

Michigan Law Review

Volume 113 | Issue 6

2015

Rank Among Equals

Ben A. McJunkin
Covington & Burling LLP

Follow this and additional works at: <http://repository.law.umich.edu/mlr>



Part of the [Human Rights Law Commons](#), and the [Law and Philosophy Commons](#)

Recommended Citation

Ben A. McJunkin, *Rank Among Equals*, 113 MICH. L. REV. 855 (2015).
Available at: <http://repository.law.umich.edu/mlr/vol113/iss6/6>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RANK AMONG EQUALS

Ben A. McJunkin*

DIGNITY, RANK, AND RIGHTS. By *Jeremy Waldron*. New York: Oxford University Press. 2012. Pp. 10, 147. \$29.95.

INTRODUCTION

Dignity is on the march. Once regarded as a subject exclusively within the province of antiquated moral philosophy, dignity—that “shibboleth of all perplexed and empty-headed moralists”¹—has recently developed into a cornerstone of contemporary legal discourse.² Internationally, the concept of human dignity has been central to the emergence and acceptance of universal human rights.³ Dignity, in some form, is guaranteed by such seminal documents as the Preamble to the Charter of the United Nations,⁴ the Universal Declaration of Human Rights,⁵ the German Basic Law,⁶ and the South African Constitution.⁷ Domestically, appeals to dignity undergird popular legal arguments for social and political rights at both the state and federal levels.⁸ Human dignity has been cited with surprising frequency in the recent opinions of the U.S. Supreme Court—including nine times (and “indignity” once more) in Justice Kennedy’s recent majority opinion in *United States v. Windsor*, which struck down a central provision of the Defense of Marriage

* Associate, Covington & Burling LLP. I would like to thank Catharine MacKinnon, Christopher McCrudden, J.J. Prescott, and Marc Spindelman for helpful feedback and encouragement on this piece. I would also like to thank the editors of the *Michigan Law Review* for their thoughtful work.

1. ARTHUR SCHOPENHAUER, *THE BASIS OF MORALITY* 101 (Arthur Brodrick Bullock trans., George Allen & Unwin Ltd. 2d ed. 1915) (1840).

2. Christopher McCrudden, *In Pursuit Of Human Dignity: An Introduction to Current Debates*, in *UNDERSTANDING HUMAN DIGNITY* 1, 1 (Christopher McCrudden ed., 2013) (“The concept of human dignity has probably never been so omnipresent in everyday speech, or so deeply embedded in political and legal discourse.”).

3. MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 1–2 (2012).

4. U.N. Charter pmb.

5. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmb., art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

6. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 1, § 1 (Ger.).

7. S. AFR. CONST., 1996, §§ 1, 7, 10.

8. See, e.g., Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron’s Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1177, 1184–85, 1194–99 (2011) (providing examples of human dignity’s being used in arguments supporting same-sex marriage rights).

Act (“DOMA”).⁹ Scholarly engagement with dignity’s legal dimensions has never been more prevalent or more important.

Against this backdrop of emergent (and still emerging) interest in the jurisprudence of dignity, Jeremy Waldron¹⁰ offers *Dignity, Rank, and Rights*, a profound and provocative take on the relationship between dignity and the law. Looking to the concept’s use in legal contexts, Waldron contends that human dignity operates as an elevated legal status that entails individual human rights. He casts what he sees as the law’s normative commitment to universalize human dignity as the gradual democratization of aristocratic privilege, a process Waldron describes as “a sort of leveling up” of humanity (p. 64). Although Waldron presents these two accounts of dignity as part of a single, self-reinforcing argument,¹¹ astute readers will note their independence. The first account identifies what contemporary legal dignity consists of and how it operates. The second offers up something like an origin story for that contemporary conception, one that attempts to reconcile dignity’s history as a strongly hierarchical notion with the egalitarian undercurrents of the modern-day human-rights movement. By interweaving these accounts, Waldron believes he can offer a conception of legal dignity that salvages its universality while avoiding the pitfalls of grounding such a critical tool in the murky realm of moral thought.

Dignity, Rank, and Rights is a refreshing work of legal philosophy. Edited and introduced by Meir Dan-Cohen,¹² the book comprises two lectures by Professor Waldron; commentaries on those lectures by Michael Rosen,¹³ Don Herzog,¹⁴ and Wai Chee Dimock;¹⁵ and a reply by Waldron to his commentators. Aided by the commentaries, *Dignity, Rank, and Rights* unfolds more like a rich conversation than an arid academic defense. Yet Waldron’s book is perhaps most useful to those already well versed in the debates over the meaning of human dignity and its relationship to the law. Articulating his account of human dignity as an elevated legal status, Waldron draws upon a diverse array of thinkers and texts—from John Locke and John Austin to Hannah Arendt and Lewis Carroll (pp. 20, 58 n.34, 23 & 39 n.31, 29). He also dispenses with competing visions of human dignity quickly, and with no shortage of nuance (pp. 22–30). The resultant book is both pointed

9. *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692–94, 2696 (2013). For a detailed survey of the Supreme Court’s invocations of human dignity, see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–81 (2011) (chronicling the frequency and variety of references to dignity in Supreme Court decisions).

10. University Professor, New York University School of Law.

11. For example, Waldron suggests that we can see contemporary dignity as a universal legal status only if we first “understand the *dynamics* of the movement between modern notions of human dignity and an older notion of rank.” P. 33.

12. Milo Reese Robbins Professor of Law, University of California, Berkeley, School of Law.

13. Professor of Government, Harvard University.

14. Edson R. Sunderland Professor of Law, University of Michigan Law School.

15. William Lampson Professor of English & American Studies, Yale University.

and poignant, if not the ideal primer for the novice starting to engage with dignity's jurisprudential dimensions.

This Review disentangles Waldron's twin accounts in the hope of laying bare the implications of his work. Part I sets out the methodological and substantive dimensions of Waldron's project to cast contemporary dignity in terms of legal status. It contrasts Waldron's status claim with more traditional visions of dignity as a legal value, examining both the relationship of dignity to human rights and the normative strength of dignity's universal distribution. Although Waldron sees his depiction of human dignity as breaking with important traditions, his work is largely synthetic—it offers a singular conception of dignity that encapsulates many features of established accounts by reimagining them as the privileges and immunities attending status. This Part also briefly examines the *Windsor* decision as a touchstone for domestic understandings of dignity's operation in legal contexts.

Part II explores and critiques Waldron's account of human dignity as a gradual extension of aristocratic rank. Borrowing from feminist theory and queer theory, as well as from the equality projects to which they are allied, this Part notes some troubles with extending preexisting rights in the guise of equality. Specifically, it examines the ways in which the narratives Waldron deploys may entrench social norms that perpetuate inequality and injustice while limiting the potential for marginalized groups to employ dignity as a deeply remedial legal tool. This Part concludes by suggesting that Waldron may be able to strengthen the normative grip of dignity as a rights-entailing status by incorporating those notions of human worth that have been central to dignity-based antidiscrimination and antistatutory projects.

