Aristocratic Dignity?

Donald J. Herzog

University of Michigan Law School

Available at: https://repository.law.umich.edu/book_chapters/231

Follow this and additional works at: https://repository.law.umich.edu/book_chapters

Publication Information & Recommended Citation


This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
The Berkeley Tanner Lectures

The Tanner Lectures on Human Values were established by the American scholar, industrialist, and philanthropist Obert Clark Tanner; they are presented annually at nine universities in the United States and England. The University of California, Berkeley became a permanent host of annual Tanner Lectures in the academic year 2000-2001. This work is the seventh in a series of books based on the Berkeley Tanner Lectures. The volumes include a revised version of the lectures that Jeremy Waldron presented at Berkeley in April 2009, together with the responses of the three invited commentators on that occasion—Wai Chee Dimock, Don Herzog, and Michael Rosen—and a final rejoinder by Professor Waldron. The volumes are edited by Meir Dan-Cohen, who also contributes an introduction. The Berkeley Tanner Lecture Series was established in the belief that these distinguished lectures, together with the lively debates stimulated by their presentation in Berkeley, deserve to be made available to a wider audience. Additional volumes are in preparation.

Martin Jay
R. Jay Wallace
Series Editors

Volumes Published in the Series

Joseph Raz, The Practice of Value
Edited by R. Jay Wallace
With Christine M. Korsgaard, Robert Pippin, and Bernard Williams

Frank Kermode, Pleasure and Change: The Aesthetics of Canon
Edited by Robert Alter
With Geoffrey Hartman, John Guillory, and Carey Perloff

Seyla Benhabib, Another Cosmopolitanism
Edited by Robert Post
With Jeremy Waldron, Bonnie Honig, and Will Kymlicka

Axel Honneth, Reification: A New Look at an Old Idea
Edited by Martin Jay
With Judith Butler, Raymond Guess, and Jonathan Lear

Allan Gibbard, Reconciling Our Aims
Edited by Barry Stroud
With Michael Bratman, John Broome, and F. M. Kamm

Derek Parfit, On What Matters
Edited by Samuel Scheffler
With T. M. Scanlon, Susan Wolf, Allen Wood, and Barbara Herman
On the academic lectern, too, we’ve leveled up. We’re interested in good arguments, no matter how base or despicable other cultures might have imagined the speaker. If there still are a lot of white guys in universities, no one takes seriously the claim that universities are theirs by right.

But it would be mistaken to imagine the lectern (or for that matter the public sphere) as a place for nothing but the bloodless give-and-take of reasons. It also is a site for jousting, for thrusts and parries, cutting objections, and even sneers—for the nerd’s version of a duel. So I shall have to begin by disappointing sanguinary readers: it is always a pleasure to read and listen to Waldron. Then too, I am entirely sympathetic to his approach to human dignity: I think that modeling our moral understanding on the legal categories is quite promising.

Don’t worry, I have some reservations. But mostly what I want to do is continue further down the same path. Here’s the nub of what I’m after: aristocratic dignity, like the academic lectern, has attractive features. But it also has decidedly unattractive features. These features are themselves deeply embedded in modern law. They are embedded, too, more broadly in morality and everyday social life. I think Waldron is missing how much reconstruction aristocratic dignity needs to do the work he wants it to.

So: the Countess of Rutland, Waldron tells us, enjoyed a couple of remarkable legal privileges. She couldn’t be bodily seized or jailed for debt. Now we all enjoy those privileges. There’s a lovely case of leveling up.
But compare: In 1573 England, John Fortescue had a problem. His neighbor, Lord Grey de Wilton, liked to go hunting—and trespass on land in which Fortescue had the right of free warren. Fortescue complained repeatedly. The lord’s jaunty response? “Stuffe a turd in your teethe,” he told his neighbor. “I will hunt it, and it shall be hunted in spite of all you can do.” There were Star Chamber proceedings between the two. Grey ambushed Fortescue and beat him, knocking him off his horse. Fortescue was no ordinary commoner: he was a member of Parliament and would go on to become chancellor of the exchequer. Queen Elizabeth’s displeasure with Grey led the poor lord to spend some time in Fleet Prison.

