. Radbruch, ‘Rechtsphilosophie’, in A. Kaufmann (ed), *Gesamtausgabe*, vol. 2 (Heidelberg, C. F. Müller, 1993), 345.

³² There is a debate in recent scholarship on the history of human rights, which role the Holocaust played for the development of modern human rights law—a central (see Morsink, *The Universal Declaration of Human Rights*, 37 and passim) or none (see, for example, Moyn, *The Last Utopia*, 7). There are good reasons to think that it did play a meaningful role, especially if one looks beyond the sphere of power politics and their agents. For a short survey, see G. D. Cohen, ‘The Holocaust and the “human rights revolution”: a reassessment’, in A. Iriye, P. Goedde, and W. Hitchcock (eds), *The Human Rights Revolution* (Oxford, Oxford University Press, 2012), 53ff; Morsink, *The Universal Declaration of Human Rights*, 37ff. The second recital of the Declaration is of interest in this respect, too.

³³ One of the drafters of the German *Grundgesetz*, later Federal President T. Heuss, is often quoted, though sometimes in a misleading way: that dignity is a *nicht interpretierte These*, a non-interpreted thesis. There were substantial contours around what dignity meant in the drafting process, including the substantial connection of human dignity and human rights, the priority of the individual over state interests, the importance of liberty or the unfolding of human personality in a community; see the review of the drafting record in Mahlmann, *Elemente*, Goos, in Chapter 3, this volume, for further discussion. Illustrative for some background consensus on dignity during the drafting process of the Universal Declaration is the rebuttal of the South African Delegation’s attempt to water down the egalitarian conception of rights in the Declaration: see Glendon, *A World Made New*, 146.

To be sure, dignity continues to be a morally and legally highly contested territory. But how could it be different since major questions of human life are at stake? One should not draw wrong conclusions from the degree of factual disagreement on all levels of morality and the law about as to what the concept means. One sometimes encounters in some discussions about dignity a conclusion that the *factual (historical and/or contemporary) variety of understandings* of dignity (which is a clearly evident reality) means that there is an *intrinsic impossibility* of giving the idea any convincing meaning. This is a fallacious conclusion. The factual variety of interpretations is one thing, arguing that some interpretations of this reality are more plausible than others is quite another. The factual variety of interpretations presents us with a task; it implies nothing about the possibility of carrying it out. Disagreement exists about legal concepts that have been with us for thousands of years, for example the basic concepts of tort. The challenge is therefore not to stay stuck in descriptive accounts of variety (a state of affairs that nobody would seriously contest), analytically crucial as they certainly are, but to answer the question, whether there are possible reasons *normatively to prefer* one concretization over the other. This leads to the next question, the question of justification.

Problem of justification

Genealogy and legitimacy

There is no understanding of human dignity without also understanding the historical genealogies of this idea in various cultural contexts. But it is important to remember that genealogy cannot substitute for a theory of the validity of a normative idea. Whatever the historical trajectory of understandings and misunderstandings of dignity, one needs a justificatory theory that provides reasons for ascribing dignity to human beings. There are doubts in contemporary theory about the difference between genealogy and justification,³⁴ but this misses a central point: that there is the possibility of wrong, illegitimate developments and traditions, and it is possible to formulate a critique of these

³⁴ For a recent example, see H. Joas, *Die Sakralität der Person* (Berlin, Suhrkamp, 2011), 12ff, pursuing the project of an 'affirmative genealogy of the universalism of values', 15ff., 147ff. These doubts are not limited to normative theory, cf. the critique of Reichenbach's and Karl Popper's distinction of the context of discovery and context of justification, K. Popper, *Die Logik der Forschung* (Tübingen, Mohr, 1934); T. S. Kuhn, *The Structure of Scientific Revolution*, 2nd edn (Chicago, University of Chicago Press, 1970), 8; P. Feyerabend, *Against Method*, 4th edn (London, Verso, 2010), 149ff.

in a theory of justification that transcends the pure facticity of historical trajectories.

Another point is worth stressing: The validity of such a theory is independent of the self-understanding of actors. Their self-understanding does not provide for sufficient reasons to assume or deny a particular value status of human beings. Schopenhauer, whose critique of dignity has become a much quoted reference point of scepticism about dignity,³⁵ may have thought of himself in the framework of his metaphysical theory of the ontological unity of all being and a correspondent ethics of life denial and pity and not in terms of his dignity. If so – what is the consequence of this stance? Was he not, as is any human being, of intrinsic, supreme worth? Just because he was unconvinced by the idea of dignity in general and Kant's account of it in particular does not mean that he didn't possess this value-status.

