PART I

Theorizing the relationship between human dignity and international human rights law

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Dignity's Contentious History

Human Dignity: Origins and Orientation

> Different comprehensive doctrines provide different accounts of human dignity. These accounts are sufficiently convergent, though, that they allow human dignity to serve as an 'accepted principle of shared morality' … And for those who for whatever reason do not want to push deeper, it does function as an axiom of Ur-principle.[1]

References to human dignity abound in contemporary political and legal culture. So widely is dignity invoked that it can be tremendously difficult to pin down a definition that would be acceptable to all. When it is invoked on the one hand to honour the immortal soul bestowed upon all God's creatures, and then the next minute to venerate the existential status of human subjects in a Godless world, one can sometimes sympathize with Steven Pinker's claim that it is simply a 'useless' concept that should be canned in favour of a more analytically rigorous one such as liberty.[2] But, as we shall see, the history of the concept of dignity suggests that it is less rigid than might seem at first glance. More importantly, dignity often seems to play an important normative role that is distinct from other concepts in standard moral discourses. This suggests that it assumes certain discursive responsibilities that other normative concepts might find difficult to bear.

The modern term 'dignity' arose in the thirteenth century from the Latin *dignitas*, which referred to the 'worthiness' of individuals. This was often given a specifically Christian cast, sometimes pertaining to

a human being's value in the eyes of God as his creation, and at other times pertaining to the moral imperative that all human beings should emulate the inherent dignity of God and higher beings. This conception quickly found currency among the other monotheistic faiths, and references to the dignity or worthiness of humans flowing from their status as God's most blessed creation can be found in Islamic and Judaic texts. The strong association of dignity with such religious beliefs persists to the present day.[3]

Some commentators, such as Rosen,[4] might argue that this gives human dignity a specifically scholastic tinge that explains its long association with certain variations of conservative thought down to the present day. But I think that this overstates both the conservatism of Christianity specifically, and of religion broadly, with regard to the normative emphasis that is placed on human dignity. Indeed, many tended to deploy human dignity in a humanistic manner to blur or mitigate the distance between the unlimited creative power of God and the more limited, but still tremendous, creative powers enjoyed by his creation. The latter emphasis persisted down through the fifteenth century and finds its canonical expression in the work of Pico Della Mirandola, whose 'Oration on Human Dignity' has been called the manifesto of the Renaissance. Mirandola describes human beings' relationship to God in a positive manner; albeit often granting great – even idolatrous – weight to the ambitions of the former. Imagining a dialogue between God and Adam, Mirandola has God exclaim:

> We have given you, O Adam, no visage proper to yourself, nor endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with premeditation, select, these same you may have and possess through your own judgement and decision. The nature of all other creatures is defined and restricted within laws which we have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature. I have placed you at the very center of the world, so that from that vantage point you may with greater ease glance

> round about you on all that the world contains. We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine.[5]

There is little that is reactionary or conservative in this articulation of human beings, their dignity, and their relationship to God. Indeed, Mirandola's God almost seems in awe of his own quasi-divine creation. These proto-Blakean sentiments come out more overtly later. In a statement of some elegance, Mirandola calls on human beings to emulate the dignity of God and higher-order angels in the creation of the novel, and asks:

> But what is the purpose of all this? That we may understand – since we have been born into this condition of being what we choose to be – that we ought to be sure above all else that it may never be said against us that, born to a high position, we failed to appreciate it, but fell instead to the estate of brutes and uncomprehending beasts of burden; and that the saying of Aspah the Prophet, 'You are all Gods and sons of the Most High,' might rather be true; and finally that we may not, through abuse of the generosity of a most indulgent Father, pervert the free option which he has given us from a saving to a damning gift. Let a certain saving ambition invade our souls so that, impatient of mediocrity, we pant after the highest things and (since, if we will, we can) bend all our efforts to their attainment. Let us disdain things of earth, hold as little worth even the astral orders and, putting behind us all the things of this world, hasten to that court beyond the world, closest to the most exalted Godhead. There, as the sacred mysteries tell us, the Seraphim, Cherubim and Thrones occupy the first places; but, unable to yield to them, and impatient of any second place, let us emulate their dignity and glory. And, if we will it, we shall be inferior to them in nothing.[6]

So, from the origins of its formal explication, dignity was understood as more than simply one or another moral characteristic of human beings. For Mirandola, dignity emerges as a consequence of humanity's divinely ceded power correctly to interpret and to transform the world. This is no doubt inspiring, even if it is occasionally overenthusiastic and, of course, specifically attached to a very distinct ontotheological tradition.

However, Mirandola's pioneering oration does demonstrate one of the considerable problems that would beset dignity down through the centuries: its conceptual ambiguity. While earlier religious thinkers deployed dignity to denote a human being's status before God, Mirandola subtly shifted the discourse to make their creative powers its central characteristic. These dramatic shifts would hardly be atypical of dignity's conceptual history. References to dignity abound in religious and philosophical literature from the Renaissance onwards, but they are applied in an eclectic and occasionally even contradictory manner. It would not be too much to say that, often, authors simply deployed dignity to baptize certain features of human beings and/or institutions with the veneer of moral and philosophical grandeur. Moreover, and in contrast to its earlier deployment in the monotheistic traditions, dignity is rarely deployed in an egalitarian manner. Most accounts that reference it relate it to one's social status and wealth. Locke and Smith both reference the 'dignity' found in the office of the king and in father figures. Rousseau refers to the 'dignity' found in prosperity. Grotius, often considered the founding theorist of international law, references dignity several times in *The Rights of War and Peace*. Typically, his references are, per Locke and Smith, concerned with the dignity and honour of institutions and sovereigns.[7] David Hume's account is somewhat closer to our modern sensibilities. In his essay 'Of the Dignity or Meanness of Human Nature', Hume relates dignity to a human being's capacity to act virtuously and embody virtues. This is because acting virtuously and embodying virtues amplifies a human being's overall worthiness. Hume also notes that dignity is already a controversial topic in the philosophical literature, and often inclines authors to rhetorical excess.

> The most remarkable of this kind are the sects, founded on the different sentiments with regard to the *dignity of human nature*; which is a point that seems to have divided philosophers and poets, as well as divines, from the beginning of the world to this day. Some exalt our species to the skies, and represent man as a kind of human demigod, who derives his origin from heaven, and retains evident marks of his lineage and descent. Others insist upon the blind sides of human nature, and can discover nothing, except vanity, in which man surpasses the other animals, whom he affects so much to despise.[8]

Despite these, and countless other references, few thinkers made dignity a central concept in their moral theories. As such, it might gradually have been relegated to the backdrop of secular moral discourse had it not been for the work of Immanuel Kant.

The Kantian Conception of Human Dignity

> What is related to general human inclinations and needs has a *market price*; that which, even without presupposing such a need, conforms with a certain taste has a *fancy price*; but that which constitutes the condition under which alone something can be an end in itself has not merely a relative value, that is, a price, but an inner value, that is, *dignity* … Morality, and humanity insofar as it is capable of morality, is that which alone has dignity.

While there remains no consensus on what 'dignity' means, by far the most important and famous conception remains the classical liberal account of it developed by Immanuel Kant.[9] This fame is well deserved, even if Kant's articulation of his conception of dignity is occasionally quite confusing. In this section, I will briefly discuss Kant's conception of human dignity. In preparation for presenting my own conception, I will also explain why I think that it is important to go beyond Kant in some important respects.

Part of the difficulty in giving an account of Kant's conception of dignity is the range of formulations found in Kant's work. Moreover, it is not always clear what theoretical role dignity is intended to play in the Kantian system. At points, Kant seems to argue that dignity flows from, and is thus conceptually subordinate to, human autonomy. In these moments he seems to be saying that autonomy is the central feature of human life, which gives us moral value generally.[10] At other points, Kant gives dignity itself a more central place. Indeed, according to some interpretations of his work, it would almost seem to warrant pride of place in the entire moral system. Unfortunately, there is no space to deal with all these conceptual difficulties here, let alone to provide a rigorous articulation of all possible formulations of his conception of dignity. Instead, after briefly discussing some of these challenges, I will focus on reconstructing Kant's conception in the strongest possible light. This will also provide a clearer contrast when discussing how my own conception of dignity contrasts with his.

Kant's most famous formulation of dignity is cited at the beginning of this chapter: human dignity is a status that places the life of human beings above all price.[11] As a rhetorical statement, this is about as good as Kant gets, and it remains a deeply moving formulation of his particular conception. However, by itself, the formulation tells us little about his overall conception, aside from the worth that he ascribes to each human life. To understand better why he ascribes us this value, we need to dig deeper into the *Groundwork to the Metaphysics of Morals*.

In this seminal work Kant developed a complex argument to the effect that all autonomous human individuals possess a free will from the standpoint of practical reason, and are therefore able to will their own independent ends. Other objects in the world, including non-human animals, do not possess this capacity. Like all purely scientific phenomena, they are governed by material causality and therefore operate according to the laws of cause and effect. Kant argues that, on occasion, human beings are prone to the bad faith belief that we are also simply material objects in the world, governed by causality. But Kant feels that this can never be proven metaphysically without lapsing into

transcendental illusion, and is denied by our practical reason, which affirms the sense of ourselves as a rational being capable of willing our own ends. The moral belief that we are simply the product of our material environment is a belief in what Kant calls 'heteronomy', and is to be rejected.

There is an important reason for Kant's being keen to reject heteronomy, and all its affiliated beliefs. This is because he believes that the transcendental capacity to will our own ends is the central reason for our not being just material objects in a value-free universe. Kant makes the radical and highly innovative argument that the autonomy of individuals is the enabling condition of moral philosophy. At first glance, this might seem like a curious feature. If it were true that autonomy and freedom were the enabling conditions of morality, how could we claim that morality had any substantive content? Wouldn't all individuals simply be free to will their own ends as they saw fit – or, for that matter, not at all?

This position would certainly become more prominent in the writings of later thinkers, particularly those in the existential tradition. But Kant is unwilling or unable to take this step. He will not claim that autonomy of the self and freedom of the will leave us free to pursue any ends that we prefer. In fact, recognizing our freedom to pursue different ends is simply the first step to recognizing the rational form, substance and end of morality to which we have a duty to conform. The capacity to will our own ends is central to Kant's broader argument that practical (moral) reason demands that we submit our will to a regulative categorical imperative, which is to direct our actions in conformity with the overall and universal moral law.[12]

Kant breaks this categorical imperative into three formulations. The first is that all human beings must always act in such a way that we could accept the maxim that we order ourselves by as a universal law. Kant refers to this as the formula for a universal law of nature. It is probably the most well-known formulation of the categorical imperative, and also the most controversial. Given these controversies, I will acknowledge this formulation only briefly here. It is obvious that Kant considers it exceptionally important to his moral thought overall. However, it is not

clear what direct relationship this first formulation of the categorical imperative has to Kant's account of human dignity. The clearest link is that if the first formulation truly is a universal law, it demonstrates our capacity to will ends that are objectively moral. This places us above other animals, who are purely subject to deterministic heteronomy and therefore cannot be said to act on any imperatives that are universalizable. But the core insight here is that dignity is related to autonomy and freedom from causality, which is better captured by the second formulation.