So much for dispute resolution, claim and counterclaim, and reason-giving among the dignified. But it’s worse than that. Grey’s “turd in your teeth” would have been exactly right had he been addressing any ordinary commoner. Yes, England offered aristocrats fewer formal legal privileges than did the rest of Europe. But even in England, peers of the realm couldn’t be arrested except for treason, felony, and breach of the peace. They couldn’t be forced to appear in court on most writs. They didn’t have to testify under oath: how insulting not to take their word for it! No wonder a 1648 petition to the House of Commons (and there are others like it) implored them to make “Kings, Queens, Princes, Dukes, Earls, Lords, and all persons, alike liable to every law of the land...so all persons even the Highest might fear and stand in awe, and neither violate the publick peace, nor private right of person or estate, (as hath been frequent) without being lyable to accompt as other men.”

Here’s Edward Hyde, later Earl of Clarendon, addressing the House of Commons in 1640:

He told them another Story as ridiculous, of a Gentleman, who, owing his Taylor a long Time a good Sum of Money for Cloaths, and his Taylor coming one Day to his Chamber, with more than ordinary Importunity for his Debt, and not receiving any good Answer, threatened to arrest
him; upon which the Gentleman, enraged, gave him very ill Words, called
him base Fellow, and laid his hands upon him to thrust him out of his
chamber: in this Struggle, and under this Provocation, Oppression, and
Reproach, the poor Taylor chanced to say, that He was as good a Man as
the other; for which Words He was called into the Marshal’s Court; and
for his Peace, was content to be satisfied his Debt, out of his own ill Man­
ners; being compelled to release all his other Demands in Lieu of
Damages.  

I offer these vignettes not to produce a few stray details from the
rich and repellent history of the British aristocracy, nor so that you
can join a campaign to reintroduce “a turd in your teeth” into ev­
eryday use. Instead, I want the example to set up this point: at the
heart of the dignity enjoyed by aristocrats was the claim, “I don’t
have to answer to the likes of you.” That claim, which took specific
legal form, is deeply antithetical to the version of dignity Waldron
wants to tease out, and again it’s deeply entrenched. So we need to
do two things. We need to get it into focus. Then we need to think
about what kind of work needs to be done to reconstruct noble dig­
nity so it can do the work we want it to. It may be that we face more
work than just paring off the bad parts.

First things first: let’s focus. Take the canonical form for royal
proclamations: “it is our royal pleasure…” Or take the form of
royal assent for signing a bill from Britain’s Parliament into law, a
typically bastardized bit of law-French: “la Reyne le veult,” or the
queen wills it. Today this is mere verbal form. Once it was real, and
it underlined that mere will or even caprice was enough. Here we
have authority exercised without even a shred of a pretense that it
is reasoned judgment. So Shakespeare’s Henry V starts a war with
France because he’s insulted by a gag with some tennis balls and
stops it because he falls in love with Catherine of Valois. The poor
subjects of the realm careen around at his whim.

Or take the advice another seventeenth-century aristocrat, the
Earl of Derby, offered his son: “Undertake no suit against a poor
man...for then you make him your equal."\(^5\) Listen to Charles I, demanding money from Parliament in 1628: "Take not this as a threatening (for I scorn to threaten any but my equals)."\(^6\) That same year, at the election at Lewes, the gentry found it degrading to have their names on the same electoral rolls as those of the enfranchised commoners, so they refused to vote.\(^7\) Two centuries later, the same sensibility surfaced in frenzied Tory complaints about the Reform Bill of 1832. Here's Sir Charles Wetherell, addressing the House of Commons during the bill's second reading, July 6, 1831:

A more rash and tyrannical innovation on the constitution than the present had, he said, never been attempted,—the tendency of the measure was to democratize, he had almost said to sansculottize the constitution. The ten pound voters were a mere mockery of a representative body. He ventured to assert it as a proposition in the abstract, that ten pound men were not fit for the enjoyment of the elective franchise. What! he would ask the gentlemen opposite, was this their conservative body? the respectable constituency of the parish workhouse! For his part, he considered that to solicit votes in the lazaretto—in pauper establishments—was degrading to the character, qualifications, and station of a representative.\(^8\)

Wetherell was recorder of Bristol. When he showed up there a few months after delivering himself of this genial sentiment, he was met with jeers and stones. When he offered to imprison those responsible, riots began. By the end, buildings lay in smoking rubble and a dozen were dead—no doubt confirming Wetherell's jaundiced estimate of the lower orders.