This leads to the next point: the fact that the mainstream of a culture denies the dignity of persons and perhaps even violates dignity, such as members of European cultures did for hundreds of years externally through slavery, colonialism or imperialism, and internally through the treatment of women (among other examples), does not mean that the victims of these actions, although part of this culture and perhaps even sharing its basic values, did not possess dignity. On the contrary, despite the age-old denial of the intrinsic worth of women, the resulting practices of denial, and even the self-understandings of some women of their lower worth, women most certainly possessed dignity, even when it was denied to them.

Dignity refers, therefore, to a value-status that is not dependent on the subjective self-perception of an individual or the self-understanding of a particular culture. This is not an exotic proposition but one describing a common feature of human rights: the fact that from the standpoint of a certain culture or religion the legitimacy of freedom of religion is denied does not mean that a person belonging to this culture or religion—from the perspective of legal ethics and a theory of legitimacy and even less so in positive law—should not enjoy this freedom.

This point is not to be confused with two quite different questions: whether, first, the dignity of an individual can legitimately be protected against her will; and, second, how and by whom the content of dignity is to be determined. As regards the first question, one can hold that dignity is an intrinsic normative property of human beings irrespective of the particular self-understanding of that individual while maintaining, without contradiction, that this

³⁵ A. Schopenhauer, *Preisschrift über das Fundament der Moral* (Hamburg, Felix Meiner Verlag, 1979), 64.

nevertheless entails a *prima facie* duty to respect the freedom of the person to decide about her life herself. This is so because, as indicated above, part of what dignity protects is human autonomy. There are practically universally accepted limits to this autonomy: it is a standard norm of human rights law to prohibit slavery (indeed, on the level of public international law it is *ius cogens*), even when the slavery is voluntarily undergone. Given the reality of human trafficking, this is a practically highly relevant point. The autonomy of the individual is thus limited by non-derogable minimum norms of how to treat human beings. But below this threshold, hard as it is to determine where this line is to be drawn in practical cases such as dwarf-tossing³⁶ and laser-dromes,³⁷ there is a very wide space of robustly secured self-interpretation without any constraints that is based on the autonomy of individuals protected by dignity. The kinds of constraints that dignity can legitimately impose on human liberty serve only to preserve that autonomy, so even if this use of dignity constrains individual action for the person's own good, it is not truly paternalistic.³⁸

Legitimacy without metaphysics?

The second question of the method and agent of determining the content of dignity leads to the theory of legitimacy and its foundations. Should human dignity—given what has been said—be taken to be an objective ontological property of human beings? And, if so, does this not presuppose a considerable amount of metaphysics that is widely discredited by contemporary post-metaphysical ontology and epistemology? However, nothing of what has been said before presupposes such an ontological claim. To be sure, dignity is not a natural property of an entity like weight or length.³⁹ Rather, dignity is a predication of a value-status by a value-judgement of a human subject to an object of evaluation (another human being) according to normative principles of axiological ascription.⁴⁰ Normative predicates of this sort do not imply ontological propositions about an objective normative reality irrespective of human moral judgement. On the contrary, they can be interpreted with ontological plausibility as elements of mental reality, created by the internal resources of the human mind, supervening upon facts that are uncontested elements of the

³⁶ Conseil D'Etat, no 136727, 27 October 1995, *Commune de Morsang-sur-Orge v Société Fun Production et M Wackenheim*.

³⁷ ECJ, C-36/02 Omega (14 October 2004).

³⁸ On further constraints based on respect of worth see below the remarks on limitations.

³⁹ See J. Habermas, *Die Zukunft der menschlichen Natur* (Frankfurt am Main, Suhrkamp, 2005), 62.

⁴⁰ Mahlmann, *Elemente*, 262ff.

fabric of the outer world, such as the particular properties of human beings, without referring to objective (metaphysical) normative facts in the world.⁴¹ Nor do normative predicates of this sort necessarily lead to ethical subjectivism if the principles of ascriptions enjoy more than subjective, and perhaps even universal, validity. Whether or not this is the case, it is a question of the theory of validity that provides the reasons for normative legitimacy of dignity-ascriptions.