The second formulation of the imperative bears the most important relationship to dignity. It is that all individuals must always act in such a way that we treat our humanity, and that of others, not just as a means but always as an end in itself. It is our status as the only beings with the capacity to submit ourselves to moral imperatives of our own design – in effect, to will towards ends that we ourselves have chosen but which have a rational moral structure[13] – that gives human beings a dignity that places human life above all price. Price is a variable that can be measured and affiliated with an object. However, the dignity of human beings cannot be measured in this manner, if at all. It is incommensurable and absolute. As Donnelly puts it:

> Kant's key move was to distinguish two kinds of value, which correspond to two sides of human nature: dignity (Wurde, worth) understood as 'an absolute inner worth' which is the standard of distinctively human or moral value; and price, the standard of value of the material world and man's anima nature. A human being is a creature with a worth, a dignity; that is literally priceless, outside of the domain of instrumental value.[14]

Moreover, for Kant, dignity as an end in ourselves is what sets us above and, to some degree, outside the world around us, which is defined by causal relations in which objects interact with one another according to a predefined script. This Kantian argument about the relationship between autonomy and our capacity to be moral – indeed to establish the existence of morality at all – is nicely made by J. B. Schneewind.

> The power of choice enables us to decide between the call of desire and that of morality. Kant thinks that we might have it even without having the kind of practical reason we have. It would function like the Clarkean will, enabling us to choose even where the alternatives are indifferent; in other cases its choices would be determined by the relative strengths of desires and passions. The will itself is neither free nor unfree. As pure practical reason, it provides us permanently with the option of acting solely on the reason which its own legislative activity gives us. The power of choice, which enables us to opt for morality or against it, is a free power. Because we can choose, we never have to accede to desires which, though certainly part of ourselves, are caused in us by our encounters with the world outside us.[15]

This point is complex and bears more reflection as it relates to dignity. At points, Kant seems to think that this capacity to choose to will the moral law sets us above anything else in nature except other rational beings. He could justifiably be attacked from an environmentalist perspective for so elevating human beings at the expense of nature. Kant is firmly in the classical liberal tradition in his approach to the natural world. There is little sense in which nature or any non-human animals enjoy anything approaching a dignity 'beyond price'. As he put it in his 'Lectures on Ethics': 'But so far as animals are concerned, we have no direct duties. Animals … are there merely as means to an end. That end is man.'

While Kant's later works, especially the *Critique of Judgement*, develop a formidable approach to interpreting nature's beauty and *telos*, he is committed to the idea that natural objects are appropriable for the ends determined for them by man and God. But it is important to note that this is not simply some crude speciesism on Kant's part. He does not simply assert that we are different than animals and nature because we are free to choose, and therefore enjoy a dignity that sets us apart from them. Freedom and autonomy are at the locus of Kant's account of dignity but do not exhaust it. He develops a complex argument to that effect, since, for Kant, moral value stems precisely from our capacity to set ends for ourselves. Because we are capable of doing this, and in

effect bringing value into the world, we cannot be treated as means to an end since it is in some respects the duty of man to ascribe all ends to the world. Without us, there would be no value. This, in effect, elevates us above all the values that we create.

As mentioned, this is centrally related to our autonomy and freedom to choose, since treating ourselves or other human beings as means to an end removes our capacity to choose, and therefore our ability to will moral ends.[16] It is, in essence, to treat a human being as a thing in the world rather than as an autonomous person who can will their own ends. For Kant, this is failure in our moral duty, and betrays both our dignity and the dignity of the one we diminish. But there is also an important egalitarian humanism to this position. Kant's conception of dignity is firmly in opposition to accounts given by Locke, Smith and others, who associate it firmly with institutional office and rank. He would also be opposed to attempts by modern thinkers, such as Waldron, to conceive of dignity as a status or rank that is ascribed to individuals or institutions as a social gesture. We are indeed supposed to treat each individual as possessing dignity because they are an end in themselves. But, for Kant, such a conception would still ascribe too much influence to the external world, and thus risk being affiliated with inegalitarian ideas if manipulated properly. The only way properly and securely to understand dignity is as belonging to everyone, low and high, from birth to death, as an *a priori* fact. Moral imperatives are to be organized around it. Perhaps more importantly for our purposes, states and social institutions are to be organized in a manner that respects dignity and its egalitarian connotations.

This is where the third formulation of the categorical imperative comes in. Kant believes that a kingdom of individuals who are ends in themselves should be established, wherein free individuals will moral laws in tandem with one another. In later works it becomes clearer that such a society would look very different from the one in which he lived, and, indeed, from our own. In later chapters, I will discuss and apply in far more detail these Kantian ideas, particularly his argument that states have an obligation to establish the 'rightful condition' for free humans to engage one another as ends.

Kant's conception of dignity has been very influential, down to impacting the decisions of major judiciaries such as Germany's.[17] It is also tremendously powerful, especially in its egalitarian and humanistic moments. However, it is far from perfect. In the next section, I will develop some criticisms of the Kantian conception and preview some of my own ideas about how dignity should be conceived.

Criticisms of the Kantian Conception

Kant's conception of human dignity is rich and provocative, and anyone attempting to develop a different one will have to engage and learn from it. But I believe that it remains marred by some serious limitations. The Kantian conception of human dignity has never been entirely satisfying due to its apparent insensitivity to socio-historical and other empirical contexts. Here, I will argue that important features of his conception can be saved from this limitation, but only at the expense of dropping some of Kant's more specific philosophical commitments.

As mentioned in the section above, one of the (apparently) defining features of Kant's conception of human dignity is his insistence that dignity is in no way dependent on external features of the world but exists *a priori* as a defining characteristic of the human subject. This is a powerful idea, finding expression in the frequent characterization of dignity in international legal documents as inalienable or intrinsic to all human beings. But the philosophical justification for such a strong position on dignity is not as powerful as its rhetorical heft might suggest. It is centrally related to the occasionally ambiguous links that Kant draws between dignity, freedom and the capacity to bring moral value into the world. There is a sense in which Kant cannot accept that external features of the world – what I call socio-historical contexts – can impact the dignity of human beings. Acknowledging this would undermine Kant's deep commitment to the idea that all human beings are absolutely free, regardless of the heteronymous features of their life. Concurrently, if socio-historical contexts impact on human freedom, it would suggest that our dignity as lawgivers who will their own ends can be not just disrespected but actually limited and qualified. This is

unacceptable for Kant, both because it limits the dignity of human beings as free lawgivers, and less admirably because it might limit our capacity to hold each individual fully accountable for their actions.

There is a sense in which Kant is too radically transcendental. He seems simply to assert that all individuals possess the transcendental capacity to will their own ends, regardless of the specific details of their lives, and that is that. Whether this is true of his conception, a monologically transcendental view, while inspiring in some respects, simply seems unrealistic after a point. Moreover, there is a paradoxical sense in which the radicalness of Kant's transcendental commitments might blunt the critical edge of his philosophy as it applies in the empirical world. If it is true that all individuals possess dignity simply as an *a priori* brute fact, it can lead one to question whether and why sociohistorical contexts and powerful institutions should be rearranged to establish a freer society. If we are simply free and dignified agents, and that is that, there can be no sense in which change could either increase or diminish that freedom. This would be a remarkable position to take. It would make little sense to say that a slave toiling in the fields in eighteenth-century Virginia could not be made more fundamentally free to lead a dignified life by the elimination of slavery. Even in the Europe of Kant's time, it would seem deeply odd to claim that individuals would not be made freer by the elimination of aristocratic political and economic institutions – and the examples can multiply.

Indeed, Kant does not seem fully to believe in this extreme position.[18] His later works in political and legal philosophy are replete with calls for reform and the transformation of both the state and cosmopolitan society along lines that would better treat human beings as ends in themselves. As pointed out by Arthur Ripstein, Kant's legal and political philosophy has a fundamentally radical edge to it that is occasionally underappreciated.[19] Kant claims that for the state to claim sovereign authority over citizens, it must maintain the rightful conditions for the exercise of their freedom as dignified ends in themselves. This includes a responsibility to maintain and deepen a host of liberal institutions that would have seemed radically progressive in Kant's time, and engage in a cosmopolitan politics that seems idealistic even to this day. Kant

takes this position to the extreme by concluding that, to the extent that states fail to establish this rightful condition, they cede the moral right to sovereign authority over their citizens.

To my mind, this more realistic and contextually sensitive dimension of Kant's thought demonstrates how one should go about understanding his conception of dignity. I agree with Kant that there is a fundamental link between one's freedom and human dignity. However, I think that we must follow his somewhat constricted insight that freedom – what I will later call agency – can be very much inhibited or amplified by the socio-historical contexts within which individuals live. Because of the links I, like Kant, draw between agency and dignity, it is possible for the dignity of human beings to be amplified or limited by the socio-historical contexts within which they live. We must try to make individuals more capable of agency to amplify the dignity they enjoy as authors of their own lives. Taking dignity seriously means (re)organizing socio-historical contexts in order to amplify agency to the greatest extent possible. In this respect we still have a very long way to go. Many states still engage in practices that, directly or indirectly, limit the dignity of individuals. Significant changes are needed.

Fortunately, some resources can be brought to bear in order to move societies in this direction. One of the most important of these is positive law, in which references to human dignity already abound. In the next few sections, I will trace out how human dignity came to play a role in both the domestic and international legal systems. I will also examine several further philosophical conceptions of dignity that have emerged, some of which add much to our understanding of its logic and importance.

Samuel Moyn on Dignity's Secret Catholicism

Kant's vision of a liberal–cosmopolitan world order that respected human dignity was exceptionally innovative at the beginning of the nineteenth century. Unfortunately, he paid the eternal price of being ahead of his time; many centuries would pass before anything like the Kantian vision was realized in the law, either domestically or internationally.

The romantic nineteenth century was defined by several different intellectual currents, many of them hostile to the idea of human dignity. The most prominent in opposition to the Kantian vision were undoubtedly the various nationalist movements, which tended to draw on various Herderian and Hegelian conceptions of an organic total community like the nation state. These movements were often anti-individualistic, and therefore rejected humanistic philosophies like those oriented around human dignity. And indeed, the most militant were actively hostile towards such ideas, since they served to discredit the then ascendant imperial and colonial projects through which so-called 'civilized' nations expressed their culture and power. Simultaneously, Marxism emerged as a major force deeply critical of many of these imperialistic trends. However, there is little evidence to suggest that Marx himself was particularly attracted to any specific conception of human dignity. While there is a sensitivity to the indignity of life under the most brutal forms of capitalism in *Capital* and other Marxist texts (especially his earliest works), he never appeared to have given the idea much thought.[20] It is likely that Marx would have felt that appealing to dignity would have given his 'scientific' theory an unpalatably moral dimension. This would have run counter to his general intention of developing a relatively deterministic account of why capitalism's inherent contradictions would lead to its collapse. And indeed, most of the movements birthed in Marx's name were tragically indifferent or even actively hostile to any of the individualistic connotations associated with the idea of dignity. In this respect, they differed little from the vulgar collectivist philosophies developed by the various nationalist movements.