The good news for Waldron's thesis is that law was already a realm for the give-and-take of reasons and arguments, justifications and criticisms, among dignified equals. The bad news is that that is precisely why the nobility often wanted nothing to do with it. How unseemly to be shoved into a position where you had to answer to the base underlings!
Let me revisit the legal tagline Waldron approvingly adduces: "An Englishman’s home is his castle." That, too, might seem to have an endearingly lofty ring about it: your home might be modest, might even be a dump, but in it you’re an aristocrat. The reality is rather less charming. Coke echoes a series of late sixteenth- and early seventeenth-century commentators in finding here legal license to use armed, even deadly, force against intruders. But this too is a kind of unaccountability. Without the common law’s now familiar enquiry into whether the man defending his house had a reasonable belief that his (or some other occupant’s) life or limb was threatened, the unaccountability is stark: the state will not second-guess his judgment about what kind of force he needed to use.

More dramatically, the state’s jurisdiction, the reach of the law, stops at the threshold. Through early modernity, the standard view was that the government ruled not over individuals but over male heads of households. This view was formally reaffirmed by the revolutionary assembly in France. A man’s house is his castle because inside it, he rules as absolute sovereign. A special dignity for him—and indignity, and helplessness, for others. I suspect, though I don’t have enough evidence up my sleeve to be confident, that this view, rather more than the fact of the marriage contract, explains why the law found it so hard to frame marital rape as a crime. Here, by the way, liberal individualism shouldn’t be condemned as sociologically naive or pernicious. It should be embraced as offering legal recourse and dignity to those on the other side of the threshold, once invisible.

So again, at the core of the legal dignity enjoyed by aristocrats is something like this: I enjoy special privileges and need not answer to the likes of you for how I use them. That is not something we have made available to everyone. Nor is it something we should. But that core still shows up, curiously, in modern law, notwithstanding all our commitments to liberalism, democracy, equality, the rule of law, and the like.
I don't mean qualified or even absolute privileges that we justify as instrumentally required to get a job done. The Constitution, for instance, says that "for any Speech or Debate in either House," senators and representatives "shall not be questioned in any other Place." On the floor, your senator can slander you to his heart's content. The language will be published in the Congressional Record. And you won't be able to sue him. Why? Because we want to be sure to preserve robust debate. But those kinds of privileges are connected to what Waldron calls condition status. No surprise that when William Proxmire was sued for lambasting the recipient of one of his Golden Fleece Awards off the floor of the Senate, he didn't enjoy immunity.

What about Florida's embrace of the so-called castle doctrine? This statute overturns long-standing common law. Suppose you're in your house or other dwelling, or even your car, and someone is "unlawfully and forcefully entering." You may use deadly force against him and Florida will presume that you had a reasonable fear of death or great bodily harm, which will then excuse your action as self-defense. For today's purposes, I don't care if you cheer or deplore this legal innovation. And it is, for sure, universal. But what it extends is "I can kill someone in my house and I needn't answer for it." In this way, Florida has made its homeowners, apartment-dwellers, and even drivers aristocrats for a day—or, I suppose, not for any particular time, but any time at all when they're in their special castles. I won't be surprised if courts try to haul the statute back toward the common law. But it's worth remembering that plenty of public celebration of Florida's act depended on the cruder thought that you should be free to kill intruders. It's worth remembering too that state after state is adopting similar legislation.