This formulates the next question: How can one form such a theory of legitimation? What could it look like? There is a very substantial debate about this topic concerning the history of justifications of dignity and contemporary attempts in this respect.⁴² There are at least three types of legitimation theories discussed that have something like a paradigmatic character, though they do not exhaust the theoretical space in which dignity is explored today.

First, dignity can be regarded as a *transcendent gift*. Dignity is bestowed from this point of view through some kind of act of grace. This is the mode of legitimation of human dignity used in religious ethics. A common metaphor in this respect is the idea that human beings are formed in the likeness of God.⁴³ This is formulated in Judaism⁴⁴ and by the concept of *imago Dei* in Christian thought,⁴⁵ although this idea appears in others contexts as well, such as in polytheistic antiquity.⁴⁶ This mode of justification sometimes betrays a rather low estimation of human nature. Without the transcendent gift, humans can be regarded as quite deplorable creatures, not least because the tragedy of the Fall left humans with a corrupted nature or,⁴⁷ in Luther's drastic words, in Satan's image (*imago diaboli*).⁴⁸ Second, dignity can be based on properties of human beings, and—since properties of human beings as such have no prescriptive implications—on *normative principles*, although perhaps this

⁴¹ On the epistemological background of this non-referential theory of moral judgement, see M. Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 2nd edn (Baden-Baden, Nomos, 2012), 252ff, 343ff.

⁴² On the historical debate and contemporary problems, see Mahlmann, *Elemente*, 97ff, 248ff.

⁴³ See the second (later) account of creation in Gen 1:26, 27.

⁴⁴ See Y. Lorberbaum, 'Blood and the image of God: on the sanctity of life in biblical and early rabbinic law, myth, and ritual', in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Den Haag, Martinus Nijhoff Publishers, 2002), 55ff; Nathan Rotenstreich, *Man and His Dignity* (Jerusalem, Magnes Press, 1983).

⁴⁵ For a central example from scholastic thought see Aquinas, *Summa Theologica*, in *Die deutsche Thomas-Ausgabe*, vol. 13 (Heidelberg, Kerle, 1953ff), I–II, q. 64,2.

⁴⁶ See Ovid, *Metamorphosen* (Stuttgart, Reclam, 1997), I, 76–86, on the two possible versions of the creation of human beings.

⁴⁷ Compare with Aquinas, *Summa Theologica*, I–II, q. 82,1.

⁴⁸ M. Luther, *Über das 1. Buch, Mose. Predigten. 1527*, in *M. Luthers Werke, Kritische Gesamtausgabe*, 24. Band (Weimar, 1900), 51; Luther, *Predigten über das erste Buch Mose, gehalten 1523/24*, in *M. Luthers Werke, Kritische Gesamtausgabe*, 14. Band (Weimar, 1895), 111; Luther, *Vorlesungen über 1. Mose von 1535–45*, *ibid.*, 42. Band (Weimar, 1911), 166.

is often not made explicit, such as, for example, those that render some and not other properties of human beings constitutive of dignity, or general ethical principles like those of justice. From this perspective, human nature is, despite its rather evident unpleasant and destructive side, something that—in the light of these normative principles—*by itself* can legitimize the predication of human dignity. Dignity is not regarded as a transcendent gift; it is the original, inalienable, and equal property of every human being. This is the mode of legitimation of secular humanism.⁴⁹

The third mode of legitimation is in the form of radical social constructivism. In this approach, various theoretical origins are posited that not only assume the historical relativity of certain aspects of the idea of dignity, but take it at its core as nothing but a contingent product of discourse formations, final languages, social semantics, autopoietic systems, grand narratives, and the like.⁵⁰

The necessity of justification

The problem of justification is central. The plausibility of any determination of the content of dignity is dependent on its theoretical justifiability. No conception of dignity will survive in morality and the law if no convincing reasons are at hand why dignity should be understood in this way and not another.

Reasoned justification can, in addition, not be suspended because of a reliance on an overlapping consensus, leaving competing thick theories or normative justification to the side.⁵¹ Though, today, human dignity is taken to be a bedrock ethical and legal principle from many points of views, the contemporary political and social world is certainly far from any satisfactory practice of this idea. In addition, history has taught us that there is little reason to rely with calm confidence on the persistence of such an overlapping consensus. The firmly established consensus of today may be eroded by tomor-

⁴⁹ An argument based on human properties and normative principles of human moral understanding is fully immanent and secular—it may be unconvincing, but there is no necessary ‘transcendent kernel’ connecting it to religion. On the idea of an inner ‘transcendental kernel’ in Kant’s philosophy (something different to a transcendent kernel, it appears), see Michael Rosen, *Dignity* (Cambridge, Harvard University Press, 2012), 31.