This is not to say that substantial efforts were not made on some fronts – many of them motivated by religious, abolitionist and anti-imperialist movements. As the century moved to a close, many women's movements also made able use of the idea of dignity to demand suffrage and respect. However, while each of these movements pushed for important demands that were integral to securing dignity for traditionally marginalized groups, there was no sense in which any of them advocated for giving it any more conceptual or legal heft beyond its

moral weight in pushing for a specific set of reforms. In other words, the term 'dignity' was instrumentalized to make particular demands for particular causes.

Samuel Moyn observes that the first place where dignity enters into the law is esoteric and unexpected: the 1937 Irish Constitution. Moyn argues that the founding status ascribed to the Kantian conception of dignity overstates its actual significance for legal practice. In fact, it was in Catholic countries, inspired by the Church's emphasis on the dignity of collective entities, that human dignity entered the lexicon of legal values. But while the emphasis given to dignity was individualistic, it was hardly the autonomous individualism of Kant and other liberal thinkers. Moyn claims that the Irish were specifically motivated to establish a Christian democratic society – one that would protect the individual but also had illiberal characteristics consonant with the need to uphold Catholic values. In other words, dignity as it appeared in the law originally had a conservative slant – one that may be more admirable than the postmodern conservatism of Trump and Orban that is ascendant in the current era, but hardly consistent with the emancipatory rhetoric ascribed to it by many liberals and some progressives.

> These two groups of Catholics agreed on the rejection of the modern, liberal secular republic, which they viewed as immoral and individualistic. Instead, they favored the dispersal of authority to the 'natural' social hierarchy established by God and descending through religious institutions, local communities, and patriarchal families. This agreement was perfectly obvious to contemporary witnesses, such as celebrated political theorist Michael Oakeshott, who in this era offered readers a conspectus of European political thought in which 'Catholicism' was a possible option alongside 'representative democracy', 'communism', 'fascism', and 'National Socialism'.[21]

Moyn makes the bold claim that, for most domestic constitutions, comparably universalistic but metaphysically loaded conceptions of dignity

were those that made their way into law. This problematizes the traditional cosmopolitan and liberal narrative that dignity entered the law in its full Kantian glory in 1948.

> After all, for a long time, including in the 1940s, dignity was most strongly correlated with religious constitutions in general – of which the German was merely one among others – and Christian Democratic constitutions in particular. Those constitutions as much broke with 1789 as safeguarded it, let alone rehabilitated it after disaster. The Irish were the true pioneers both in the development of religious constitutionalism and in symbolizing its project through appeals to human dignity. In their 1937 constitution, they gave dignity foundational placement, as a religiously inspired root concept connected (as in the later West German case) to the subordination of the otherwise sovereign democratic polity to God, and for many to the moral constraints of his natural law.[22]

Moyn's account of this 'secret' history of dignity, characteristic of the sceptical historicism he employs in other works, is aimed at undermining neo-utopian narratives[23] wherein dignity and rights entered the world in the post-war era and will ultimately bring about the long-promised ideal society. His work is consonant with other trends in socio-legal and critical legal studies that have aimed to undermine triumphalist narratives about what law, and the normative concepts underpinning it, are actually able to accomplish in practice. I have a great deal of sympathy with many of these arguments, and will deal with them more extensively in Chapters 3 and 4. For now, I will simply say that while Moyn's claims are historically relevant, they need not prevent one from developing a novel conception of human dignity that emphasizes different normative commitments than has been the case in the past. History is not destiny; its lessons can be absorbed without becoming determinative. I see few *a priori* reasons for why dignity cannot be put to more radical uses in the law – particularly international law – than its Catholic and conservative heritage might suggest.

At least to some extent, Moyn seems to accept this. In the conclusion of his article he emphasizes the modern-day explosion of literature on dignity, highlighting recent works by Dworkin, Kateb and Benhabib among others. But Moyn does not interpret this as evidence that dignity might possess some rhetorical or conceptual value that has led to its coming to the fore. Instead, he seems to interpret dignity in a manner analogous to his earlier treatment of human rights. The fact that one can detach dignity so easily from its Catholic (and, one assumes, Kantian) associations, demonstrates its unwelcome plasticity as a moral and legal term. On Moyn's understanding, this plasticity renders it a fairly useless part of the moral and legal vocabulary. He would rather that advocates simply state their political commitments in plain terms, without relying on universalistic rhetoric and concepts.

Here, Moyn seems to echo Carl Schmitt's cynical observation that 'whoever invokes humanity wants to cheat'.[24] In other words, invoking dignity is intended to silence political disputes through the adoption of a moralistic rhetoric that shames opponents into submission, for who would want to be on the wrong side of respecting human dignity? However, I do not find this to be a tremendously compelling point. Indeed, it is not clear to me what would be entailed by simply expressing one's political commitments in plain terms, detached from certain universalistic inclinations. Perhaps what Moyn has in mind is adopting a subjectivist political grammar predicated on an emotivist meta-ethics. Given this, one would not claim that one's stated political preferences were predicated on more universal moral truths. Instead, they simply express subjective political preferences. But even cast in this way, one would not get very far. What about those who simply prefer to cast their subjective political preferences in a universalistic manner? Those who adopt a subjectivist viewpoint in morality cannot then criticize those who simply prefer to express their political preferences by using a more objective sounding set of terms. Beyond this, I think that there are compelling philosophical reasons to reject the kind of subjectivist political semantics predicated on emotivist meta-ethics that Moyn seems to have in mind – though, again, that is somewhat unclear.

Following Dworkin, I do not think the structure of practical reason lends itself to adopting the external scepticism towards political and moral truth that Moyn seems to be implying.[25] External scepticism, or the idea that there is simply no Archimedean point from which to begin assessing the truth (or not) of political and more general moral propositions, mistakes what is important about practical reason. We cannot help but commit ourselves to certain courses of action, and in determining their moral and political worth what matters is how well we can justify such actions. From the standpoint of practical reason, what is important is the commitment that we demonstrate to unpacking the internal logic of moral and political propositions by testing their integrity and efficacy through a process moving towards reflective equilibrium. Given that, there are few good reasons to avoid at least attempting to develop a more fruitful set of political concepts.

In this historical and exegetical chapter there is no space for a more extensive discussion of these philosophical issues. I present them only so as quickly to rebut the idea that there is no need to put forward universalistic political propositions predicated on moral conceptions like human dignity. But, what about dignity itself? Why deploy it in particular? Moyn's contribution does a great deal to awaken us to the different conceptions of dignity that have existed historically, but I see few reasons why its plasticity should prevent us from articulating a new conception if that can improve, however incrementally, on its predecessors. If there is one important lesson that history teaches, it is never to underestimate the possibility that novel developments might take place. And clearly, given its attraction to many different people from many different walks of life, human dignity seems to inspire such novelty, often for the good. Dignity may be a plastic concept, but that might speak to its capacity to inspire rather than just its apparent mutability.

For instance, I think that, despite the scepticism of some, the novelty value of connecting dignity to a regime of international law was exceptional. Moreover, these developments prefaced the ascendant status increasingly given to dignity, as a growing number of scholars began to recognize its emancipatory potential. It is to these developments that I now turn.

The Internationalization of Dignity

The experience and aftermath of the Second World War undoubtedly influenced current interest in human dignity. The traditional narrative concerning the war and the burgeoning of the international human rights regime is well known and does not warrant repetition here. Instead, I will simply jump into discussing where and how dignity is linked with international human rights law. Moyn and others are right to criticize the now stock narrative that a secular conception of human dignity emerged with the philosophy of Kant, only to languish until 1948. As we have seen, the story is considerably more complex than that, but there is no doubt that the current interest in dignity owes much to its canonization in international human rights law.

The conceptual link between realizing dignity and the aims of international law are very explicit in the text of many international legal codes. The Universal Declaration of Human Rights (UDHR) – itself a non-binding but wildly influential articulation of global principles – opens with the following Preamble:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…
> whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

References to human dignity appear twice in the Preamble. First, human dignity is acknowledged as one of the sources of 'freedom, justice, and peace in the world'. Secondly, faith in inherent dignity is associated with the 'worth' of human beings, and is a step on the road towards 'social progress' and a better life in which all enjoy 'larger freedom'.

References to dignity appear twice more in the UDHR. The first is in Article 1, where dignity is linked to the Enlightenment ideals

of 'reason and conscience' that imply that all should act towards one another in a spirit of 'brotherhood':

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

At this point, dignity is largely articulated in rather abstract and even hagiographic terms as leading to and from all good things, somehow and someway. However, the next references to human dignity, in Articles 22 and 23(3), are far more provocative. Here, the UDHR explicitly links human dignity to one's capacity to flourish in a rich social environment. This observation will be important later, when I conceptually link human dignity to what I term 'expressive capabilities'.

Article 22 reads:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23(3) is even more express in drawing an explicit connection between respect for economic, social, and cultural rights and the flourishing of human dignity:

> Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

The last point comes very close to implying, as I did in the section above, that states have an obligation to maintain a rightful condition that involves protecting economic, social and cultural rights. This conceptual

link becomes even more express in the Covenant designed to protect just those rights.

At points, the International Covenant on Civil and Political Rights (ICCPR) comes very close to declaring that amplifying human dignity is the ideal to and from which all 'daughter rights', and indeed, the authority of the United Nations itself, flow. References to dignity appear throughout the text of the Covenant. The most striking are found in the Preamble, which seems to go out of its way to outdo that of the UDHR. The reference to dignity appears immediately:

> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person.

While admirably emphatic, the language of the Preamble toys with the same tension that wracks many normative arguments that draw inspiration from human dignity: if human dignity is 'inherent', what need have people for human rights? Here, one detects echoes of Arendt's famous argument on the right to have rights, and that individuals came to recognize the need for the universal rights of man only when their enforceable civic rights were entirely stripped away.[26] In an appropriate twist, this concern seems to be verified by the text of the ICCPR itself. After emphatically stressing the importance of human dignity as the source for all human rights, references to it appear only once more in the text of Article 10, which outlines the legal rights of individuals: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

The remainder of the Article does not detail what is expressly involved in paying respect to the dignity of individuals who have been arrested. It only suggests that the accused should be treated differently than the convicted, and children differently than adults.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) opens with the same dignity-centric language as the ICCPR. But, unlike the latter Covenant, the emphasis on dignity does not disappear once one dives into the heart of the text. Indeed, the ICESCR makes a strikingly programmatic reference to dignity in Article 13, linking its amplification directly to a host of related goods:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Such sections are likely to be what the drafters had in mind when they called for the 'progressive realization' of the Covenant, as opposed to the ICCPR, which contains no such qualifications. While the section is nominally about education, it links many different goods. Education is to be available to all – not just as a good in and of itself, but because it fosters the 'development of the human personality and the sense of its dignity', which in turn should 'strengthen' and further the respect that individuals have for human rights and freedom, and contribute to establishing a lasting culture of toleration and peace.