Or consider the bizarre doctrine of state sovereign immunity. The Eleventh Amendment to the Constitution says that a citizen of one state can't sue another state in federal court. In 1887, the Supreme Court said this was a matter of dignity: "The very object and purpose of the 11th amendment were to prevent the indignity of
subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” In 1890, the Supreme Court held that individuals can’t sue states, period, even if they are citizens of that very state: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” (So much for the dictates of plain text!) This law is alive and well. Writing for the Court in 2002, Justice Thomas insisted, “The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”

Yes, states may graciously deign to let their citizens sue them. But nothing requires them to waive immunity. If they choose not to, they can exult in their legal dignity and say to you, stuff a turd in your teeth. The putative justifications sometimes offered for sovereign immunity are quite obviously threadbare. So, we’re sometimes told, the state is busy with important tasks and has better things to do than answer lawsuits. The same might be said of General Motors. Or again, we’re sometimes reminded that finally taxpayers foot the bill of lawsuits, so “we” would be suing “ourselves.” But if you sue GM for selling you a defective car that got you hurt in an accident, we don’t bar the suit if we learn that you’re a shareholder in the corporation. And yes, I know that some of us are weirdly inclined to treat corporations with the same deference some are inclined to treat governments.

Better, as usual, not to lose ourselves in the abstractions. What does sovereign immunity mean on the ground? In April 2005, Susan Birk gave birth to her daughter, Vayle. The infant needed emergency surgery and she needed it in a hurry. The transport team showed up eighty minutes later than they said they would. That lost time meant everything: Vayle suffered “severe, permanent brain damage, among other things.” Pursuant to Connecticut law, Birk and her husband, acting for Vayle, sought permission to sue the state—the medical facilities screwing up were public. The claims commissioner rejected her claim because she hadn’t filed some of the relevant paperwork. The family then sought to reopen
the claim, the commissioner agreed to let them sue—and then a state court said no, he had no legal authority to reopen the case. So the state would remain legally immune, in a setting where private parties would have been paying millions of dollars.\textsuperscript{16}

Some critics think it's conceptually confused to attribute dignity to states. I think that's wrong: it depends on a bankrupt methodological individualism that somehow passes for hardheaded wisdom these days, though I haven't space to attack the view here. Anyway I think the view that states have dignity—or, better, the sort of dignity that means they can sniff disdainfully and refuse to answer citizens' complaints in courts of law—is perfectly coherent. It's just repellent, an affront to the rule of law. In this way, our governments enjoy just the kind of legal dignity aristocrats once did. But their being unanswerable for their injuries and affronts is miles away from the vision of dignity Waldron rightly affirms. So it'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. "Rank has its privileges": that is the loathsome underbelly, or maybe prominently displayed belly, of the noble dignity Waldron is embracing.

\* \* \*

Before I gesture toward how a reconstruction might go, I have two sneers for you. (No, not at you.)

The first is from Jeremy Bentham advising Greek legislators in 1823. "Never is the day labourer, never is the helpless pauper, an object of contempt to me: I can not say the same thing of the purse-proud aristocrat: I can not say the same thing of the ancestry-proud aristocrat: I can not say the same thing of the official bloodsucker: I can not say the same thing of the man covered with the tokens of factitious honor: least of all can I say the same of a King."\textsuperscript{17}

The second is recorded by the poet Thomas Moore six years later. Its victim is Robert Peel, the great Tory who would become prime
minister. Peel’s father had gotten fabulously wealthy in textiles, so poor Peel, nouveau riche that he was, had, as Moore reports others felt, “vulgar manners.” “This, it seems, is a favourite subject of merriment with the King, who sometimes says ‘Now, I shall call Peel over to me—watch him, as he comes—he can’t even walk like a gentleman’—These people, in their insolence, attribute this want of gentleman-like air in Peel to his birth. As if some of the highest among themselves had not the looks & minds of waiters.”

Yes, there’s a sneer in there at waiters, but that’s not the one I want—yet. I want you to ponder the king and his merry little band of aristocrats, obnoxious gods from Mount Olympus, toying with and belittling poor Peel, chuckling at his awkward gait, banding together as superiors who cement their dignified status by having ridiculous underlings around and rejoicing in their ridiculousness.

These sneers are glimpses of a long-running cultural war over contempt and therefore over dignity. Waldron affectionately quotes Robert Burns’s verse, with its endearing refrain, “A man’s a man for a’ that.” That one gives you the benign picture of leveling up: hey, we’re not low-lifes, we’re every bit as dignified as the nobility. Bentham’s sneer is different. It inverts the usual status hierarchy. Bentham has no contempt for workers and paupers: they’re dignified figures. But he says he does have contempt for aristocrats and kings. Indeed, he boasts about it. It’s as if the only way to be dignified is to scorn the credentials of the well-born.