⁵⁰ Dignity in systems theory is a good example for this approach; see N. Luhmann, *Grundrechte als Institution* (Berlin, Duncker & Humblot, 1965) and the post-autopoietic-turn maintained functional interpretation of human rights, N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp, 1997), 1075ff. One may count Habermas’s reconstruction of dignity as the product of reciprocal communicative structures of recognition as belonging to this kind of justification as well: see Habermas, *Die Zukunft der menschlichen Natur*.

⁵¹ See John Rawls, *Political Liberalism* (New York, Columbia University Press, 1996), 144ff.

row, if the wayward tides of human history change. There is consequently no alternative to try to develop as good a justification of human dignity as possible in order to reaffirm the basis on which any consensus may rest, while recognizing the fallibility of any such human theoretical endeavour.

A task of particular importance in this respect concerns the theory of legitimation by secular humanism. There are at least two reasons why this approach is of considerable interest. A secular humanistic account of dignity is of importance, first, because it is necessary to lay the groundwork for a common understanding of dignity that can be potentially shared beyond religious or cultural borders. This is an indispensable aim in a pluralistic but profoundly interconnected contemporary world. From a secular perspective this reference to secular modes of justification is without alternative, and it is not at all new to religious thought. On the contrary, it is a traditional approach familiar for example to classical Natural Law doctrine: it is the theoretical move to legitimize norms under the hypothetical (and from the point of view of the religious theoretician, contrafactual) assumption of the non-existence of God, the famous *etiamsi daremus* ('daring to think') justification of Natural Law without reference to transcendent sources.⁵² Religions have nothing to lose by this move, as understood by many religious thinkers. If some normative content is justified even without arguments stemming from a particular religion, this additional justification should only be welcomed from a religious point of view. In addition, religious ethics are not petrified entities; they are very much shaped by human reflection and thought that is by its very nature mundane, and has no direct humanely unmitigated access to the cognition of another world (one should not forget this in order to maintain an adequate sense of epistemological humility). The simple distinction between religious ethics and secular thought is therefore an artificial one in important respects.

This point is of some practical importance, given the political agents of the culture and social practices of human rights. Religions have most certainly been responsible for severe violations of human dignity: slavery and the attribution of certain roles to women are cases in point. But religions have also inspired, and do inspire, many people to pursue a quite different course by fighting (often most impressively) for the worth of human beings. A secular humanism is therefore a minimum core of a justificatory theory. It can, and should, however, be supplemented by additional arguments, not the least from the religious sphere, that can strengthen the idea of human worth.

⁵² See H. Grotius, *De jure belli ac pacis* (Tübingen, Mohr, 1950), 11; F. Suárez., *De legibus*, II, VI, 3 (Madrid, Institutio Francisco de Vittoria, 1974).

Second, secular humanism has some interesting thoughts to offer. One potentially promising way to think about this matter is the following: Humans are not just the objects of an obscure, passively endured environment and life; they are subjects that try to understand and (re)create their world. They attempt aesthetically to appropriate their own much-faceted chatoyant existence, including also its rather sombre sides. Their subjectivity is the one of a being endowed with an emotionally richly textured mortal and consciously transient self. They are faced with the possibility and task of autonomous self-determination that may lead sometimes to felicitous decisions and sometimes to decisions that they have to pay dearly for. Human autonomy is exerted under moral rules that can motivate us to transcend narrow personal interests out of care for the well-being of others and respect for what justice demands. This very peculiar fabric of human existence does seem to provide some reasons to ascribe to human beings intrinsic worth because creative subjectivity; feeling, conscious, mortal, autonomous selfhood; or the ability to moral self-transcendence can be plausibly taken as crucial elements of the axiological principles underlying the justified predication of dignity.

Another argument stems from the observation that human beings are, as a matter of anthropological fact, a purpose for themselves. Human beings are radically equal in this respect: the life one enjoys is something equally valuable for any person. Given the demands of justice to treat equals equally, this status of a life being of intrinsic worth has to be universalized. It is therefore a justified universal right for all.