References to dignity also appear in other major international human rights documents. The most prominent and important for my purposes are the references in the European Convention on Human Rights (ECHR). In later chapters I will refer to European Union (EU) jurisprudence when trying to indicate how amplifying human dignity can be made the fundamental orientation of international human rights law.

The most striking reference in the ECHR appears in Protocol 13, concerning the protection of fundamental freedoms and the elimination

of the death penalty. The language is strikingly close to that of the UDHR:

> Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.

References to human dignity also appear in the Charter of Fundamental Rights of the European Union, Article 1 of which proclaims: 'Human dignity is inviolable. It must be respected and protected.'

Finally, references to human dignity appear in the European Convention for the Protection of Human Rights and Dignity of the Human Being With Regard to the Application of Biology and Medicine: Convention on Human Rights and Medicine. The Preamble states:

> Convinced of the need to respect the human being both as an individual and as a member of the human species and recognising the importance of ensuring the dignity of the human being;
>
> Conscious that the misuse of biology and medicine may lead to acts endangering human dignity;

Then, somewhat further down:

> Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine.

These references indicate the ascendant prominence of human dignity in international human rights law. There are also important instances in which references to human dignity have been incorporated into domestic constitutions, including those of Germany, South Africa and Switzerland. For instance, the Constitution of South Africa indicates that respect for 'human dignity, the achievement of equality and the

advancement of human rights and freedoms' is one of the founding principles of the post-apartheid state. And, most notably, Article 1, paragraph 1 of the German Constitution reads: 'Human dignity is inviolable. To respect and protect it shall be the duty of all state authority.'

The increasing legalization of dignity has been matched by a growing theoretical literature on the topic, by authors such as Benhabib, Kateb, Dworkin and many others. Many of these are explicit efforts to provide philosophical and normative support to the international human rights regime. In the next and final section of this chapter, I will look at some of these efforts and assess their relative efficacy.

Providing New Theoretical Frameworks for Human Dignity

The legalization and internationalization of human dignity, combined with declining faith in Marxist-Socialist visions, have contributed to human rights and their affiliated concepts becoming the ideology of the 'last utopia' – the final shot at establishing a truly progressive state and society.[27] Not coincidentally, the last several decades have seen an explosion of theories trying to frame new conceptions of human dignity, fleshed out with a corresponding set of rights. My own project is affiliated with this trend, and I have no desire to criticize it. Instead, this last section is designed as a quick overview of some of these projects. Generally speaking, there are two major streams of thought in the recent dignity literature. These should be treated as ideal typologies rather than as firm categorizations. While dignity is a rather plastic concept, there is a limit to its flexibility. All the authors mentioned here share a large number of overlapping concerns, are often critical of the status quo, and marry their conceptions of dignity to more general normative frameworks. But the way in which they go about doing so is subtly different and bears consideration. After briefly summarizing the positions of the various authors, I will detail what I take to be the strengths and weaknesses of both respective streams. I will conclude by highlighting how my own conception of dignity draws insight from both, as filtered through a critical legal lens.

The first stream of thought in the modern theoretical literature on dignity is an individualistic one. This is often, though not exclusively,

affiliated with liberal political thought and its corresponding set of rights. Authors who are representative of this stream are Ronald Dworkin[28] and George Kateb. Such authors tend to commence their analysis of dignity by looking at the roles that it plays in the normative situatedness of the individual, and then gradually shift from there to analysing how it can and should transform the individual's relationships with those around them. The goal for these authors is to cash dignity out through an affiliated account of rights that is conceived as largely immutable and set by the overarching theoretical architecture designed to prioritize individualism.

Ronald Dworkin's account of dignity is exemplary in this field. For him, dignity is central to the moral framework that he develops in *Justice for Hedgehogs*, and which he seems to imply is latent within all his voluminous works. Most of the historical antecedents to which he appeals, including Hume, Kant and Rawls, and indeed many of his philosophical opponents such as Berlin, can be neatly classified as liberals. Dworkin's conception of dignity is firmly within that tradition. He claims that respecting dignity involves realizing two social principles. The first is that each individual should enjoy self-respect and should take their lives seriously.[29] The second is that each individual should have an opportunity to live authentically, acknowledging 'special, personal responsibility for identifying what counts as success' in that individual's life though establishing a coherent narrative of unique existential value to them.[30] As interpreted – I think correctly – by Simon, these principles perform triple duties in Dworkin's moral system. They provide guidance on what one must do to live well; demonstrate the rights that individuals have against their political community; and, finally, clarify the rights that we owe to others.[31] Added together, they are intended to provide a formula for how to live well as dignified individuals.

Another account of dignity that falls into the individualist stream, but draws on different philosophical sources, is George Kateb's. Drawing on the work of continental authors such as Heidegger, Kateb argues that dignity is an existential value that is imputed to an individual by virtue of their identity. As he puts it early in his book *Human Dignity*:

> Human dignity is an existential value; value of worthiness is imputed to the identity of the person or the species. I stipulate that when the truth of identity is at stake, existence is at stake; the matter is existential. The idea of human dignity insists on recognizing the proper identity of individual or species; recognizing what a person is in relation to all other persons and what the species is in relation to all other species.[32]

Kateb's interpretation of the existential character of dignity is related to a unique existentialist interpretation of morality. Dignity serves two functions. Its directly existential function is to delineate the absolute independence and uniqueness of all individuals relative to one another. This has a conceptual independence from 'instrumental practicality' and morality. This is not to say that dignity and morality cannot be related, and that is indeed the next step that Kateb takes. But his point is to emphasize that the existential function of dignity is to make us aware that our identity exists independently of any 'suffering' or competing consequentialist concerns for which we might feel compelled to make sacrifices.[33] Naturally, this makes Kateb deeply hostile towards utilitarian doctrines.[34] Secondly, dignity's moral function is to guard the individual from unjustifiable suffering at the hands of the state. Moral dignity exists to protect the individual's uniqueness from oppression by others who might wish to use the individual as a means to an end, and is thus an offshoot of existential individuality.

Both Dworkin's and Kateb's conceptions of dignity are individualistic, because each begins his account by analysing dignity's value for and to the individual. Dworkin believes that dignity is valuable first and foremost because individuals should enjoy self-respect, and secondly because they should be capable of living authentic lives whose narratives are of ultimate value to them. The offshoot of this is that dignity defines the way in which individuals are to relate to one another, most prominently through the mediums of politics and the law. Kateb's conception of dignity, while drawing on different authors, is remarkably similar. Dignity is first and foremost an existential value. Through it we recognize our unique identity both as individuals and as a species

relative to all other species in the world. The follow-on from this is the need to develop a moral account of how to protect unique individuals from unjustifiable suffering at the hands of others, most notably at the hands of political institutions and the law. Not surprisingly, both Dworkin and Kateb place immense importance on the idea of rights as metaphysically immutable and largely set. The resulting style of criticisms tends to be immanent. Since the rights affiliated with dignity are immutable and largely set, the form and practice of politics and law must reflect or synchronize with them.

The second prominent stream in the modern theoretical literature on dignity is what might be called the 'relational' stream.[35] Again, this is often, though not exclusively, embraced by various democratic and cosmopolitan thinkers such as Jürgen Habermas, Jeremy Waldron and Seyla Benhabib. Authors in the relational stream are also concerned with the normative situatedness of the individual. However, they often commence their analysis of dignity by looking at the way in which its normative imperatives should transform the social contexts in which the individual is situated. In this respect the relational stream is often more reliant on historical and socio-philosophical analysis that demonstrates how claims about dignity operate to transform the social contexts within which individuals pursue their interests and various life goals.

The ultimate conclusion of these authors is to unpack their conception of dignity through an account of rights conceived as structural pre-conditions established prior[36] to engaging in robust political discourses about the goals and interests to be pursued collectively through the establishment and functioning of collective institutions and mediums. To put that more simply, rights are respected as necessary for carrying out political processes but because the process itself is ascribed greater weight than in the individualist stream, rights are not as immutable and set: they can be reconceived and put to new work as necessary.

Jürgen Habermas's conception of dignity is perhaps the most important, given his status as among the most pre-eminent philosophers of the modern era. However, his contributions to the direct literature on dignity have been fairly minimal. The most concrete is his paper 'The Concept of Human Dignity and the Realistic Utopia of Human

Rights', in which he notes that the proliferation of references to dignity in international and constitutional law necessitates developing a more complex account of the concept's intellectual genealogy. After briefly running through this account, Habermas concludes that dignity has played a central role in mediating between facts and norms by importing universalistic mores into positive law. This was foundational to establishing the realistic utopian[37] vision of a society organized around respecting human rights.

> After two hundred years of modern constitutional history, we have a better grasp of what distinguished this development from the beginning: human dignity forms the 'portal' through which the egalitarian and universalistic substance of morality is imported into the law. The idea of human dignity is the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights.[38]

Habermas notes that another way to conceive of dignity is to envision a gradual extension of the concrete concept of social honour from belonging to a few individuals and offices enjoying high ranks in hierarchically ordered tradition societies to include every human being.[39] Here he directly invokes the work of Jeremy Waldron, who is also keen to develop a genealogy of dignity that traces its concrete impact in modern normative and legal discourses.

Waldron is sceptical of more directly philosophical projects, such as Kant's and Dworkin's, which seek to ground human dignity in a comprehensive account of the self and morality more generally. Like Habermas, Waldron wishes to pragmatize dignity by demonstrating the use to which it is put in social discourses and the impact that this has for subjects. Waldron argues that we should understand human dignity as deriving from a gradual attempt to grant all human beings the same moral rank that was once attributed only to aristocrats. Dignity is a normative rank that raises everyone to the same level on the moral and political hierarchy, at least from a legalistic standpoint.[40] This elevation

to the same moral rank coincides with entitlement to the same basic set of rights. As Waldron puts it in his *Tanner Lectures*:

> So there is my hypothesis: the modern notion of human dignity involves 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.[41]

Unfortunately, while Waldron's conception is helpful and innovative, he does not provide a great deal of guidance on how this shift to granting all human beings the same rank should shift our normative understanding. His conception of dignity is uncharacteristically historical rather than critical.