So Bentham sneers at the king and the king sneers at Peel. No one here has the idea of meeting as dignified equals. It’s only a question of who’s on top. This cultural war is long-running—indeed, it’s not over—and it’s fought on many fronts. It’s fought out in august moments of public law, such as the French revolutionary assembly somberly voting to strip France’s aristocrats of one privilege after another. It’s fought out in episode after episode in private law, such as what sorts of cuffs and beatings will and won’t be actionable in tort instead of privileged as discipline. It’s fought out in the nitty-gritty scenes of everyday life, where we struggle over
flared nostrils; deliberate shoves and inadvertent ones, too; respectful eye contact, unpleasantly prolonged stares, and that particular, peculiar kind of blithe disregard that involves looking straight through somebody. And it has other moments of startling inversion, such as commoners dueling to boost their social status.19

Here dignity isn’t readily available to one and all. People are scuffling for it and an ever-tempting way to climb the ladder of dignity is to push others down. It’s a mistake to think that dignity is necessarily what economists call a positional good. But often it has been. Often it still is. I’m absolutely with Waldron in seeking an account of human dignity that makes it available to one and all. But that means positional accounts of dignity, ones depending on exalted position over the base underlings, aren’t merely unattractive. They’re nonstarters as a matter of logic. Those are my two sneers and those are their stakes.

Next I want to introduce a distinction in social theory. Waldron offers some sensible ways of thinking about the concept of status. Here’s another one—anyway I hope it’s sensible—which depends on contrasting it with the idea of a social role. Let’s say that your status follows you across the whole social landscape. Aristocratic status is like that. You’re a duke not only when you proudly survey your dominions; not only when you assure your impoverished tenants that you’ll instruct your agent to be less harsh with them about making payments; and not only when you promenade at court in your ermine robes, drink too much sherry, and grope the servant maids. You’re a duke 24/7, as we might say today. You require special treatment no matter where you are, no matter what you’re doing. In church you will sit in a grand pew at the front. In Parliament you will be entitled to a seat in the House of Lords. The tailor will come to your estate and if he dares to demand that you pay your debts, you’ll have your way with him, socially and legally, for his audacity. If for some reason you appear in the marketplace, others will bow low or even fawn and scrape, make way for you, and ask what you want in submissive tones they don’t use for any old customer. And so on.
But a role is just a position in some institution. So it's something you ordinarily shift in and out of, unless you're unlucky enough to be captive of one of Erving Goffman's total institutions. Writing or delivering these comments, I'm a professor. I suppose there's a sense in which I'm a professor when I'm grocery shopping—it's still my job—and sometimes my younger daughter teases me about my unimpeachable claims to expertise in jazz by saying, "Oh, right, you're a law professor," words she draws out with comically ironical awe. But—trust me—I don't quote Bentham at the supermarket. And I suppose you don't open your laptops and take notes on the dinner conversation when you're visiting your family. When Bill Ford, great-grandson of Henry and then CEO of Ford, showed up at a dinner meeting at my daughter's elementary school, he grabbed the same paper plates and plastic utensils the rest of us did, he stood in line with the rest of us, and he ate the same gloppy food. And a damned good thing: he was there as parent of a student, not as CEO. We no longer imagine society as one unified hierarchy. Because of social differentiation—the emergence of a host of largely autonomous institutions—that view has become empirically implausible. Instead we see a series of institutions—states, economic firms, families, universities, Boy Scout troops, you name it—with reasonably clear jurisdictional boundaries.