I. DIGNITY AS RANK

Despite widespread commitment to the concept of human dignity, there remains a deep disagreement in both legal and philosophical circles about dignity's nature and content.¹⁶ At its most basic, the notion of “human dignity” typically connotes something like a fundamental respect for each person's humanity.¹⁷ But the two prevailing conceptions of human dignity, those drawn from the writings of Immanuel Kant and from Judeo-Christian teachings, exemplify how sharply such a simple idea can diverge in application. Kantian dignity—most frequently summarized by the maxim that persons should be treated as ends in themselves, never as mere means—is

16. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 675 (2008) (“It is clear that the idea of dignity has become a central organizing principle in the idea of universal human rights, although with interesting differences between jurisdictions, and that there are several different strands of metaphysical and philosophical thinking feeding these differences.”).

17. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 198 (1977) (“This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.”).

grounded in respect for the uniquely human capacity for autonomous moral reasoning.¹⁸ By contrast, Judeo-Christian human dignity is a corollary to the concept of *imago dei*, the belief that all persons are made in God's image and thus carry some "inner, transcendental kernel" of the sacred that commands respect.¹⁹ Applying these competing conceptions of dignity to a singular legal issue—abortion, for example—produces arguments cutting in opposing directions.²⁰

In *Dignity, Rank, and Rights*, Waldron tries to sidestep just such meta-physical or theological precommitments, which tend to be a source of deep disagreement.²¹ Rather than assume, as many do, that legal invocations of human dignity import their content from particular moral accounts, Waldron postulates that human dignity can be analyzed first and foremost as a legal concept, much in the same way that we think of, say, consideration in contract law as principally a legal, rather than moral, idea.²² As Waldron notes, dignity already operates as a legal tool; the language of dignity already "enriches our vocabulary," and "many of those riches arise in the first instance from law."²³ Accordingly, he wants to explore "how the concept works in its legal habitat and see whether the jurisprudence of dignity can cast any light on its use in moral discourse" (p. 14). Thus Waldron's project is not one of derivation from first principles but of interpretation of existing practices.

By beginning in law, Waldron's methodology allows him to engage directly with the work that dignity is busy performing in legal discourse, particularly human-rights discourse. It also permits him to avoid the "often destructive or, at best, reductive" skepticism, most frequently seen in modern moral philosophy, about whether we need a concept of dignity at all (p. 134). Yet Waldron sets himself an onerous task. To elevate dignity to the

18. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 76 (2011). See generally IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 96–101 (Jens Timmermann ed., Mary Gregor & Jens Timmermann trans., Cambridge Univ. Press 2011) (2d ed. 1786).

19. See ROSEN, *supra* note 3, at 3, 9 (internal quotation marks omitted).

20. See Reva B. Siegel, *Dignity and the Politics of Protection*, 117 YALE L.J. 1694, 1738–39, 1750–51 (2008) (explaining that Kantian conceptions of dignity emphasize the woman's autonomous choice while religious conceptions emphasize the dignity of the potential child).

21. For example, Kant's account of dignity crucially depends on the existence of a noumenal self, an increasingly rejected idea even among his modern disciples. MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 2 (2002).

22. At times, Waldron overreaches to defend this methodology. For example, he asserts at one point that "'dignity' is not a term that crops up much in ordinary moral conversation." P. 14. Both Rosen and Dimock appropriately chastise Waldron for this claim. It may very well be that moral philosophers have abandoned the term (and Waldron's statement becomes less surprising when he reveals it to be the product of a lunchtime conversation with Joseph Raz). But, as Rosen explains, dignity is certainly alive and well in ordinary discourse and, when invoked, unquestionably makes a moral claim. P. 83.

23. P. 137. More so than Waldron, I am sympathetic to Dimock's suggestion that the concept of dignity is rightly at home in a multitude of alternative habitats, "being differently shaped by each of these different environments." P. 120.

realm of substantive legal principle rather than “mere slogan,”²⁴ Waldron seeks to articulate an account of contemporary human dignity that will unify its disparate legal uses and aid in the further development of a cohesive human-rights jurisprudence. In the following Sections, I first examine Waldron’s attempt to find such unity by deploying the concept of legal status. I then consider the ramifications of that move, both for dignity’s normative grounding and for Waldron’s particular methodology.

A. *The Nature of Dignity*

What Waldron finds when he examines dignity’s operation in law—particularly in human-rights law—is an apparent contradiction. On the one hand, law frequently contains straightforward protections of individual dignity. For example, the Geneva Conventions expressly denounce “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁵ Likewise, the Universal Declaration of Human Rights guarantees certain rights in order to ensure “an existence worthy of human dignity.”²⁶ Formulations like these are consistent with an increasing trend in legal discourse to describe fundamental concepts as abstract values, in the sense typically implied by value theory.²⁷ In fact, some sources explicitly identify dignity as a value to be promoted or secured through the operation of law.²⁸ Values of this sort are attained through the protection offered by specific rights; rights are a means to the value as an end. Criminal laws against rape, for example, are widely justified by their protection of the value of individual autonomy.²⁹ Likewise, sexual-harassment law is often understood as promoting the value of gender equality.³⁰ Many accounts of human dignity proceed this way,

24. Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419, 1420 (2003) (“[T]o invoke the concept of dignity without clarifying its meaning is to use a mere slogan.”).

25. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(c), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

26. Universal Declaration of Human Rights, *supra* note 5, art. 23(3).

27. See Mark Schroeder, *Value Theory*, STAN. ENCYCLOPEDIA PHIL. (May 29, 2012), <http://plato.stanford.edu/archives/sum2012/entries/value-theory/>.

28. The South African Constitution, for example, explicitly “affirms the democratic values of human dignity, equality and freedom.” S. AFR. CONST., 1996, § 7(1) (emphasis added); see also Oscar Schacter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 848 (1983) (“The ‘dignity of the human person’ and ‘human dignity’ are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples.”).

29. See Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 941 (2006) (“[C]onceptually speaking, emphasis on nonconsent as definitive of rape views the crime fundamentally as a deprivation of sexual freedom, a denial of individual self-acting.”).

30. Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 2 (2009) (“It is generally understood that sexual harassment is wrong because it denies its victims the right to workplace gender equality.”).

focusing on the instrumental use of human rights to secure a given conception of dignity.³¹

On the other hand, dignity is frequently cited in human-rights law as the foundational principle that grounds other rights. For example, both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights state that all human rights “derive from the inherent dignity of the human person.”³² Dignity, in this sense, is presupposed to *explain* the entitlement of individuals to the enumerated rights. Because dignity as a foundational principle must be logically antecedent to the rights it grounds, it is inconsistent with the instrumental relationship imagined by rights *to* dignity.³³ While accounts that posit some objective, intrinsic human dignity are well suited to perform this foundational role,³⁴ they are largely incompatible with Waldron’s hypothesis of a purely *legal* dignity, one that does not depend upon the adoption of a particular moral worldview.