The same cannot be said for Seyla Benhabib, who is perhaps the most critically minded of the authors in the relational stream. She persuasively argues that the discursive shift towards recognizing universal human rights and human dignity should change our understanding of the relationship between individuals and society. This discursive shift moves us away from a positivistic approach to law that understood rights as belonging primarily to citizens by virtue of their participation in affairs of state. Instead, Benhabib claims that human dignity enables us to conceive all human beings as moral subjects who are entitled to legal protections simply by virtue of their being human. This leads her to develop two main frameworks for conceiving how a human being can be understood and amplified. The first is to look at the different democratic iterations of human rights movements emerging around the globe, and how they advocate for a diverse array of human rights that are necessary for respecting dignity.[42] The second is to look at the jurisgenerative power of traditionally marginalized groups who rally behind the concept of dignity and deploy it to demand new rights and entitlements from states.[43] This power shakes rights discourse out of a calcified positivism and opens up new avenues for expanding our understanding of the normative obligations of states, and develops ways to translate these new obligations into a more dynamic and responsive legal medium.

What unites the authors of the relational stream is their interest in eschewing the more classically transcendental mode of argument associated with the individualist stream. Authors such as Dworkin and Kateb are interested in developing conceptions of dignity that flow from a deeper account of the self and the mores that it should adopt. Consequently, their accounts are highly individualistic. By contrast, Habermas, Waldron and Benhabib[44] develop conceptions of dignity that have two prongs. The first is to treat the concept discursively – as a concept that entered the normative vocabulary of Western public spheres during a specific time in their history. Dignity subsequently entered the legal lexicon through pressure from allied movements that were concerned with equality, democracy and human rights. This leads to the second prong of the relational approach. While Habermas, Waldron and Benhabib may be sceptical about the intrinsic quality of dignity, they appreciate its rhetorical and ideological capacity to bear the weight of diverse social aspirations that seek to deepen and broaden social equality and rights. They therefore see dignity as a relational concept that mediates between an individual's moral values and the concrete demands that they make through various mediums such as law and politics. Naturally they see it as especially useful in putting forward demands via rights discourse.

There are virtues and deficiencies in both the individualist and relational streams that warrant analysis here. I will begin by discussing what I think we should take from each stream, before moving on to their deficiencies.

I believe that the primary virtue of the individualist stream is its meta-ethical heft. The strong emphasis placed by authors such as Dworkin and Kateb on the normative worth of the individual provides a clear foundation for the more general theoretical architecture that they develop to justify their moral proposals. Both authors frame this normative worth through their conceptions of human dignity. This is exceptionally helpful relative to the relational school because it provides a deeper – some might even say intrinsic – set of reasons for why dignity is important. Put very simply, it is important because human beings necessarily value their lives and wish to make something of them.[45] After

this is established, one can then engage in a more systematic review of the types of reasoning required to realize this goal, which raises all the standard questions that appear in most deontological accounts of morality.

The limitation of this individualist stream is its presumption that dignity is inherent in each individual, regardless of their situatedness in the world. In this, they echo the limitations of the Kantian approach. For Dworkin, dignity has to have an intrinsic quality to it, since it is the basis for the remainder of his liberal moral theory. For Kateb, dignity is existential and prefigures morality. This is also why their mode of argument is immanent in nature. Since dignity is taken as a given, the form of reasoning affiliated with it proceeds deductively. But this leads to a major problem that goes back to Kant's own account of dignity. If it is true that dignity is inherent in each individual, one must seriously question the degree to which empirical matters, including socio-historical contexts, can ever impact upon it. This seriously limits the critical potential of the individualist stream, because it is never clear why the socio-historical contexts in which individuals live should really have any bearing on their dignity. Of course, neither Dworkin nor Kateb accepts this, and both develop strong theories about the way in which society and political institutions should be ordered. But it is never clear to me why this connection is as tight as they presume. If dignity exists in isolation from all other factors, why should it really matter in what contexts individuals live?

This problem is rectified by the relational stream of theories on human dignity. The conceptions of human dignity developed by authors such as Habermas, Waldron and Benhabib may be less romantic than Dworkin's or Kateb's. However, they are more realistic because they appreciate that dignity can be influenced by the socio-historical contexts within which individuals exist. More importantly, Habermas and Benhabib provide complex and rich frameworks that demonstrate how dignity has been mobilized by social groups to articulate concrete sets of political and legal demands. These take place within a recognizable public sphere with institutions common to many modern states and the international legal system. The relational stream therefore eschews

the abstract and monologically immanent reasoning of the individualist stream in favour of more concrete and dialectical forms of criticism. This is very amenable to the critical legal approach to dignity that I will develop in Chapter 3.

The limitation of the relational stream is that it lacks the strong meta-ethical justification of dignity's value that is offered by the individualist stream. For individualists such as Dworkin and Kateb, the self and its dignity are patently what matters. The relational stream struggles to develop such a powerful meta-ethical justification because it is too context sensitive and overdetermined by empirics. Indeed, the strongest justification for these positions has been given by Habermas, who argues that quasi-transcendental imperatives present within the structure of political and moral dialogue itself imply the necessity of realizing certain democratic and egalitarian structures. However, this strikes me as unconvincing. It does not clarify for whom or to what purposes political and moral dialogue should matter, paradoxically relegating the individuals who participate in it to secondary importance in their own drama. This can be rectified only by articulating very clearly why the individuals who engage in such dialogue have some kind of value, which I believe can be captured by a more robust conception of dignity. My goal will be to present this in Chapter 3.

Critical Legal Studies and Human Dignity

The conception of dignity that I will shortly present has its roots in critical legal studies. As mentioned earlier, this might seem unusual, given that critical legal scholars were often reticent to develop constructive normative conceptions, preferring to dedicate themselves to unmasking the hidden conceits of law and legal analysis. In this short summary I will discuss both why I think this is a virtue, and why we need to move beyond critique. There is no space here to discuss completely the complex history of critical legal studies and its intellectual offshoots. Instead, I will simply briefly describe the main characteristics of the critical legal movement, before moving on to why I think some conception of dignity is a necessary normative addition to the movement.

Critical legal studies developed the epistemic positions of the American legal realists, but innovatively gave the earlier tradition a deconstructive twist. Though there is some debate about when the realist movement died down, most believe that critical legal studies emerged in the mid-1970s, with the publication of a sequence of classic texts, including Duncan Kennedy's 'Form and Substance in Private Law Adjudication'[46] and Roberto Unger's *Knowledge and Politics*. By the 1980s, it was arguably the most prominent – and certainly the most infamous – movement in legal philosophy, inspiring both passionate advocacy and derisive dismissal.[47] Despite this brief moment of ascendancy, enthusiasm for critical legal studies petered out by the end of the decade. Many left-wing scholars became unhappy with the generally Marxist perspective adopted by most critical legal scholars. They were happy to retain the overall critical outlook towards the law, but wished to examine other intersectional forms of marginalization. For these reasons, critical legal theory branched out into a broader array of interpretive lenses and disciplines, such as critical race approaches to law, socio-legal studies and so on.

Critical legal scholars differed widely in their interests and focus, often deploying deconstructive tools to examine a broad array of topics in the law. Nonetheless, most critical legal scholars held to a few central tenets. The first was some variation on the indeterminacy thesis. This is where the critical legal scholars' debt to American legal realism was most transparent. The indeterminacy thesis held that many, or most, legal questions did not actually beget an objective answer. The text of the law was riddled with ambiguities that could not be resolved through the application of the various formalist modes of analysis taught at law schools, most of which expressly or implicitly presumed the tenability of some variant of legal positivism.

This led to the next main tenet, which was the socio-historical situatedness of legal practitioners and institutions. As much or most of the law did not lend itself to an objective interpretation, this meant that legal practitioners and institutions did not actually engage in an ideologically neutral enterprise. Since law is not self-interpreting and does not beget an objective determination, this begs the question of how

legal practitioners and institutions decide what the law shall be and how to apply it in any given circumstance. The answer given by most critical legal scholars is that legal practitioners and institutions resolve ambiguities by interpreting the law in line with their ideological preferences. These preferences were determined by the socio-historical situatedness of the legal practitioner in question (their economic interests, psychology, educational background, class position and so on).

Finally, there is the third major tenet, which is that law serves to marginalize weaker members of society. This is where critical legal scholars deviated most formidably. Many took a fairly orthodox Marxist line on this point. Others, such as Unger, developed more original normative conceptions to justify their opposition to the contemporary status quo. But regardless, critical legal scholars believed that since what counted as law was largely the decision of often privileged legal practitioners who emerged out of elite institutions, the law tended to serve their interests by marginalizing other groups in society. Most noticeably, this included mitigating the capacity of marginalized groups to use the law in order to advance a more progressive agenda. Law and its advocates were fundamentally a reactionary force in society. This meant that the progressives should either use it with caution as a double-edged sword, or refrain from pushing their agenda through the law wholesale.

This last point is the most crucial one for my purposes. While very few critical legal scholars have written about dignity, their position can be inferred from how most Crits (adherents of critical legal studies) approach human rights. The scepticism of most Crits towards the law and legal institutions extended to most accounts of rights and rights discourse. In his earlier work, Unger dismissed liberal rights for flowing from a fundamentally self-contradictory psychology and metaphysics.[48] This meant that they served to reinforce a fundamentally deficient form of society in which abstract individualism took the place of genuine self-authorship and democratic community building. For Costas Douzinas, human rights are a cultural fetishism that can distract from more pertinent efforts to develop a new critique of political economy and state institutions.[49] For Allan Hutchinson and Michal Mandel, rights promise a Utopian future that is never to arrive.[50] Much like characters in

a work by Samuel Beckett, naïve progressives put their faith in rights discourse only to realize, time and again, that such discourse serves only to reinforce the property entitlements of the rich and powerful. Given this, it is far wiser to put one's faith in politics. These opinions are also echoed by Duncan Kennedy, who worries that appeals to right will limit our capacity to engage in Marxist and postmodern critiques of the state and marginalizing institutions. For these reasons, progressives should look upon rights and rights discourse with a fair amount of scepticism.

> Critique is always motivated. The practitioners of the critique of rights have often had mixed motives of the kind I am describing here. One motive is leftist and the other is mpm [modernism/postmodernism]. Suppose for the moment that one didn't have to worry about the leftist implications, what would be mpm motives for a critique of rights? The answer is that belief in rights and in the determinacy of rights reasoning are important parts of the overall project of bourgeois rightness, or reason, or the production of texts that will compel impersonally.[51]

There is much to admire in the critical legal examinations, including their critiques of rights discourse and affiliated conceptions such as human dignity. However, I feel that much of this goes too far. With the exception of Unger, many critical legal scholars have been largely focused on demonstrating the flaws and dangers inherent within rights discourse and its affiliated conceptions. Few of them have been willing to give constructive suggestions on what should replace it. Indeed, most Crits ultimately come down from their critical heights and concede that one should use the law to try to achieve a more egalitarian society, while always being cognizant of the dangers of using the master's tools to deconstruct his house. What this egalitarian society would look like, let alone why it is a worthwhile aspiration, is never spelled out in much concrete detail. Sadly, this has also been true of most of their intellectual descendants in various socio-legal and legal studies movements.