It is a feature, not a bug, of Waldron's account that human dignity is in this way a status. It follows us around relentlessly: or anyway we want it to and think it should. We may need to punish criminals. But it is still cause for grave concern, even horror, when we gratuitously humiliate them, let alone torture them. We don't want to crush their dignity. So, too, our bodies may betray us. We may become incontinent. We may drool uncontrollably or twitch badly or shuffle along hunched over and hesitantly instead of walking upright and briskly. But there is something worrisome about people who mock or flinch at what we rightly describe as these indignities, let alone those tone-deaf buffoons who sneer at the very idea of death with dignity. No matter what our social or biological
plight, we are entitled to dignity. So I think the distinction between status and role brings out a decided merit of Waldron's account: it highlights the crucial fact that our dignity doesn't simply attach to particular roles. The relevant sense of dignity here is not the sort you forfeit by slipping on a banana peel or lecturing with your fly unzipped or anything like that. Indeed, at stake in Waldron's concern with how we treat criminals is that you can't forfeit this kind of dignity even by grotesque immorality. That is, criminals still have claims on how we may and may not treat them: no abuse, no torture, no officially sponsored or officially neglected rape. That we flout these claims on a daily, ongoing, bureaucratized basis depends in part on a kind of aristocratic contempt for the underlings.

It is then another feature, not a bug, of Waldron's account that it helps explain and justify why we worry endlessly about gender, race, social class, sexual orientation, and the like. For these, too, seem to work as social statuses. And, depending of course on what status you occupy, they may open you up to indignity after indignity. I have nothing nice to say about the jargon and canting of much work in the humanities these days. But concerns about these matters are not in fact the hangover of the 1960s or the special preoccupation of tenured radicals. Try this, from Mary Wollstonecraft's best book, her observations on Scandinavia:

In fact, the situation of the servants in every respect, particularly that of the women, shews how far the swedes are from having a just conception of rational equality. They are not termed slaves; yet a man may strike a man with impunity because he pays him wages; though these wages are so low, that necessity must teach them to pilfer, whilst servility renders them false and boorish. Still the men stand up for the dignity of man, by oppressing the women. The most menial, and even laborious offices, are therefore left to these poor drudges. Much of this I have seen. In the winter, I am told, they take the linen down to the river, to wash it in the cold water; and though their hands, cut by the ice, are cracked and bleeding, the men, their fellow servants, will not disgrace their manhood by carrying a tub to lighten their burden.20
Even among the wretched servants, the men propped up their dignity by mistreating the women. Wollstonecraft already knew the personal and private were political.

Is domestic service itself a hateful affront to human dignity? By 1699, *catch fart* had passed into the English language, at least the colorful version of it spoken by deviants, as slang for a footboy.²¹ (And this, alas, after I ruminated on "stuff a turd in your teeth." This is my plot to clinch the award for most scatological Tanner commentator.) It was still in use at the end of the eighteenth century, and one dictionary spells out the point: "*Catch fart*. A footboy; so called from such servants commonly following close behind their master or mistress."²² Whether a footboy can be dignified, whether any number of so-called menial occupations can be dignified, what we should make of Thomas Moore's sneer that some aristocrats have manners no better than those of waiters: all this raises struggles over the dignity of labor whose pursuit would take me too far afield. I'd notice only that when devoted service becomes one's only task—when we're talking about live-in servants with no serious time off to pursue other activities, to occupy other roles—it's harder to see it as dignified. Why? Because then one's identity threatens to collapse all the way into the job.

James Boswell feasted on the same gender dynamics that made Wollstonecraft's gorge rise. Take this 1762 journal entry:

> Indeed, in my mind, there cannot be higher felicity on earth enjoyed by man than the participation of genuine reciprocal amorous affection with an amiable woman. There he has a full indulgence of all the delicate feelings and pleasures both of body and mind, while at the same time in this enchanting union he exults with a consciousness that he is the superior person. The dignity of his sex is kept up.²³

If the dignity of his sex is kept up by romantic affection and sexual intercourse, the dignity of hers is kept down. For both Wollstonecraft and Boswell, to be male is to be something of an aristocrat. Wollstonecraft condemns the fact; Boswell embraces it. Here, too,
we find the motif I focused on earlier: the exercise of exclusive privileges for which one needn’t answer to the underlings. Boswell kept his endless assignations with prostitutes and others secret from his wife, but that seems to have been a matter of prudently avoiding domestic conflict, not any acknowledgment that what he was doing was wrong. He’d not have had the same stance about any infidelity of hers.

So we have the idea of a valuable status, human dignity, that you don’t relinquish, no matter what social setting you find yourself in. This means that dignity can’t be a wholesale attack on status. But we also have the idea of inferior or base statuses, some of them the sort that Goffman identified as stigma, that you don’t relinquish, either. We’d like to get rid of those in the name of human dignity. Not any old status will do, and as you now know, I am skeptical of the claim that aristocratic status is what we’re after.