This ostensible circularity—“[d]ignity is what some of our rights are rights *to*; but dignity is also what grounds all of our rights” (p. 17)—motivates Waldron to reconsider dignity’s character. Eschewing the language of value, Waldron instead contends that legal dignity “is a normative status and that many human rights may be understood as incidents of that status” (p. 18). The relationship between status and rights, Waldron tells us, is not like the ends–means relationship of a value but rather “more like the relation between a set and its members” (p. 18). That is, a status both comprises certain rights and simultaneously “conveys the *point* of clustering those particular rights and duties together in a certain way” (p. 139). Elsewhere, Waldron has expanded on this idea, explaining that a status’s “primary structural presence in the law is justificatory: it works to package certain

31. See, e.g., JAMES GRIFFIN, ON HUMAN RIGHTS 29–32 (2008) (arguing that claims to human dignity reference a value of personhood, which is secured by the provision of particular human rights, such as the right to food); L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 DUKE J. GENDER L. & POL’Y 1, 31–43 (2013) (advocating for the adoption of sexual-harassment provisions designed to secure the value of dignity in the workplace).

32. International Covenant on Civil and Political Rights pmbl., adopted Dec. 16, 1966, S. TREATY. DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights pmbl., adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Mar. 23, 1976).

33. See Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 357 (2012) (“It would be contradictory to make human dignity a right in its own, however, because it is regarded as the foundation for all truly fundamental rights and the source of at least part of their core content.”).

34. For example, the Kantian incommensurability of persons might serve as a foundation for laws against prostitution. See Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 10–11 (2011). Similarly, *imago dei* might entail legal restrictions on abortion and birth control. See Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT’L J. CONST. L. 355, 371–73 (2012).

arrays of rights, duties, etc. under the auspices of a certain entrenched concern in the law.”³⁵ By invoking the concept of status, Waldron believes he can solve the circularity of dignity: individual entitlements to the *status* of dignity animate legal protections that characterize dignity as the content of rights; meanwhile, the status itself generates entitlements to the rights that constitute it, allowing dignity to be, in Waldron’s terms, “foundation-ish” (p. 21), if not quite foundational.

Waldron contends that a status-based account of dignity also better conforms to our intuitions about dignity than does a value-based alternative. For instance, status better accommodates the view that dignity simultaneously confers rights and imposes concomitant moral obligations on its bearer (pp. 140–41). Waldron has examined his idea elsewhere in the context of what he describes as “responsibility-rights.”³⁶ There, he articulated his view that dignity includes (or perhaps is defined by) a sphere of responsibility within which one has a certain authority to which the law must defer.³⁷ As a source of responsibility, legal dignity is more than a mere passive value to Waldron; it includes an affirmative “obligation to maintain the elevated status to which one is called as a human being” (pp. 140–41). Indeed, Waldron’s dignity is almost ontological—it is “a rank or status that a person may occupy in society, display in his bearing and self-presentation, and exhibit in his speech and actions” (p. 28).

Etymologically, the word “dignity” has long been linked with elevated status, in the form of social standing.³⁸ But this is principally the dignity that attends a noble birth, an honorific office, or even an especially worthy institution.³⁹ Few scholars have seriously considered that the particular dignity we enlist to ground human rights might be fundamentally understood as an assertion of ranking status (with all the pomp and mien and, most importantly, hierarchy that such claims typically entail).⁴⁰

Indeed, Waldron’s claim is all the more intriguing because legal statuses, despite a very lengthy history, are increasingly disused. Statuses reflect a sort of top-down categorization of individuals and the assignment of legal

35. Jeremy Waldron, *Does “Equal Moral Status” Add Anything to Right Reason?* 8 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-52, 2011), available at <http://ssrn.com/abstract=1898689>.

36. Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1120–21 (2011).

37. *Id.* at 1121.

38. *E.g.*, ROSEN, *supra* note 3, at 11 (“‘Dignity’ originated as a concept that denoted high social status and the honors and respectful treatment that are due to someone who occupied that position.”).

39. *See* McCrudden, *supra* note 16, at 657.

40. Waldron explicitly states that ideas of social differentiation and hierarchy are necessary to his claim, since it is a vision of extending to everyone the dignity associated with the highest level of a preexisting hierarchy. Pp. 133–34.

significance to those categories.⁴¹ Famously, if somewhat overstated, the whole of modern law has been described as a rejection of such classifications and the embrace of individual self-definition.⁴² The statuses that remain in legal use are largely functional classifications created in service of policy. Consider the legal ramifications of marital status. Currently, over 1,000 federal statutes (not to mention countless state laws and administrative regulations) premise an individual's rights and responsibilities on whether he or she is married.⁴³ Even with such far-reaching implications, marital status is merely conditional (at least for those who have been granted access to the institution): it reflects only one's current circumstances, which may be temporary and which are typically the result of affirmative choices by the status holder.

Waldron envisions legal dignity as a more fundamental, more enduring kind of status. Dignity is what Waldron refers to as a "sortal" status—a status that represents a person's permanent social standing based on the "sort" of person one is (p. 59). Examples of sortal statuses in contemporary legal regimes are hard to find, likely because our relatively recent history demonstrates their dangers. In the United States, for example, those who held the legal status of "woman" could not vote in federal elections until 1920.⁴⁴ Prior to the mid-nineteenth century, being both married and a woman in America denied a person the legal capacities to own property, enter into contracts, or earn a salary of her own.⁴⁵ In other countries, sortal statuses have been used to justify some of the most horrific crimes against humanity. Perhaps some part of what makes Waldron's account of dignity-as-rank so provocative is his attempt to revive and reform statuses of this sort by recasting them as the fundamental basis for the provision of human rights.

Waldron's thesis is not merely provocative; it is also prescient. Legal dignity is increasingly invoked to connote statuslike features of the type Waldron describes. Just last term, the U.S. Supreme Court premised its pathbreaking marriage decision, *United States v. Windsor*, on the status implications of the denial of human dignity. *Windsor* invalidated Section 3 of DOMA, which defined "marriage," for all federal purposes, as "only a legal union between one man and one woman as husband and wife."⁴⁶ The lawsuit was brought on behalf of a widow who had been lawfully married to a

41. See R.H. Graveson, *The Movement from Status to Contract*, 4 MOD. L. REV. 261, 261 (1941) (explaining that statuses fix "the rights and duties, capacities and incapacities of the individual . . . as a consequence of his belonging to a class").

42. See HENRY SUMNER MAINE, ANCIENT LAW 163–66 (Ashley Montagu ed., Univ. of Ariz. Press 1986) (1861).

43. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

44. See generally U.S. CONST. amend. XIX.

45. Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–83, 983 n.101 (2002).