I do not think this tendency to engage exclusively in trashing is an adequate response to the needs of the current era. Indeed, there is a

suspicious quality to attempting to evade what Rawls characterizes as the burdens of moral judgment by claiming to be engaging exclusively in a critical appraisal of law without invoking competing moral norms.[52] This approach of engaging in critique from nowhere does not strike me as authentic, or even adequate, and demonstrates a failure of imagination. It would be more accurate to characterize many of these critical legal and affiliated efforts as invoking relatively thin sets of norms oriented around achieving a more egalitarian society. But the broad contours of what this egalitarian society would and should be are rarely spelled out, and no effort is made to inspire or orient concrete and constructive action. While the task of critique is always important, it is not sufficient if the expectation is simply that deconstructing regimes of marginalization will imminently lead to the emergence of some vaguely conceived egalitarian society. This requires examining how law, including international human rights law, can be reoriented along more progressive lines.

One critical legal thinker who never fell into this tendency was Roberto Unger. Throughout his lengthy oeuvre, Unger has developed a comprehensive account of what a more egalitarian society would look like, and has connected it to an incisive critique of the contemporary legal order. In Chapter 3, I will draw on his work to sketch out my conception of human dignity and begin to spell out why I think it should be appealing to many critical legal and progressive scholars.

This chapter has reviewed some of the various conceptions of human dignity that have emerged over the centuries. Beginning with the Renaissance, it traced the deployment of dignity in early modern thought, down to the work of Immanuel Kant. After discussing and criticizing Kant's powerful conception, it looked at the more critical history of dignity developed by Samuel Moyn. It then moved towards more contemporary issues by looking at dignity's historical internationalization in international human rights law, and its subsequent resurgence in the theoretical literature.

Chapters 1 and 2 have largely been about exegetically setting the stage for presenting my own conception of dignity and unpacking how it can be amplified if made the fundamental orientation of international human rights law. It is to this more constructive task that I now turn.

3

A Critical Legal Conception of Human Dignity

The Need for a New Conception of Human Dignity

In Chapter 2, I discussed some of the major theoretical conceptions of human dignity developed throughout the concept's long and rich intellectual history. I ended by unpacking some of the salient characteristics of what I characterized as the individualist stream and the relational stream, before arguing for the necessity of developing a critical legal conception of human dignity as the basis for a more constructive project. This would retain the critical bite of that movement while also firming up its normative basis, much of which has always been fuzzy beyond appeals to now familiar left-wing tropes.

Continentally inspired left-wing legal scholars and progressives have generally spent the past several decades dealing with the collapse of Marxism by engaging in the primarily deconstructive task of undermining marginalizing discourses and power structures. Much of this draws on the brilliant and pioneering work of postmodern theorists such as Foucault, Derrida, Spivak and others. There is a great deal to be said about continuing this task of deconstructing and undermining marginalizing discourses and power structures. But I believe that what is often left behind in these tasks is any explicit argument for any given position. Oftentimes, authors engage in the task of deconstructing marginalizing discourses and power structures simply to assume the salience of their normative motivations, and moreover assume that

this will be clear to anyone who interprets their work. To my mind, this has resulted in a somewhat hermetic left-wing intellectual culture, in which we have failed to make clear why deconstructing marginalizing discourses and power structures should matter to those impacted by them. More importantly, we have failed to provide clear alternative conceptions that highlight what changes should be undertaken to reorganize society along more emancipatory and egalitarian lines. Here the resources of analytical political and moral philosophy can be a great guide in buttressing critical approaches to legality. My conception of human dignity is intended to fill this gap.

The critical legal conception of human dignity – or, as I sometimes call it, 'dignified self-authorship' – presented in this chapter is designed to explicate many implicit critical legal claims about emancipation and equality, and incorporate them within a dynamic normative approach to legality. Many of the significant ideas are drawn from the work of Roberto Unger, with considerable additions developed through an analysis of the capabilities approach of Amartya Sen and Martha Nussbaum. I draw on these authors specifically because my conception holds that human dignity is deeply related to an agent's capacity to engage in self-authorship. This requires demonstrating why human dignity, agency, and self-authorship can and should be connected in the novel conception that I present. On this point, I feel that while Unger provides a usefully broad overview of a critical legal conception of agency, Sen and Nussbaum provide the theoretical resources needed to describe what robust agency would entail in far more concrete and less macro logical detail. This makes synthesizing their views a worthwhile task.

My conception of human dignity also draws on the conceptions that have come before, while attempting to go beyond them in important respects. Most of the concrete inspiration for my conception of human dignity comes from authors in the relational stream, who approach human dignity as a starting point for the critique of existent social institutions. I reject the immanent quality of many moral arguments that flow from the individualist stream of thought, which takes dignity to be inherent. This often results in a rather static form of moral reasoning,

wherein political institutions and human rights are seen as necessarily taking the form that an author thinks is important to respecting the inherent dignity of human beings. I believe that dignity operates on a continuum determined by an individual's set of expressive capabilities, and that political structures should be reoriented to amplify this set wherever possible. One of the ways in which this is exemplified practically is via the model of rights that I suggest my conception of dignity begets. This set of rights is designed to enable individuals to reconceive and reconstruct political institutions and specific positive rights along lines consonant with their interests and commitments.

The model of human rights that flows from my conception of human dignity is oriented around the central idea that individuals should be made as capable as possible of transcending the socio-historical contexts that govern them. One of the most important ways in which this can be achieved is when individuals are authors of the political and legal institutions that govern them. The other is through engaging in redistributive efforts to ensure that all individuals enjoy an equal set of what I call 'expressive capabilities', except when inequalities flow from their morally significant choices. Together, these rights should operate in tandem, enabling individuals to mobilize political and legal power to transform the social contexts within which they pursue their interests and various life goals.

Dignified Self-Authorship[1]

In this section I develop a conception of dignity that is an individual's capacity for self-authorship through context transcending acts of agency. This is the theoretical core of my project. It is also where the critical-legal association with Roberto Unger is clearest.[2] Following Unger, I emphatically reject the traditional conception of dignity and seek to replace it with one that is far more robust, and centred on an individual's ability to reject and transform the false necessity of the socio-historical context within which they live.

Unger rose to prominence with the publication of *Knowledge and Politics* in 1973.[3] While he has since shifted his overarching approach in

very significant ways, and both his theoretical architecture and critique of liberalism have been subjected to considerable philosophical criticism,[4] Unger's overall position has remained relatively stable. He argues that classical liberalism is based on a poor understanding of human nature, which cannot bridge the divide between the subjectivism of its individuals and liberalism's pretensions to scientificity.[5] At the same time, Unger does not believe that either the Marxist or the hyper-theory leftist alternatives have provided adequate theoretical alternatives to classical liberalism. Much of his more constructive work is aimed at providing just such an alternative: one that takes the best aspects of liberalism while overcoming its theoretical and concrete limitations.[6]

My project draws inspiration and guidance from Unger's efforts, while deviating from them in important respects. In particular, my conception of dignity draws a close link between dignity, self-authorship and agency. While each of these occupies a unique place in my theoretical architecture, it is the link between them that animates the entire conception. Respecting and amplifying dignity is taken to be the normative goal, or *telos*, that just social institutions should strive to realize for all individuals.[7] Self-authorship occurs when individuals define themselves by redefining the socio-historical contexts in which they live, including through and sometimes in opposition to social institutions. Agency is their general capacity to do this, as defined by the set of 'expressive capabilities' that an individual enjoys.

My conception can be summarized in the claim that human beings enjoy dignity when they are capable of dignified self-authorship through context transcending acts of agency. Here, self-authorship is interpreted in a very Ungerian fashion, and is deeply related to agency. Individuals are capable of dignified self-authorship to the extent that they are able to transform the world around them by transcending and shaping the socio-historical contexts they inhabit. This is a complex claim that requires some elaboration.

Unger recognized that all human beings exist as individuals embedded in specific socio-historical contexts.[8] Socio-historical contexts are the totality of external features in the world that are subject to human control and creation. Because it is conceived as a totality, the idea of a

socio-historical context should be given a robust and extensional interpretation. It includes the political-economic arrangement of a society, the laws, the culture, many semantic aspects of the language, gender and ethnic relations, sexual mores and so on. One of Unger's points is that what characterizes all these external features is that they are ultimately the product of deliberate human activity, and in some cases deliberate human design.[9] For instance, it may be true that a given legal system developed in an evolutionary manner analogous to biological life in the natural world. But what distinguishes the former from the latter is that some human beings exercised their agency to beget a system of laws, while (until fairly recently) we had little control over the dynamics of human natural selection.[10]

One of the problems that Unger detects is that we often conflate socio-historical contexts with scientific necessity. Because we are influenced by all external features in the world, it can be easy to think that, as all individuals are to some extent unchangeably determined by biological laws, so too who we are is necessarily determined by the political, cultural, legal and economic arrangements particular to the socio-historical context that we inhabit. Unger calls on us to reject this 'false necessity' and recognize that all socio-historical contexts, being the product of deliberate human activity and even design, are ultimately characterized by their plasticity. We can deploy our 'context transcending' powers to reshape them according to our will and interests. Of course, being a critical legal scholar, Unger argues that we should reshape them to be considerably more egalitarian and democratic.

This is where the links between dignity, self-authorship and agency become clear. I believe that individuals can be authors of their lives to the extent that they refuse to allow their identity to be essentially determined by the socio-historical contexts that they inhabit. Here I must be careful. This is not to suggest that all individuals must continuously revolutionize the socio-historical contexts in which they live. Nor am I taking an explicitly anti-communitarian stance and arguing that individuals should reject those socio-historical contexts and their impact on identity, especially if they personally affiliate with them. But they should not feel compelled to live according to the compulsions

of socio-historical contexts whose false necessity they would otherwise choose to reject given the opportunity. Being dignified authors of our lives means being generally capable of exercising our agency to transform the world around us, in co-operation with and demonstrating respect for others, in a manner that is expressive of our individual interests and commitments. This capacity for agency can be greater or lesser, depending on the total set of expressive capabilities that an individual enjoys. The more robust a set of expressive capabilities that an individual enjoys, the more generally capable of agency individuals become. And the more capable of agency they become, and the more they can exercise this capacity in line with their personal choices, the more we can say that individuals have enjoyed lives of dignified self-authorship. Whether and how they choose to alter their world becomes a matter of choice rather than being determined by arrangements and institutions in a socio-historical context.