So status is crucial. But I think we can get some more purchase on the idea of dignity by thinking about roles. In any given social setting, we’re selectively forgetful: we ignore considerations irrelevant to the business at hand. When you go to vote in a primary, it may matter whether you’re a Republican or a Democrat. But it doesn’t matter whether you’re a Catholic or a Jew or an atheist, whether you root for the Boston Red Sox or the New York Yankees, whether you are an especially loving parent or happen to have no children. When you go to buy vegetables at the market, you don’t ordinarily care about the religion or politics of the seller. (Whether the crops are organic might be a political issue, but that’s not the sense of politics at issue here.) There’s a kind of equality in this and also a kind of dignity: you might be thought badly of in some other setting, but you leave its concerns behind when you take up a new role.

We can use the law to model this strand of dignity, too. Justice is blind: not that judges are tottering and decrepit, but that the law will resolutely ignore all kinds of facts that might in some other social setting be perfectly relevant. If English law once had special
rules to recognize aristocratic status, it also came, sometimes at least, to ignore and so flout that status. Here’s Bentham again, this time from some of his scribbled notes on French reforms of judicial procedure:

What then? Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, or what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. What if, instead of parties, they were witnesses? Upon business of other people’s everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.24

A “great man,” Bentham went on, might well find talking to attorneys and testifying before judges “humiliating to his grandeur,” but no matter. Like it or not, he would have to participate in legal proceedings. Bentham’s “nobody complains of it” is facetious whistling in the dark. He knew full well that aristocrats and other Pooh-Bahs were enraged by the law’s commitment to equality, its cheerfully ignoring their august status and putting them on level playing fields with such ignoble types as chimney sweeps.

It is painfully obvious that the law doesn’t live up to its own ideal of equality, that justice all too regularly peeks out from behind her blindfold, that race and class and political power can make all the difference even when they’re entirely irrelevant. So, too, it is painfully obvious that role differentiation more generally doesn’t live up to its own structures of equality. We know that the rich have more political power, not just more market goodies. You may have suspected that white men do better on the market. Well, empirical
studies have shown that white men get offered better prices on cars and do better in bargaining compared with women and minorities with the same economic profiles. Let's not even get started about what happens if you're particularly good-looking—or particularly not. About such lamentable everyday leakage across roles, institutions, and their jurisdictional boundaries, about the ongoing influence of baleful status categories, I am inclined to say just what Waldron does. There is a normative order here and when our actual practices don't live up to their own aspirations, we know what's wrong and we can struggle to improve things.

So where are we? To make sense of human dignity, we need to hang on to the form of status, understood as something that travels with you everywhere you go, not just a role you occupy now and again. But law's blindness to irrelevant facts, its brushing aside the content of lots of status claims as irrelevant to the matter at hand, is one of our most powerful images of equality—and of dignity. Just think of Bentham's chimney sweep issuing a subpoena to the duke. Waldron is right, too, in urging that we need more than mere form: we want to illuminate the fact that everyone enjoys a high status, not just that everyone now has the same status. I am happy to agree that some of the content of aristocratic status is helpful: again, recall the Countess of Rutland's enjoying the special privileges not to be seized or jailed for debt and how we've now extended that to everyone. But too much of what aristocrats had, in law and society, is stuff we want to abolish, not extend to everyone. We don't want even furtively to embrace having special perks and not answering to others for your mistreatment of them. And again, desirability aside, we can't coherently embrace anything positional.

So what else can we say about the content of human dignity? I'm a fox, not a hedgehog: I rather doubt there is one big imposing thing to say about such topics. I suppose my rejection of much of noble dignity and privilege might seem a rejection of Waldron's central thesis. But I'd rather see it as a partial emptying out of Waldron's view. I think we can still go far by thinking about how the law treats
people. I am wholly in agreement, for instance, with Waldron's suggestion that the law credits us with self-command, and that that is an ascription of dignity. I shall underline, what he does not, that command theories of law are then deeply defective—as if we were terrified privates confronted with a sadistic sergeant in basic training.