Arguments from humiliation can be reconstructed as the negative flipside of these thoughts. It has been observed, and with good reason, that human beings have a fine sense of self-respect.⁵³ To violate this self-respect by degrading treatment is to harm human beings in a way that justifiably cannot be inflicted on beings that are of intrinsic worth.

The same is true for violations of other basic human interests that do not involve, or do not only involve, humiliation—the pain of torture is humiliating, but there is also the subjection of another to sheer pain as well, and this in itself is not reconcilable with the worth of human beings.

From this perspective, human dignity seems to have a foundational role for human rights, though not every violation of any human right is a violation of human dignity, an important point that will be considered in more detail below. It seems hard to justify the protection of the personal, physical, and psychic integrity of persons, their liberty and equality, without an argument

⁵³ S. von Pufendorf, *De Officio Hominis*, in G. Hartung (ed), *Gesammelte Werke*, vol. 2 (Berlin, Akademie-Verlag, 1996), VII, §1.

for the intrinsic worth of humans. Why should one not allow violations of personal integrity, of liberty, of equality, if not every person possesses equal intrinsic value? Personal integrity, liberty, and equality all presuppose that the human beings to whom these basic goods belong do count normatively. If humans are of no normative importance, their basic goods can have none either, and human rights lose their justificatory point.

Who decides?

Who decides about the justified content of human dignity? The answer is an unsurprising one. The agent is the usual one of any project of human thought. There are no philosopher kings or queens; there is no dignitarian avant-garde that has an epistemological prerogative in this respect. The justification of dignity can only be the result of the renewed, failing, improved, fallible attempts of equal human beings in common to grasp what the normative core of their humanity is about.⁵⁴

Problem of concretization

Ambit and limits

A problem that applied ethics and the law share in common is the concretization of human dignity. For the law, this is a decisive task if one wants to avoid the term becoming emptied of content or expanded beyond recognition with perhaps unwelcome consequences for the human rights order. What is needed is precision about the content of guarantees of dignity and precision about the limits of the scope of dignity, too. The latter is of as much importance as the former. One cannot shy away from the task of stating clearly what the protection of dignity does *not* demand.

To take an example: there are good reasons to think that guarantees of dignity can serve as justifications for legislative action against hate speech under certain well-qualified, contextualized conditions; if a minority is endangered in concrete circumstances, for example.⁵⁵ This does not mean, however, that it demands protection against any speech that is discriminatory, offensive,

⁵⁴ L. Wingert has coined the poignant phrase of the 'irreplaceability of the individual', the *Unvertretbarkeit des Einzelnen*, in the course of justification in this respect. See L. Wingert, *Gemeinsinn und Moral* (Frankfurt am Main, Suhrkamp, 1993), 179ff, 290.

⁵⁵ M. Mahlmann, 'Free speech and the rights of religion', in A. Sajó (ed.), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Utrecht, Eleven International Publishing, 2007), 41ff.

or stupid. Another example: dignity is a reason for the protection of equality through discrimination law but not every discrimination is necessarily a violation of human dignity, because a certain degree of interference must be a precondition of the assumption of a violation of human dignity if the term is to maintain any definable legal contours.⁵⁶

This explains why one can assert the *foundational role* of human dignity for other human rights as referred to above but still maintain the position that not every human rights violation is at the same time a violation of the dignity of the person. There is no justification of the abstract, substantive prima facie legal positions provided by human rights without reference to the idea of the intrinsic worth of human beings, and thus to human dignity. That does not mean, however, that human rights do not, or could not, protect human interests beyond what dignity demands, for instance for the sake of furthering the demands of justice.

The content of guarantees of dignity outlined above adds substance to a system of human rights. It is not made redundant by a catalogue of classical human rights, protecting the right to life, basic liberties, equality, and some social rights. One reason is that the scope of dignity encompasses specific notions that are not fully covered by other rights. This concerns protected levels of respect for individuals and, crucially, matters of instrumentalization, objectification and reification. Another reason is that the idea of human dignity can be a decisive tool in the convincing interpretation of other human rights. It can remind the interpreter of a central dimension of any human right as a heuristic tool of legal humanism. The expansion of rights of persons of a homosexual orientation is a case in point.⁵⁷ The reference to dignity helped to pierce the veil of traditional prejudice and resentment, emphasizing how human beings are a purpose in themselves irrespective of their sexual orientation. It showed more clearly the point of equality clauses and anti-discrimination law: whatever one thinks about the sexual orientation in issue is irrelevant, since the point of such protections is not to promote any particular sexual orientation but to acknowledge the intrinsic worth of persons, their