This is where the distinguishing features of my conception of dignity become clearer. One of the motivations behind drawing on Unger is that his argument about socio-historical contexts cuts both ways. When we respect and amplify an individual's dignity, false necessity becomes malleable to the transformations determined by individuals engaged in dignified self-authorship. Where their dignity is highly constrained, socio-historical contexts can be experienced as highly determinative, and even unbearably oppressive. The goal, or *telos*, of just social institutions should be to respect and amplify dignity while curbing the external features of the socio-historical world that constrain it.

It is my position that respecting and amplifying human dignity should be a normative goal, or *telos*, of social institutions because human dignity is something that must be achieved rather than something that is simply inherent in all individuals, or ascribed to them by moral fiat.[11] Human dignity can be understood as a continuum. Some of us may enjoy a great deal of dignity: for instance, those with a very robust set of expressive capabilities that enable them to choose what form of life they wish to pursue and enact significant changes in the world. Others, such as the very poor or individuals reduced to 'bare life',[12] may enjoy little or no dignity at all.

This, I must highlight, is not at all their fault or a moral slight against them. The argument for understanding dignity as operating on a continuum is by no means intended to say that some individuals are more valuable than others – to reinvent a kind of aristocratic hierarchy of dignity, to invoke Waldron.[13] Quite the opposite: where individuals enjoy less dignity, it is the consequence of inadequate and even hostile acts or omissions by social institutions that have a responsibility to care for them.[14] This reinforces the need for a conception of dignity that directs attention towards empirical socio-historical contexts, especially responsible social institutions such as law, rather than at transcendental features such as 'good will' or well-meaning but pious declarations about inherent qualities. Socio-historical contexts should be arranged to respect and amplify dignity, and social institutions such as law can play a major role in this effort. The easiest way in which they can do so is by acting to enhance the individual's expressive capabilities, the total set of which indicates how capable they are of agency.

This final claim requires considerably more elaboration and more concrete discussion. This section operated at a fairly high level of abstraction in arguing for my specific conception of dignity and its relationship to self-authorship and agency. In the next section, I will ground the discussion by clarifying what I mean by a set of expressive capabilities, and how this is related to agency and dignified self-authorship.

Dignity and Expressive Capabilities

As mentioned, my account of expressive capabilities draws very heavily upon the work of Amartya Sen and Martha Nussbaum. However, I give their work a twist by connecting it to Unger's critical philosophy, and my own account of dignified self-authorship. Since my account discusses an individual's general capacity to transform the world in a manner expressive of their interests and commitments, I choose to identify an individual's set of capabilities as 'expressive' so as to characterize the main idea better.

This warrants some clarification. In Chapter 2, I discussed two contemporary streams of theoretical literature on human dignity, drawing

special attention to the individualist stream and the relational stream. I also briefly discussed the strengths and weaknesses of both. My account of human dignity relies on expressive capabilities to mediate between these two streams. On the one hand, I have argued that human dignity is fundamentally related to self-authorship and agency. This captures the individualist idea that, to the extent possible, dignity is correlated with being able to live our own lives authentically. As I have already indicated, in the conception of human dignity that is sketched here, the total set of capabilities determines the extent to which we are able to live authentic lives of dignified self-authorship. However, I reject the idea – embraced by many individualist authors – that dignity is somehow an inherent quality enjoyed by all. Instead, I accept the claims of the relational school that dignity depends on the relations that individuals are capable of establishing in the world, and the myriad ways in which they are able to operationalize their agency to engage in dignified self-authorship. This is captured by the idea of expressive capabilities, since the total set can be negatively and positively impacted by empirical determinants. Moreover, later in this chapter I will also draw on the relational stream in maintaining that fully amplifying dignity would entail realizing two human rights that can be normatively mobilized by individuals in a variety of socio-historical contexts and for different types of reasons.

The capabilities approach to human agency outlines the universal but context-sensitive conditions required for all human beings to enjoy a dignified life. The approach takes securing the dignity of human beings as a primary aim.[15] Sen and Nussbaum integrally link dignity to an agent's choices; but agency is understood here in a rather refined way. To discuss agency concretely, we must look at the actual capacity that an individual has to make meaningful life choices.

Such a claim is more empirically oriented than one finds in a strictly Kantian approach. Sen and Nussbaum tirelessly stress that agency means little unless one looks at what choices individuals are capable of making. For them, this means looking at what individuals are capable of doing. From the perspective of the capabilities approach to human flourishing, understanding agency means passing from

transcendental philosophy to the messiness of the empirical world. This is where the connection between the capabilities approach and utilitarianism is most apparent. Sen has been especially critical of utilitarians for not being adequately sensitive to the meaningful differences that exist between individuals.[16] This suggests that Kantian individualism remains the moral centre inspiring his project. Nonetheless, Sen accepts the utilitarian claim that substantiating agency is as much a matter of developing sound policy as it is of deriving the correct transcendental metaphysics.[17]

In *Inequality Re-examined*, Sen clarifies this point by referring to the capabilities that an individual possesses as determining the 'overall agency a person enjoys to pursue her well-being'.[18] He distinguishes between (i) the well-being of individuals and (ii) their agency to pursue well-being. This is a key distinction, since Sen admits that one's well-being and the agency to pursue it or not (what he calls 'agency') may in many instances conflict. He gives the example of a doctor who is willing to sacrifice her health to secure that of others, though one can think of many far less admirable examples.[19] For example, this might also involve the capability to make what seem like unhealthy choices. A Brahmin who decides to fast for religious reasons is emphatically different from an individual struggling in the midst of famine.[20] Nussbaum claims that this distinction highlights the link between the deontological and utilitarian dimensions of the capabilities approach to human flourishing. Since human flourishing entails being able to make meaningful choices through the exercise of practical reason, all individuals should have the capabilities needed to pursue their own idea of human flourishing.[21] After this threshold is met, the capabilities approach to human flourishing is agnostic on the actual functioning of people, since their flourishing or not is now seen as being dependent on their individual choices.

This is where I will conclude my fairly limited exegesis. No doubt, much more could be said. Sen and Nussbaum have developed a very powerful moral concept of agency that brings a great deal of analytical rigour to what one could broadly call the historically ambiguous idea of positive liberty. Moreover, they work to apply their conceptual

frameworks to highly concrete examples that provide a great deal of guidance on how the capabilities approach can operate in practice. However, Sen and Nussbaum have often avoided developing the more critical possibilities of their project. While their underlying moral concept is quite radical, they have been strangely reticent to develop the more substantive critique of social institutions that would seem to follow from it. This may be because they feel that the capabilities approach is fundamentally liberal in its orientation towards agency, even if it expands the concerns of liberalism quite extensively. If this is the case, there should be no reason why the social institutions of a robust liberal democratic society could not adopt and implement something like the capabilities approach to human agency.

Certainly, both Sen and Nussbaum have done interesting work demonstrating how the capabilities approach can assist marginalized individuals in even the most extreme socio-historical contexts.[22] But, ultimately, I do not believe that it is a convincing reason not to unpack the critical possibilities of their project. If one pushes the more radical dimensions of the capabilities approach to their full extent, I feel that it would require considerably rethinking both the ideological contours of liberalism and the social institutions that engender liberal democracy. This is especially true if we wish to arrange social institutions to enable dignified self-authorship of the type that I discussed earlier.

This is why I develop Sen and Nussbaum's theory by linking it to Unger's philosophy. The decision to characterize capabilities as expressive is to highlight this synthesis. Expressive capabilities are those through which a person defines himself or herself by redefining the boundaries within which they exist. To use Unger's terminology, expressive capabilities are 'context transcending' powers.[23]

While similar, expressive capabilities are distinct from the Kantian will in that they exist only potentially unless they are realized and amplified in the empirical world.[24] This means that one must look at what individuals are able to do, given both their intrinsic capabilities and the empirical socio-historical contexts within which they live.

An ideal example of an expressive capability that is incredibly important, but also often undervalued in relation to agency, is an

individual's capacity creatively to deploy and use a language. Noam Chomsky has done a great deal of work in demonstrating that language includes both innate and empirical features. One such feature is the biological predisposition of human children to learn a language as their brain develops throughout infancy. Some of its empirical features include the semantic meanings actually associated with the terms used in specific languages such as English. Here, Chomsky makes the revolutionary point that the transformational rules of universal grammar permit the formation of a potentially infinite number of novel semantic statements, though all the statements produced must adhere to the rules of human syntax.[25] Human beings, essentially through playing games with the semantic inheritances that they acquire as part of their languages, bring novelty into the world. In the same way, the socio-historical boundaries within which we exist can be transformed indefinitely by the application of a human being's expressive capabilities.

The 'creative aspect' of language use can be linked to our expressive capabilities as part of my more general conception of agency. Roberto Unger has already taken a pronounced step in this direction by making clear the connection between a robust conception of agency and Chomskyan linguistics. As he puts it in *The Self Awakened*:

> [T]he Capacity to produce the infinite out of the finite changes everything, shaping our conscious experience in its entirety. It gives us our power of using limited means to generate unlimited variations in language and thought, to express different contents or meaning through similar formal relations among symbols, and to convey the same contents or meaning through different series of symbols. It results in the most signal trait of our conceptual-intentional experience: our ability endlessly to revise our thoughts by bringing pressure to bear against their presuppositions: an ability we acquire only through our more basic power to generate endless variation and complication. This power in turn informs our sensational-motor experience by allowing us constantly to change the tacit stories with which we infuse our perceptions and guide our movements.[26]

Our creative capacity to use language, both as an abstract cognitive power and as a concrete entitlement that should be realized and amplified by the political and legal systems within which we exist, provides an ideal example of how this process of redefinition takes place. By employing the creative powers of language every day to bring novel semantic structures into the world, we can transcend a particular socio-historical boundary that once limited us.[27] Language use is an important example of an expressive capability, because it has both innate and empirical dimensions that clarify its relation to agency. All individuals have the capacity to enjoy a rich semantic inheritance with which they can develop a potentially infinite number of new statements that bring novelty into the world and allow them to reflect their individuality. But to do so to the fullest and richest possible extent, they need to be able to learn a language; be exposed to a wide variety of different language games through education and participation in the arts and artistic endeavours; benefit from supportive parenting and other positive adult role models and so on. This supports my argument on why individuals should have this expressive capability amplified – for instance, through the provision of a good education made available to all individuals regardless of their level of wealth and power.