46. *Windsor*, 133 S. Ct. at 2683.

same-sex partner under New York law but who was denied the marital exemption under the federal estate tax.⁴⁷

The *Windsor* Court explained that the “State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”⁴⁸ That decision “is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”⁴⁹ New York’s grant of dignity permitted same-sex couples “to define themselves by their commitment to each other” and to “live with pride in themselves and their union and in a status of equality with all other married persons.”⁵⁰ According to the Court, DOMA’s “essence” was its “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power.”⁵¹ As Justice Kennedy explained, “The avowed purpose and practical effect of the law here in question are to impose a disadvantage, *a separate status*, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”⁵² Because “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,” the *Windsor* Court declared the statutory provision unconstitutional.⁵³

As *Windsor* illustrates, invocations of dignity, at least domestically, include statuslike features of doctrinal significance. *Windsor*’s dignity is conferred by the state, expresses meaning about the standing of the dignified, and, as Waldron predicted, imposes obligations even as it affords rights.⁵⁴ These features appear to be unaccounted for by those who regard dignity as a mere value. There is consequently considerable promise in a theory like Waldron’s, which taps into these underexamined aspects of dignity’s nature in constructing an account of the concept.

B. *The Case for Normativity*

All that said, Waldron has a problem. If the invocation of dignity in law means nothing more than describing a legally conferred status, the human rights secured by dignity’s foundation are nothing more than social constructs. By building his theory around dignity’s legal functions, Waldron has divorced his account of dignity’s nature from the metaphysical or theological rationales that tend to require dignity’s universal recognition and inalienable

47. *Id.* at 2682.

48. *Id.* at 2692.

49. *Id.*

50. *Id.* at 2689.

51. *Id.* at 2693.

52. *Id.* (emphasis added).

53. *Id.* at 2696.

54. *See id.* at 2694 (“Responsibilities, as well as rights, enhance the dignity and integrity of the person.”).

character. Situating human dignity in the legal realm, Waldron risks reducing the mystical to the mundane.

Even within the legal sphere, values offer a stronger claim to normativity than do statuses. Merely identifying something as a legal value entails a claim that the designated end is good and worth pursuing. Statuses make no such normative claim. As Dan-Cohen succinctly explains in his introduction, this weakness in Waldron's account of dignity marks the difference between our "celebrating and cheering" the universal provision of dignity-based human rights and our "providing an *argument* in favor of this development that would give it some normative grounding" (p. 6).

Waldron suggests that we may overcome this weakness in his account by observing that law is committed to dignity in its most fundamental modus operandi. In this endeavor, Waldron draws heavily upon the work of Lon Fuller, who nearly five decades ago articulated a connection between human dignity and law's "inner morality."⁵⁵ According to Waldron, "the characteristic modes of law's application and legal compliance are deeply dignitarian in their character" (p. 135). Governance by the rule of law, he explains, involves legal subjects' active participation—a fact that demonstrates the law's profound respect for the dignity of the human person (p. 54). Such respect is arguably deeper and (importantly) more lasting than that conveyed by, say, legal prohibitions flatly outlawing undignified treatment.

To begin, Waldron notes that legal norms necessarily guide human conduct through a process of self-application (p. 52). Those who are subject to legal rules are expected to recognize and follow them. In this way, applying legal rules to human beings is fundamentally different from, say, prodding cattle or herding sheep. Waldron views this difference as considerable evidence that the rule of law endows ordinary people with the dignity of the highest judges. "They are their own officials: they recognize a norm, they apprehend its bearing on their conduct, and they make a determination and act on it" (p. 53). As Fuller has previously described this idea, law calls on its subjects to employ self-control or self-correction, and thus it necessarily defers to human beings as responsible agents who are capable of subordinating self-interest to a universal norm.⁵⁶

Supplementing this idea, Waldron notes that legal rules are frequently framed as indeterminate standards (such as "reasonableness") (p. 53). Such standards require more than mere adherence to the law; they demand that legal subjects exercise reasoned judgment about what the law requires in particular situations. In this way, legal subjects participate in crafting the very requirements by which they are bound. Waldron cites this mode of participation as evidence of law's fundamental respect for human dignity (p. 54).

55. See LON L. FULLER, *THE MORALITY OF LAW* 42–46 (rev. ed. 1969). Waldron has explicitly defended Fuller's account of internal morality elsewhere. See Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1157–60 (2008).

56. FULLER, *supra* note 55, at 162–67.

Principles of due process likewise underscore law's participatory nature, according to Waldron. Those subject to legal processes have the right to make arguments to their judges and to present evidence on their own behalf. Where disability or incapacity hinders the opportunity to participate fully, legal subjects are entitled to representatives to speak for them. For Waldron, such principles are evidence that the law is committed to considering the unique perspective of everyone—that it treats the lowliest individuals with the dignity of the very highest.⁵⁷ Even the right to vote, Waldron suggests, can be understood in this momentous way, “as the entitlement of each person, as part of his or her dignity as an (equal) peer of the realm, to be consulted in public affairs” (p. 36).

Waldron also suggests that dignity is to be found in the inherent nature of rights claims. Drawing on the work of H.L.A. Hart, Joel Feinberg, and Ronald Dworkin, Waldron describes how modern legal systems characteristically operate by enforcing individual entitlements—that any claims made under a system of law will necessarily be made in the language of rights.⁵⁸ As Waldron glibly notes, “A party in law does not phrase his argument in terms of its being *a rather good idea* to require a defendant or respondent to pay such and such a sum of money . . .” (p. 51). Indeed, the ability to seek redress through law is itself traditionally couched in terms of a person's “right” to be heard.

The vehicle of rights establishes a certain sort of standing or considerability to which the law must defer.⁵⁹ Rights create a personal entitlement in every legal subject to “push his case before us and demand that it be considered” (p. 50). According to Waldron, we expect human dignity “to be associated with a furious sense of one's rights and a willingness to stand up for them as part of what it means to stand up for what is best and most important in oneself” (p. 145). In providing individuals with rights—the power to insist on particular treatment and hence define the duties of others—the law

57. Pp. 61–62. As a point of contrast, Waldron invites us to imagine a lowly caste in a hierarchical society:

There would be no question of trusting them or anything they said; they would appear in shackles if they appeared in a hearing at all; like slaves in ancient Athens, their evidence would be required to be taken under torture; and they would not be entitled to make decisions or arguments relating to their own defense, nor to have their statements heard or taken seriously.