⁵⁶ Not to take into account periods of employment completed by an employee before reaching the age of twenty-five in calculating the notice period for dismissal can be regarded with convincing reasons as discrimination on the ground of age, but it is hardly a violation of human dignity. See ECJ, Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG*, para. 43 (19 January 2010). An interpretation of equality and non-discrimination clauses as in *Law v Canada*, 1999, 1 SCR 497 paras 52ff that interprets the equality guarantee as demanding a violation of human dignity is in danger of interpreting the equality guarantee too narrowly or human dignity too broadly. See Supreme Court of Canada, *R v Kapp*, 2008, SCC 41, para. 22 (22 June 2008).

⁵⁷ See, for example, SACC, *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT 10/99) [1999]; ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

right to develop their personality, and to lead the live they wish to lead, within commonly justified limitations. That human dignity is sometimes taken to be redundant is perhaps partly owing to its success: other norms have been loaded with the spirit of human dignity, and may therefore appear to supersede the norm that determined their acquired dignitarian meaning in the first place.

The concretization of the content of dignity, positive as well as negative, is also crucial for sharpening the critical function of dignity. Dignity is often referred to by those on different sides of the argument: the critique of torture is based on arguments of dignity and so are some of its defences, which argues that there is a duty to protect the dignity of the victims of the tortured persons.⁵⁸ Dignity is used, to take another example, to justify the fight against assisted suicide and to justify its permitted expansion. This constellation of rival claims based on the same right is the usual business of human rights law: arguments about headscarves in the classroom, to take just one example, are buttressed *and* challenged on the basis of freedom of religion: the freedom to manifest one's belief and to live according to its command, as well as the negative freedom of pupils not to become the patients of religious indoctrination. Only if there is a clear understanding of the content of dignity, its scope, and limits, can the merits of these rival claims be convincingly assessed.

Limitations

A central question in the process of concretization is the question of the limitations on rights. The regime of limitations determines what concrete content rights in any human rights code really have. For dignity, one important question is whether dignity is absolute⁵⁹ or relative.⁶⁰ There is a good case for taking human dignity to be absolute in relation to other rights: the use of a particular freedom or the protection of equality never justifies the violation of human dignity, understood in the (narrow) sense outlined above and with it the instrumentalization, objectivication, or reification of a human being, or the denial of her intrinsic human worth. There is one case, however, where the dignity of one person may collide with the dignity of another human being,

⁵⁸ For example, W. Brugger, 'Darf der Staat ausnahmsweise foltern?', *Der Staat* 35 (1996), 67ff.; W. Brugger, 'Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?', *Juristenzeitung* (2000), 165ff.

⁵⁹ Article 1 German Basic Law is the standard example of an absolute conception of a dignity guarantee; see Philip Kunig, in I. von Münch and P. Kunig (eds), *Grundgesetz-Kommentar* 6th edn (München, Beck, 2012), Article 1, para. 4.

⁶⁰ See Supreme Court of Israel, H.C. 5100/94, *Public Committee Against Torture in Israel v The State of Israel* (6 September 1999), para. 23.

and that is the case of abortion. That such a collision may occur seems rather plausible at least for late stages of a pregnancy, whatever one thinks about the exact beginning of human life and personhood. If, in such a situation, the life of an unborn child is ended to save the life of the mother, the child's life is not taken as an end-in-itself, whereas the mother's life would not be regarded as an end-in-itself if her life were sacrificed to save the life of the unborn child. This paradigmatic collision illustrates why the time-sensitive permission of abortion for certain qualified reasons (life, health, and existential well-being of the mother, or rape) has become a standard and well-justified form of regulation, details aside, in many parts of the world. These regulations draw the right conclusion for a tragic conflict: that it should not be deepened by ill-advised criminal sanctions.