I want to close with yet another quotation. I hope you'll forgive me not just for its length but also for not delicately skipping over the excruciating language it contains. (Squirming or breaking a sweat or flushing with anger at this language, I note polemically, isn't a sign of mindless PC orthodoxy; it is a visceral sign of our commitment to human dignity.) It is one of my favorite stories about human dignity. Thomas de Quincey says he got this story from William Hazlitt, the fabulous essayist, staunch democrat, and garden-variety misogynist. Anyway, the Duke of Cumberland is out for a walk:

His Royal Highness had rooms in St. James's; and one day, as he was issuing from the palace into Pall-Mall, Hazlitt happened to be immediately behind him: he could therefore watch his motions along the whole line of his progress. It is the custom in England, wheresoever the persons of the royal family are familiar to the public eye, as at Windsor, &c., that all passengers in the street, on seeing them, walk bare-headed, or make some signal of dutiful respect. On this occasion all the men who met the prince took off their hats, the prince acknowledging every such obeisance by a separate bow. Pall-Mall being finished, and its whole harvest of royal salutations gathered in, next the Duke came to Cockspur Street. But here, and taking a station close to the crossing, which daily he beautified and polished with his broom, stood a negro sweep. If human at all,—which some people doubted,—he was pretty nearly as abject a representative of our human family divine as can ever have existed. Still he was held to be a man by the law of the land; which would have hanged any person, gentle or simple, for cutting his throat. Law (it is certain) conceived him to be a man, however poor a one, though medicine, in an under-tone, muttered sometimes a demur to that opinion. But here the sweep was, whether man or beast, standing humbly in the path of royalty: vanish he would not; he was (as the Times says of the Corn League) "a great
fact," if rather a muddy one; and, though, by his own confession (repeated one thousand times a-day), both "a nigger" and a sweep, ("Remember poor nigger; your honour! remember poor sweep!"), yet the creature could take off his rag of a hat and earn the bow of a prince as well as any white native of St. James's. What was to be done? A great case of conscience was on the point of being raised in the person of a paralytic nigger; nay, possibly a state question.—Ought a son of England, could a son of England, descend from his majestic pedestal to gild with the rays of his condescension such a grub, such a very doubtful grub, as this? Total Pall-Mall was sagacious of the coming crisis; judgment was going to be delivered; a precedent to be raised; and Pall-Mall stood still, with Hazlitt at its head, to learn the issue. How if the black should be a Jacobin, and (in the event of the duke's bowing) should have a bas-relief sculptured on his tomb exhibiting an English prince and a German king as two separate personages in the act of worshiping his broom? Luckily it was not the black's province to settle the case. The Duke of Cumberland, seeing no counsel at hand to argue either the pro or the contra, found himself obliged to settle the question de piano; so, drawing out his purse, he kept his hat as rigidly settled on his head as William Penn and Mead did before the Recorder of London. All Pall-Mall applauded; contradicente Gulielmo Hazlitt, and Hazlitt only. The black swore that the prince gave him half-a-crown; but whether he regarded this in the light or a godsend to his avarice or a shipwreck to his ambition—whether he was more thankful for the money gained, or angry for the honour lost—did not transpire. "No matter;" said Hazlitt; "the black might be a fool; but I insist upon it that he was entitled to the bow, since all Pall-Mall had it before him, and that it was unprincely to refuse it."26

There's legal equality here, and hurray for that. But if we're tempted to model human dignity, as a moral and finally a social ideal, on aristocratic dignity, we're going to have to think hard about the duke's offering money (maybe) but not a bow, and why the crowd approved, and why Hazlitt didn't. I think finally we're going to have to adopt Hazlitt's sensibility here as our own and think about how sadly comfortable we remain with aristocratic deference, with receiving it, offering it, extorting it, and—whether we are on the receiving or offering end—basking in it.
But notice, finally, how Hazlitt voices his complaint: he says the duke's snub was unprincely. An intriguing bit of leveling up is available here, and this bit, I'm happy to say, fits Waldron's central thesis perfectly: we can help undergird human dignity by universalizing the easy grace and civility of the best aristocrats.

Notes

10. Art. 1, sec. 6.