P. 57

58. See generally DWORKIN, *supra* note 17, at 81–90; Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955).

59. See Franke, *supra* note 8, at 1181 (“This may even be understood as a rule of standing: Those who are irresponsible, undignified, (or dare I say beastly?), have no standing to make rights claims.”).

thus implicitly acknowledges the dignity of its citizens (pp. 50–51). The picture of dignity that emerges in Waldron’s account is effectively a paradigm of active citizenship in a liberal legal regime.⁶⁰

I should note that the above argument for human dignity’s foundational place in the rule of law provides one of the only glimpses in *Dignity, Rank, and Rights* of Waldron’s substantive vision of human dignity. Overwhelmingly, Waldron’s focus in the book involves articulating and defending the claim that legal dignity is best understood as a ranking status. He expends comparatively little effort exploring the content of that status—which rights it entails and what “entrenched concern” those rights reflect. Yet dignity’s content is particularly important when it comes to understanding the difference between the respect owed to others’ dignity qua status and the respect (if any) owed to others’ dignity qua dignity. Rosen puts this point well:

If we take the view that dignitary harms are essentially symbolic—failures to express respect for status—then we must believe *either* that all violations of fundamental human rights are essentially symbolic *or* that dignity cannot fulfill the role assigned to it in our basic human rights documents—to provide a foundation for the rights embodied in them. (p. 95)

But if human dignity requires respect in a more substantive sense (for example, in the way we respect the law by not violating it), “we need to know the content of dignity; without it we could not respect dignity any more than we could observe the law without knowing what it was” (pp. 94–95).

What we see in Waldron’s work is an attempt to paint human dignity as something akin to the institutional privileges and immunities that attend territorial sovereignty.⁶¹ The rights of self-governance, lawmaking, and standing that Waldron cites all have clear historical analogues, frequently grounded in the language of dignity, in the context of state and national sovereignty.⁶² I am skeptical, however, that Waldron succeeds in drawing a connection between law’s “inner morality,” whatever that may be, and dignity as a legal status. Waldron’s particular examples are seductive precisely because they also track the established accounts of dignity in moral philosophy that Waldron’s project was supposed to sidestep.

60. At one point, Waldron himself proclaims, “If I were to give a name the status I have in mind, the high rank or dignity attributed to every member of the community and associated with their fundamental rights, I might choose the term ‘legal citizenship.’” P. 60.

61. As I demonstrate *infra* in Part II, Waldron intends this portrayal rather literally, suggesting that our contemporary conception of dignity is a product of gradually extending to everyone the rights held by aristocrats.

62. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *98 (“[I]t is beneath the dignity of the king’s courts to be merely ancillary to other inferior jurisdictions . . .”); An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2 (Eng.) (granting special legal respect to the “Crown and royal dignity”); Henry, *supra* note 9, at 192–99 (surveying the role of dignity in Supreme Court jurisprudence regarding state sovereign immunity).

Consider legal self-application, which many of the book's commentators regard as the most striking feature of Waldron's account of dignity.⁶³ Certainly, one can easily draw the comparison between it and a monarch's right to self-rule. But it may just as easily be portrayed as an instantiation of Kantian rational autonomy.⁶⁴ Waldron describes this aspect of dignity under the rule of law as "a matter of people fine-tuning their behavior effectively and gracefully in response to the legitimate demands that may be made upon them, controlling external behavior—monitoring it and modulating it in accordance with one's understanding of a norm" (p. 53).⁶⁵ With striking similarity, Kant claimed that dignity exists in the human capacity to subordinate bestial impulses and to follow self-crafted rules of reason. Indeed, in my favorite formulation of the categorical imperative, Kant, no less so than Waldron, treats us all with the dignity of hypothetical lawgivers.⁶⁶

This is not to say that Waldron is wrong for finding dignity in these contexts. Many thinkers have linked human dignity with the capacity for agency and moral reasoning⁶⁷ or with the entitlement to equal concern and respect before the law.⁶⁸ But Waldron falls short of showing that such examples reflect the law's inherent deference to human dignity as a kind of rights-entailing legal status.

Relatedly—and more troublingly, in my opinion—this glimpse into dignity's content raises questions about Waldron's commitment to his own announced methodology. Waldron promises his readers an account of dignity that starts from how the concept "works in its legal habitat" (p. 14)—an account, as I understood it, constructed on a foundation of current social practices. The law is replete with overt invocations of dignity that could serve as just such a foundation. Yet, to my knowledge, dignity plays little role

63. Herzog, for instance, claims to be "wholly in agreement" with the idea that "the law credits us with self-command, and that that is an ascription of dignity." P. 115. Similarly, Dimock reports being "especially struck" by Waldron's view of dignity "as an internal mechanism of self-application and self-monitoring, a style of enforcement that distinguishes the rule of law from being a purely coercive instrumentality." P. 120.

64. "Autonomy" in the Kantian sense is closely related to its Greek roots ("auto" meaning "self" and "nomos" meaning "law"). Kant believed that dignity inheres in the human capacity for moral reasoning—to recognize universal moral commandments and to obey them. See KANT, *supra* note 18, at 42–46.

65. Query why Waldron views such self-restraint as a manifestation of human dignity rather than Foucauldian discipline. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 202–03 (Alan Sheridan trans., 2d ed. 1995) ("He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.").

66. KANT, *supra* note 18, at 41–42.

67. Indeed, a frequent criticism of dignity is that its elaborations often reduce to a kind of autonomy. See, e.g., Macklin, *supra* note 24, at 1419 (explaining that "dignity seems to be nothing other than respect for autonomy"); Steven Pinker, *The Stupidity of Dignity*, *NEW REPUBLIC*, May 28, 2008, at 28 ("When the concept of dignity is precisely specified, . . . ultimately it's just another application of the principle of autonomy.").

68. See DWORKIN, *supra* note 17, at 179–81.

in the immanent justifications for those specific practices that Waldron cites as evidencing the most fundamental relationship between dignity and law. It is therefore disappointing to see Waldron retreat to such examples in an effort to secure dignity's normative grip.

If Waldron is correct that contemporary legal dignity is a status, the content of dignity should emerge from those rights that currently attend the status. Domestically, at least, dignity animates the right to participate in the judgment of others rather than the right to be a judge unto oneself.⁶⁹ It is protected, not by the right to give testimony, but by the right to be free from testifying.⁷⁰ And rather than the power to define the duties of others, dignity is the freedom from definition by others—it is “to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁷¹ An account of legal dignity that is faithful to Waldron's stated methodology should work backwards from rights such as these to divine the “entrenched concern” that motivates dignity, as a legal status, in the first instance. While Waldron's focus in *Dignity, Rank, and Rights* may lie elsewhere (specifically, on articulating the shape and scope of a status-based conception of dignity), a proper examination of dignity's content should trace the justificatory bases of legal dignity wherever they may lead.

II. RANK AMONG EQUALS

The second thread I wish to explore in *Dignity, Rank, and Rights* is Waldron's account of dignity's historical development. Unlike the account just covered, which purports to explain contemporary legal dignity's nature and operation, this second account attempts to describe the origins and evolution of our contemporary notions.⁷² Dignity is a concept that was once intimately associated with the high rank of aristocracy. The ancient Roman cognate for dignity (*dignitas*) referred to the honor, status, and privilege of office, particularly the offices held by aristocrats. The English language ultimately incorporated this connotation of the word, frequently employing it to describe the station of nobility. Contemporary uses of “dignity,” Waldron avers, must either descend from this aristocratic sense of the word or else reference a substitute conception that somehow displaced the aristocratic one.

69. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 (1994) (holding that gender is an unconstitutional basis for juror selection); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that “racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts”).

70. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

71. *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion)) (internal quotation marks omitted).

72. To be clear, Waldron himself does not distinguish between these two accounts and indeed often uses them in mutually reinforcing ways. I separate them here for the purpose of highlighting my concerns with Waldron's diachronic account, which I believe to be severable from his claim that legal dignity operates as a high-ranking status.

Given his claim that contemporary notions of dignity operate as a form of status, it is no surprise that Waldron favors continuity. His historical account of dignity is perhaps best understood, then, as an attempt to reconcile the preenlightenment conceptions of dignity as a ranking status with the normative commitment to fundamental equality that undergirds much of human-rights law. To that end, Waldron suggests that the aristocratic connotations of dignity were not lost or replaced but in fact have been extended universally—that the ordinary citizen has now “leveled up” into the once-exclusive privileges of aristocracy (pp. 31–33).

This is a troubling suggestion. Conceiving of universal human dignity as the mere extension of preexisting privileges not only limits dignity’s potential use as a legal tool (by restricting its forms to those extant) but may also be affirmatively harmful to a human-rights project that aims to destabilize existing structures of inequality. Below, I both describe and argue against embracing the purportedly historical aspects of Waldron’s work.

A. *Extending Privilege*

Waldron believes that our contemporary invocations of human dignity manifest “an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.”⁷³ In his commentary, Rosen describes this as Waldron’s “‘expanding circle’ view” of dignity: Waldron posits that the high rank of dignity, once reserved for “a relatively narrow class” of person, “has come to be extended over time until it is, to all intents and purposes, universal” (p. 79). To construct this account, Waldron first surveys “the traditional meaning of dignity associated with high or noble rank” and the legal protections that such rank entailed (p. 34). He then explores the ways in which those protections are now shared by the ordinary person—a “*transvaluation of values*,” Waldron claims (p. 32)—including through the provision of universal human rights (pp. 34–36).

As an example of this phenomenon, Waldron recounts the tale of the Countess of Rutland, who in 1606 was forcibly arrested and held captive as a result of an alleged debt (p. 56). Under English law at the time, such arrests were permitted as to commoners. But the countess’s arrest was held to be illegal as inconsistent with the dignity of her station. Waldron notes how the law now accords all persons that same dignity—“*no one’s* body is allowed to be seized; no one can be held or imprisoned for debt”—and he views this as a monumental achievement (p. 57). Forcibly requiring debtors to discharge their debts treats humans with the status of animals—incapable of behaving rightly without coercion. The abolishment of debtor’s prisons evidences the law’s commitment now to treat all humans as dignified—capable of self-control, legal self-application, and a kind of responsible agency.

73. P. 33. Waldron attributes this idea to Gregory Vlastos. P. 34. See generally Gregory Vlastos, *Justice and Equality*, in *THEORIES OF RIGHTS* 41, 41–76 (Jeremy Waldron ed., 1984).

Such examples are also why Waldron characterizes dignity's development as involving leveling up. We currently organize ourselves not like a society without nobility or rank—we did not, after all, strip the countess of her legal immunity—but rather “like an aristocratic society that has just one rank (and a pretty high rank at that) for all of us.”⁷⁴ As Dimock describes it, “What Waldron is proposing, then, would seem not only to be a common denominator, but a very high one” (p. 119).

At the outset, we should be skeptical when a legal theory begins from historical privilege, extends that privilege to all, and then declares equality.⁷⁵ The problem with this move is that the egalitarian distribution of preexisting rights does not ensure equal access to, use of, or benefit from those rights.⁷⁶ And yet the rhetoric of equality in the distribution of rights often masks these very failings. The issue—it is important to emphasize—is the incongruence of extending “equally” to new groups rights that have been tailor-made for others, particularly rights that historically have been predicated on, or are constitutive of, inequality in fact.

As a point of contrast to the Countess of Rutland, consider another example that Waldron uses to demonstrate humanity's “leveling up,” this one captured in the proverbial saying “An Englishman's home is his castle” (p. 34). For Waldron, such a saying evidences the very transvaluation of dignity that lies at the heart of his account. As he sees it, the law's deference to the privacy of the home treats every commoner with the dignity of royalty:

The idea is that we are to live secure in our homes, with all the normative force that a noble's habituation of his ancestral fortress might entail. The modesty of our dwellings does not signify that the right of privacy or security against incursion, search, or seizure is any less momentous. (p. 34)

Of course, those concerned with gender equality have long understood this “dignitarian” privilege against state intrusion to insulate and perpetuate considerable abuse and indignity.⁷⁷ Likewise, it is well understood that

74. P. 34. Some commentators question the coherence of a “rank” that does no meaningful sorting among persons. *E.g.*, Franke, *supra* note 8, at 1179. Waldron's rejoinder is that we have retained the loftiness of rank without the corresponding subordination: “High status can be universalized and still remain high . . .” P. 60.

75. See Stephanie M. Wildman with Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 890 (1995). We might begin by noting that the ancient Roman *dignitas*, upon which so much of Waldron's theory is premised, was itself closely tied to cultural performances of masculinity and femininity. See CICERO, ON DUTIES bk. 1, para. 130 (M.T. Griffin & E.M. Atkins eds., Cambridge Univ. Press 1991) (44 B.C.E.) (“There are two types of beauty; one includes gracefulness, and the other dignity. We ought to think gracefulness a feminine quality and dignity a masculine one.”).

76. And this is to say nothing of the potential for rights generally to insulate private subordination, legitimate injustices, and alienate individuals from their communities. See, e.g., Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 719–21 (2011).

77. See, e.g., Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2150–61 (1996).

inherent inequalities in the home substantially impair women's abilities to assert their legal rights—to “stand up for themselves” and “control the pursuit and prosecution of their own grievances,” as Waldron's idealized dignity bearer is wont to do.⁷⁸ Thus an Englishman's dignity becomes an Englishwoman's lack, twice over.