The question of the subject of dignity is of great concern not only in the context of abortion, not least because of new biotechnological challenges. This is a highly contested and particularly difficult area. The traditionally intense debates should not, however, cloud the fact that—some widely implausible theories apart—there is much crucial common ground, as it is hardly contested that human beings when born are the subjects of dignity, and if one thinks of the fate of children in many regions of this world, this is not a minor thing to agree upon.⁶¹

Dignity can form a substantive right itself, for example by setting limits to criminal sanctions in the case of life-long imprisonment,⁶² or it may enhance the scope of other positive legal rights, as illustrated by the previous example of equality guarantees and anti-discrimination law. It can constrain rights as well, for example by limiting the use of free speech laws, as already indicated. This dual role is also a common feature of human rights: any freedom gives rights to its bearer and may constrain the rights of others, for example through freedom of religion-based limits on indoctrination by others. Here, as in other areas, considerations of proportionality (under whatever name) rank high in determining an appropriately fine-grained solution.

There are many other areas—from social rights⁶³ to the democratic structure of a society⁶⁴—that are within the ambit of what human dignity is about. In all these areas, much constructive work needs to be done. The principles of protected subjectivity and the worth of human beings, of non-instrumen-

⁶¹ On the discussion in bioethics and the law on the beginning of life, see Mahlmann, *Elemente*, 293ff.

⁶² See, for example, BVerfGE 45, 187.

⁶³ SACC, *Government of the Republic of South Africa and Others v Grootboom and Other* (CCT 11/00)[2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para. 44.

⁶⁴ See BVerfGE 2, 1; 5, 85.

talization, non-objectification, and reification can, however, serve as useful yardsticks and signposts concerning how to proceed.

Problem of universality

A fifth problem that needs more thought is the problem of its universality. The idea of the universality of dignity is one of the basic assumptions of the modern architecture of human rights. In the realm of theory, however, relativism abounds. For some, it seems, relativism is even something of a truism, an indubitable truth only questioned by those who fancy that their parochial thought has universal scope.⁶⁵ Despite this widely shared stance, the situation seems more complicated than that. The history of ideas, if conceptualized as outlined above, teaches us an important lesson in this respect. Ideas about the intrinsic worth of human beings have been developed in very different cultural circumstances and against very heterogeneous backgrounds, whether polytheistic, pantheistic, monotheistic, atheistic, or agnostic. As far as the theory of validity is concerned, relativism is not very attractive either. Neither the anthropological assumptions nor the normative principles implied in promising a theory of justification of human dignity appear to be dependent on one particular culture. In short, the argument that only some human beings, say whites or men, enjoy properties that legitimately invest them with intrinsic worth, and that other groups of human beings, say, of a certain skin colour or women do not, has somewhat lost its centuries-old appeal. That it is just to treat equals unequally in Bombay but not in London is also considerably less plausible than a hundred years ago. There are even plausible theoretical options for the construction of a fallibilistic, but non-relativistic ethical epistemology to account for these observations. Consequently, if the arguments of the sort outlined above are roughly on the right track, there is a good case to be made that the universal practice of dignity rests on more solid theoretical grounds than many tend to believe.⁶⁶

⁶⁵ A standard argument is to regard any universalism itself as a more or less ill-disguised form of particularism; for example J-F. Lyotard, *Le Différend* (Paris, Editions de Minuit, 1983), 208ff., on the French Assemblée Nationale, which imagined itself (wrongly) as humanity.

⁶⁶ See Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 330ff. On the background theory of moral epistemology within a mentalist framework see M. Mahlmann, *Rationalismus in der praktischen Theorie*, 2nd edn (Baden-Baden, Nomos, 2009); M. Mahlmann, 'Ethics, law and the challenge of cognitive science', *German Law Journal* 577ff. (2007); J. Mikhail, *Elements of Moral Cognition* (New York, Cambridge University Press, 2011).

Problems of human appeal

The sixth and last problem concerns dignity's profound ethical, legal, and political appeal. Where does this attraction stem from? Why has it so profoundly caught the moral and legal imagination of modern civilization? Dignity is a concept of vexing complexity in certain respects. At the end, however, dignity makes an elementary point that may furnish the reason why some cannot help but succumb to its human charms. We may like it or not; we may think of ourselves as greater, more elevated, more admirable than others; we may even rise in the social hierarchy and gain power and privileges; but we will not escape dignity's central lessons. No one of us is better than any other and no one of us is worse because we all share something quite important during our limited time on this planet, with all our folly, our insights, our feelings, our sorrows, and our occasional wit: the equal worth of that mysterious, mind-boggling, cruel, tender, and unfathomably vast thing called a human life.