In his commentary, Herzog sharply criticizes Waldron's account of dignity as expanding specifically *aristocratic* entitlements. Herzog's understandable concern is that aristocratic rights have historically operated as an immunity from the legal processes that might hold them answerable for their failings (p. 101). The “dignity” associated with aristocracy elevated that class of persons above the law. Herzog objects to casting contemporary legal dignity in that same mold:

[I]t's not enough to say we've leveled up. Human dignity has to be more than offering everyone the kind of legal dignity once enjoyed by aristocrats. It has to reconstruct or reject that dignity because we have no interest in casting dignity as the haughty business of behaving badly and refusing to be held accountable for it. (p. 106)

Whatever the merits of this criticism—and it seems to me that Waldron equivocates on the necessity of any particular form of right constituting dignity—Herzog's challenge is fundamentally about the *nature* of aristocratic dignity. My concern is more straightforward: the narrative of “expansion,” regardless of the specific rights being expanded, valorizes and normativizes the positions of privilege within existing social hierarchies. It allows “entrenched power—the perspective from the top of the inequality hierarchy—[to] control[] the real and how it is seen and authoritatively contended with.”⁷⁹

Recall, again, the dignitarian dimension of the discourse emerging from the legal recognition of same-sex relationships. In *Lawrence v. Texas*, the Supreme Court affirmed that gay men and lesbian women are in fact human beings entitled to “dignity as free persons” and thus to liberty in their private, consensual, sexual activity.⁸⁰ While *Lawrence* is often lauded by those who emphasize the egalitarian content of the right thereby conferred,⁸¹ Marc Spindelman has examined the harm involved in entrenching and valorizing those rights as a condition to their extension. As Spindelman details, the normative power of the rights claim asserted by the *Lawrence* defendants rests on “the presumptive goodness of heterosexuality, a sexual status that is

78. Pp. 49–50; see MacKinnon, *supra* note 34, at 20–22 (chronicling studies demonstrating how victims of domestic violence “are in no position to face men as equals in a legal setting, even when formally on the same plane, represented by counsel”).

79. MacKinnon, *supra* note 34, at 9.

80. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

81. E.g., Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (“*Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty.”).

socially sacrosanct and legally protected.”⁸² Consequently, the *Lawrence* decision “validates heterosexuality and trumpets its intimacies”⁸³ as a necessary precondition to idealizing sexual rights as something befitting dignity.

In the process of this validation, the *Lawrence* Court overwrote a lengthy history of power inequality and sexual abuse within the institution of normative heterosexuality. It whitewashed a social reality of domination, currently lived by millions of women, with a new narrative—one of sexual choice and enduring personal bonds.⁸⁴ At times, Spindelman’s analysis of *Lawrence* appears eerily like a dystopic reading of Waldron’s “expanding circle.” Waldron views the democratization of aristocracy optimistically:

Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone’s person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege. (p. 34)

Spindelman offers an alternative interpretation:

Lesbians and gay men receive the sexual rights that heterosexuals do by analogical extension. . . . Translated: the Court vindicates sexual liberty by recognizing heterosexuals’ sexual rights and advances “equality of treatment” by extending that liberty to lesbians and gay men. Rights that are made to the king’s measure are fit for a queen.⁸⁵

Where Spindelman’s work addresses the effect of valorizing dignitarian *rights*, Katherine Franke has recently explored the norming effect of dignity discourse on the *persons* seeking those rights. In a response to another of Waldron’s considerable works on dignity, Franke chronicles the social posturing required of gay men and lesbian women challenging the legality of California’s Proposition 8, which, like DOMA, defined “marriage” exclusively as the union of an opposite-sex couple.⁸⁶ She explains how, in order to be recognized as dignified—and hence rights deserving—same-sex couples find themselves forced to “mount ritualized, repeated performances of responsibilized citizenship designed, over time, to convince a court, a legislature, the public, and to some degree themselves, that they have put their errant ways behind them and/or that they have been horribly misunderstood.”⁸⁷

In *Dignity, Rank, and Rights*, Waldron embraces just such performances. Cleverly dubbing them “moral orthopedics,” Waldron emphasizes that dignified citizens should boast “a certain sort of presence; uprightness of

82. Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1619 (2004).

83. *Id.* at 1635.

84. See *Lawrence*, 539 U.S. at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”).

85. Spindelman, *supra* note 82, at 1629–30 (footnote omitted).

86. Franke, *supra* note 8, at 1184, 1189.

87. *Id.* at 1183.

bearing; self-possession and self-control; self-presentation as someone to be reckoned with; not being abject, pitiable, distressed, or overly submissive in circumstances of adversity.”⁸⁸ As Franke rightly notes, in practice, demanding this sort of respectability pantomime as a prerequisite to fundamental rights not only conforms those seeking recognition to heteronormative standards but also redoubles the vulnerability and indignity of those who do not, or cannot, conform.⁸⁹

Waldron’s historical account is thus troubling. Fortunately, there is nothing in his account of dignity as a legal status that *requires* explaining our current practices as the literal extension of aristocratic entitlements. Aristocratic status might serve as a handy analogue, illustrating the relationship between social rank and legal rights. And surely the *dignitas* of aristocracy is linguistically connected to the law’s contemporary dignity discourse, such that understanding the senses of the former may help us to interpret the character of the latter. But reducing contemporary legal dignity to the mere replication of preexisting rights—rights frequently premised on the social inequality of those to whom they are now being offered—threatens to undermine legal dignity’s very utility. Rather than affirming our shared humanity, Waldron’s narrative of extension practically exalts existing modes of being and lends them normative force.

B. *Dignity and Equality*

Waldron’s failure to anticipate the concerns raised above may stem, in part, from an underdeveloped perspective on the relationship between dignity and equality. Although Waldron acknowledges that equality and dignity are interdependent (p. 55), *Dignity, Rank, and Rights* never clearly articulates the egalitarian dimensions of dignity’s status. Take the following assertion, which Waldron uses to summarize his “expanding circle” view of dignity as extended aristocracy: “We have adopted the idea of a single-status system, evolving a more or less universal status—a more or less universal legal dignity—that entitles everyone to something like the treatment before the law that was previously confined to high-status individuals” (p. 57; footnote omitted). In the span of a single sentence, Waldron hints at both a distributive principle (“universal status”) and a substantive guarantee (an entitlement to particular treatment), yet he equivocates on the necessity of either (“more or less”).

On the one hand, it is possible that Waldron simply conceives of equality formally, achieved by the universal distribution of dignity’s constituent rights. He has advanced a similar argument elsewhere in discussing human rights, supporting the position that the phrase “human rights” implies a formal distributive principle—“they are rights held by all humans in virtue

88. P. 22. As early as Cicero, the concept of dignity has been associated with humanity’s unique posture; the upright gait serves as a metaphor of our distinctiveness. See ROSEN, *supra* note 3, at 159–60.

89. Franke, *supra* note 8, at 1197.

of their humanity.”⁹⁰ On the other hand, Waldron’s account of dignity-as-rank appears to contemplate an actual performance—Waldron’s dignity inheres in “the active exercise of a legally defined status” rather than in the mere possession of some package of rights (p. 29). And if this is correct, we should expect dignity to entail some guarantee of substantive equality as a predicate to exercising the rights conferred by the status; it is well understood that substantive inequalities genuinely impede the capacity to benefit from legal rights.⁹¹ Waldron’s silence on this point suggests that, throughout the book, he tacitly assumes that dignity’s bearers are social equals.

In this Section, I would like to explore the possibility that Waldron’s theory might be enriched by embracing a commitment to substantive equality, one typically captured by those conceptions of dignity framed in terms of human worth. Expressions of worth have long informed the legal and philosophical discourse concerned with human dignity.⁹² In the Kantian tradition, for example, dignity is often described as that which “is raised above all price and therefore admits of no equivalent.”⁹³ On the Catholic front, dignity is often used to describe the sacred worth of human life and our basic duty to respect and preserve it.⁹⁴ Yet, rather early in *Dignity, Rank, and Rights*, Waldron dispenses with conceptions of dignity that invoke human worth, which he views as in competition with his status-based alternative. He argues that such conceptions inappropriately deploy the word “dignity” to express “a type of value or a fact about value” when better words are at our disposal (including, simply, “worth”).⁹⁵ I revisit Waldron’s rejection of worth here, not to critique that choice but in order to propose a friendly amendment that incorporates notions of human worth into a coherent jurisprudence of human dignity premised on legal status.

Waldron’s primary evidence that notions of worth are not properly part of a status-based theory of dignity turns on social responses. “The thing to do with something of value,” Waldron says, “is promote it or protect it, perhaps maximize things of that kind, at any rate to treasure it. The thing to do with a ranking status is to respect and defer to the person who bears it” (p. 24). Because Waldron views respect and deference as the core of legal dignity, he sees worth as an incompatible alternative to status.

90. Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach* 2, 21 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-32, 2013), available at <http://ssrn.com/abstract=2272745>.

91. See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 292–97 (1997).

92. McCrudden, *supra* note 2, at 7–8.

93. KANT, *supra* note 18, at 42.

94. See, e.g., ROSEN, *supra* note 3, at 96–100.

95. P. 24. I hope that I am not exposing my own cognitive limitations when I admit that I find this tactic perplexing. Given Waldron’s efforts elsewhere in the book to admonish those who make too much of small inconsistencies—“the indignant recording of such impressions is what passes for philosophical analysis in some circles,” p. 16—it is disappointing to see him elide any attempt to reconcile worth and status.

Yet our laws *do* frequently promote or protect dignity just as if it were, to borrow Waldron's phrase, "something of value." Perhaps unintentionally, Waldron himself acknowledges this in a section titled, ironically enough, "Protecting Status" (pp. 47–49). There, Waldron catalogues the myriad ways in which modern law "commit[s] itself to protection and vindication of the high rank or dignity of the ordinary person" (p. 48). Such protections include prohibitions on degrading treatment, hate speech, and invidious discrimination (pp. 48–49). If Waldron is correct that protections of this sort are more properly a response to worth than to status, his theory of dignity must either incorporate worth or else disavow such prohibitions as unbefitting dignity, properly understood.

The move, I think, is obvious. As Waldron's own examples demonstrate, law protects dignity, rather than defers to it, in response to practices of inequality—to degradation and discrimination. Judgments of worth are necessary antecedents to such practices. As Catharine MacKinnon explains, "The essence of inequality is the misanthropic notion—misogynist in the case of women—that some are intrinsically more *worthy* than others, hence justly belong elevated over them"⁹⁶ By prohibiting inequality, legal dignity implicitly affirms the equal worth of those protected.⁹⁷ Indeed, much of our contemporary human-dignity jurisprudence grew out of the atrocities of the Holocaust, atrocities premised on the dehumanization and objectification of an entire people.⁹⁸ Since then, dignity has been fundamental to the legal-recognition projects of many marginalized and objectified groups.⁹⁹

That human dignity sometimes operates by affirming human worth need not threaten Waldron's status-based account.¹⁰⁰ As discussed above, Waldron's ambivalence about the relationship between dignity and equality suggests that his work begins from a tacit assumption of substantive social equality. That assumption insulates his work from the value judgments—the question of who is "worthy"—that precede the distribution of rights and status. And, among social equals, the status-based dignity that Waldron articulates holds much promise. At times, however, it is necessary for law to communicate to the world the worth of the dignified in order to protect

96. MacKinnon, *supra* note 34, at 12 (emphasis added).

97. For more on the expressive function of dignity-based laws, see generally Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea*, 32 OXFORD J. LEGAL STUD. 1 (2012).

98. McCrudden, *supra* note 16, at 662–65.

99. *Id.* at 689–92.

100. Christopher McCrudden has taken this argument even further, suggesting that equal status may simply be one instantiation of equal worth. See McCrudden, *supra* note 2, at 42–43. Although I am inclined to agree, my argument here is narrower. Waldron claims that we should reserve the word "dignity" to refer to status, even where status derives from worth. P. 24. The neat separation that Waldron proposes is infeasible because, as Waldron himself admits, statuses are expressive: they convey the reason for packaging certain rights and duties together. P. 124. In operation, the legal status of dignity necessarily communicates something about the worth of its bearer, and that expressive function has (and should have) legal force in defending against practices of inequality.

individual entitlements to dignity's high status. Indeed, we may eventually come to recognize the universality of contemporary dignity as the propagation of the worth associated with being a dignified status bearer—an attempt, as Waldron would say, to “maximize things of that kind” (p. 24). Perhaps some notion of worth is precisely what ensures humanity's leveling up rather than its leveling down.

Humanity is a common venture. At times, the exercise of legal rights might aid us in recognizing the commonality of that venture—as in Waldron's example of the “momentous” right to vote (p. 36). The status of dignity provides us those rights. At other times, however, it may be necessary to affirm our shared humanity first, as a predicate to using rights. Because the status of dignity communicates the fundamental worth of each of us, it can do that, too. It narrows the distance between individuals and pushes back against the worst instincts of humankind. Dignity is a rich and multifaceted concept, capable of such duality.¹⁰¹

CONCLUSION

Dignity, Rank, and Rights is an unusual, and unusually refreshing, exercise in legal philosophy. Although Waldron modestly casts his contribution as simply a “thought experiment” (p. 144), his account of dignity as a legal status is meticulously researched, engages with a broad collection of thinkers and theories, and offers real insights into dignity's legal dimensions. It is all the better for the outstanding contributions of the book's commentators, who provide incisive challenges to Waldron's occasionally tendentious claims (and whose work I have regrettably given short shrift in these few pages).

The book's rare shortcomings are largely attributable to the risks associated with working at the level of theory. The concepts we explore purport to capture the lived experiences of real people, and we must therefore be particularly sensitive to those areas where our normative ideals fail to govern our social practices. In the case of dignity, it is important that the way we portray the concept maintains its utility as a tool for remedying injustice and inequality. I am concerned that Waldron's portrait of dignity as rank democratized would foreclose that kind of social change, entrenching legal-rights traditions established from underinclusive viewpoints. I urge Waldron to revisit the idea of human worth as a bridge between dignity as a ranking status and the substantive equalities that are a precondition to its exercise.

101. Many common accounts of dignity similarly recognize multiple dimensions to the concept. See, e.g., RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 13–14, 191–218 (2011) (arguing that human dignity comprises both (1) valuing human life and (2) exercising moral decisionmaking); MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 57 (1999) (describing the liberal view of dignity as a “twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is a power of moral choice within them, a power that consists in the ability to plan a life in accordance with one's own evaluations of ends”).