My conception of dignity maintains that our capacity for agency remains only an abstract potentiality until it is substantiated by expanding the range of choices that an individual could possibly make through increasing the set of expressive capabilities that they enjoy. For example, the agency to go where one pleases would mean little to someone stranded on an island of two square kilometres. This is why the set of expressive capabilities enjoyed by individuals are so important in determining their overall capacity for engaging in dignified self-authorship. To put this another way, expressive capabilities are those that enable us to define ourselves by re-defining the socio-historical contexts within which we exist. The set of expressive capabilities that an individual enjoys is the source of their general capacity to transcend the hegemonic aura of false necessity that can be associated with socio-historical contexts.[28] As Unger nicely puts it:

> In both the European preindustrial and the Asian postindustrial situations, success, even survival, required the practice of an art of institutional dismemberment and recombination. This art constantly rearranges the two linkages repeatedly considered in this essay … The practice of institutional dissociation and recombination shakes up and wears down a society's plan of social division and social ranking; roles and hierarchies depend for their perpetuation on the stability of particular institutions. This shaking up and wearing down represents one of the major forms taken by the imperative of self-transformation in history.[29]

Here it is worth noting Unger's insight about the relationship between transforming social institutions and the individual imperative of self-transformation – what I would call self-authorship. Pushed to its extreme, I think that taking seriously the links between dignity, self-authorship and agency, understood as resting on a set of expressive capabilities enjoyed by individuals, would mean substantially changing the social institutions characteristic of liberal democracy. Moreover, it would also mean rethinking how global social institutions operate and pushing them in more egalitarian directions.[30] There is vastly more that could and should be done, especially by those who possess the resources, to ensure that the expressive capabilities of all individuals are respected and amplified.

Why Dignified Self-Authorship is Important

One of the criticisms that could be levelled against the conception of human dignity discussed here concerns its overall meta-ethical value. Why should we take dignified self-authorship to be an important moral aspiration and, more importantly, prioritize it over other moral aspirations? Or, to put it in terms expressed by Derek Parfit, does dignity and dignified self-authorship 'matter'? The most serious way in which this objection could be formulated is by directing criticism against the individualistic meta-ethics underpinning the project. Stressing dignified self-authorship places my project firmly in the tradition of those

who believe that it is the development of the 'self' that fundamentally matters. There are many who would contest this standpoint. The most powerful objections come from two traditions in moral thought. There is the utilitarian tradition, which stresses that 'what matters' is impartially maximizing overall aggregate utility. Secondly, there is communitarianism, which stresses that the individual derives a great deal of their values from the community, which is therefore entitled to certain independent valuations against the individual's interest in reform and social transformation. The utilitarian's objections are serious, because they stress that true moral impartiality would mean maximizing welfare even if that came at the expense of an individual's own aspirations. The communitarian's objections are serious, because they stress that an individual's personal development takes place only within a reasonably settled horizon of meaning, thereby making a project of context transcendence both impossible and potentially dangerous.

I will first discuss the utilitarian objection. The most powerful variant of the utilitarian objection is made by Derek Parfit. He would push against a project such as this one because the underpinning meta-ethics is inherently quite subjectivist. While we might intrinsically care about the value of our lives, he would characterize this as a psychological rather than a meta-ethical argument for adopting a given position. This can easily lead to a kind of naturalism that is very close to nihilism. Moreover, some of Parfit's objections go even deeper and suggest that a project such as mine presumes that there is a 'self' in some strong ontological sense that is the source of 'what matters'. He gives a number of different philosophical arguments against that idea that there is such a self in the strong ontological sense. This means that the development of our self-hood and its private satisfactions cannot be the foundation for a moral system. Instead, Parfit argues that we should adopt what he calls a 'triple theory', prominent features of deontological and contractarian moral theories, but is fundamentally consequentialist and therefore utilitarian at its core.[31] The core of this triple theory is the claim that we should adopt moral principles that would result in optimific consequences – would make things go best, in other words. Unfortunately, Parfit gives few concrete examples of such principles, which is odd for

a three-volume work running to many thousands of pages. However, the one example that he does give is quite provocative: those beyond a certain level of affluence should always donate at least 10 per cent of their after-tax wealth to assist those with much less.

Parfit's argument against morally focusing on something like human dignity is very powerful. I cannot address his broader philosophical points at great length here – in no small part because they have many different dimensions. The most powerful is his claim that the development of the self should not be what matters, because the self in a strong sense does not exist. My most immediate objection is that the kind of soft-Platonism adopted to counter subjectivist naturalism also strikes me as unconvincing.[32] Parfit is convinced that our cognition enables us to establish certain independent moral facts that would not exist in our absence but that obtain a kind of objectivity regardless of our subjective preferences. His comparison is with the truths of mathematics: they only come into existence through human beings but then assume a kind of existence independent of our will and preferences. In some respects this might be an accurate account of meta-ethics, but it overemphasizes its objective features to say that these are entirely binding regardless of our human subjectivity. If it is true that moral facts come into the world only through our cognition, there is a sense in which it is ourselves that make them 'matter', to deploy Parfit's preferred terminology. Soft-Platonic moral facts bind because they 'matter' to someone who believes that they have good reasons to act morally.

To provide an example, consider a planet of mechanical entities who engage in rote processes requiring systematic engagement with other mechanical entities. Then consider that these processes are organized by computer programs that have enough memory to record each run-through of their process and its engagement with other mechanical entities. Rather like Parfit's deflated vision of the self, these entities seem to retain some memory of what they are doing, and engage in actions with other such entities.[33] But I do not think that we could take the extra step and say that such entities have certain moral obligations – for instance, to 'make things go best' – because though they have some form of memory, there is no psychological impetus of practical reason

to make it significant for any of them whether things do indeed go best. This suggests that, at least to some extent, for moral facts to matter they must matter to some self that ascribes them value. This is obviously not a decisive objection, because it entails the presumption that such a self does indeed exist, which is what Parfit's arguments in *Reasons and Persons* and his earlier paper 'Personal Identity' tend to undermine. However, I think that there are good reasons to believe otherwise, so long as the self is reconceived in the correct way.

Those who believe that it is possible to be rational about morality, such as Parfit, must also adopt the position that it is possible reflectively to change an individual's stance on what matters, through their being presented with strong arguments and evidence about the existence of moral facts both in the abstract sense of the word and in the world of experience. In other words, it supposes that individuals have a capacity for second-order reflection on the values developed throughout their personal history. But this entails committing to at least some conception of self-hood that is strong enough to engender a second-order capacity for reflection on first-order values previously taken to be determinative of action. It suggests that the self exists at least to the extent of being a process of reflection enabling us to shift what we value and, consequently, our behaviours as they flow from these values. This is where I think Unger's ideas are of use.

For Unger, there is also no 'self' that exists in the sense of being a firm ontological entity that grounds the individual through a determinative personal history and permanently frames their personal actions. In other words, there is no ghost underpinning all our machinery. Unger encourages us instead to look at the 'self' as a pragmatic creation that is continuously developed throughout the finite period of the human organism's life. This also relates back to his metaphysical commitment to time being real, and the universe therefore being characterized by real change at the ontological level. For Unger, time's reality means that ontology is fundamentally about becoming rather than being: what is, is what changes.[34] Time is also real for the human individual, and so what the 'self' of that individual 'is' changes also in a particular sense.[35] This means that being an individual can be wearying, since it means existing

as a self that is continuously being created. But Unger encourages us to regard this as a positive feature of our lives, since it enables individuals continuously to rise above the determinant circumstances of their personal history and rearrange the world in a manner more conducive to their interests. It is only through this process of transformation that we can choose both what to value, and reflectively to reassemble our values in reaction to superior forms of argumentation. In this sense, a self that is not set but one that is (continuously being) created through self-authorship is a prerequisite for the emergence of moral values. The self – or at least something like it – must precede morality.

This has ramifications for the claim that we should adopt a purely impartial approach to moral reasoning. Such an approach would look exclusively at how to maximize aggregate utility across all relevant moral subjects, which may well include both animals and even future generations of living beings who may be impacted by our actions in the present. The implication of such an impartial approach is that moral significance is exclusively ascribed to those actions that we can take, and those we refrain from taking, in order to maximize overall aggregate utility. Applied 'stringently', this could well entail ceasing to engage in any actions that are oriented around self-authorship and the pursuit of happiness, and focusing exclusively on utility maximization.[36] Few utilitarians would fully accept this position, since it would seem to fall entirely victim to Sidgwick's dilemma; at a meta-ethical level, such an absolutely impartial attitude towards morality would preclude any motivation to be moral and ultimately become self-defeating. If everyone is compelled to sacrifice themselves, no matter what, to be moral, one suspects that few of us would have any motivation to act morally.[37] But it is always questionable how far a utilitarian can accept limitations on the stringency of the principle of utility maximization and still be a utilitarian in any robust sense.

The problem of complete impartiality is one that I do not think the utilitarian can ever solve. It may be true that adopting what has sometimes been called 'the point of view of the Universe' would result in a more optimific distribution of resources. But, following critics such as Rawls, Nagel and others, I feel that such a point of view abstracts away from the actual motivations that individuals have to adopt a moral

outlook. Parfit claims that moral values are akin to quasi-Platonic forms that emerge, like mathematics, with cognition but are not simply the products of constructivism or a natural evolutionary process. I suspect that this might be the case. But Parfit's subsequent emphasis on the impartiality distracts from the cognitive dimension of this point, and its deeper existential ramifications.

Kierkegaard once observed that 'truth' – at least in values – redoubles if it tries to be entirely objective, but is sustainable as a kind of subjectivity.[38] This point was also made by Heidegger, who noted that what precedes the formulation of any explicit moral code or even metaphysical doctrine is the phenomenological point that individuals 'care' about the world. 'Care' is, in a sense, the fundamental orientation that precedes value. It begins from the care that individuals have for their 'selves', and should be extended, where possible, to the world at large.[39] This might include at points adopting a gradually more impartial 'view' from the Universe. But it never ceases to be 'care', which always has an element of partiality to it since it flows outwardly from our subjectivity. Seen from this standpoint, the firmly impartial utilitarianism called for by Parfit does not seem to mesh very well with the existential orientation of individuals that is the motivational basis of morality. Morality involves formalizing the explicit connotations of the commitments implied by our care for the world. Such an understanding of morality marries itself far more easily to prioritizing dignified self-authorship, and trying to ensure that all are capable of it, than to utilitarianism.

I will now move on to discussing the second main competitor to dignified self-authorship: that offered by communitarianism. If the utilitarian attaches too little importance to the concrete values constitutive of human partiality, the communitarian attaches far too much importance to them. There is a whiff of conservatism about communitarianism, which is insufficiently radical to overcome the false necessity of what are ultimately incomplete moral doctrines that serve to engender support for inadequate political and legal institutions. It should therefore be rejected in favour of emphasizing dignified self-authorship.

Communitarians hold a complex view about the sources and motivations behind human value that leads to support for an ambiguous

array of concrete moral commitments. The essential insight of the communitarian position is that moral and political theories such as utilitarianism and various comprehensive liberalisms, which are excessively rationalistic, have a deeply flawed understanding of what actually motivates individuals to hold to concrete moral commitments. According to the communitarian narrative, political and moral theorists from Kant to Rawls hold to the idea that morality should be formulated along rationalistic lines that divorce it from specific socio-historical contexts. But the communitarian objection is therefore quite a radical assault on this position. It is precisely these socio-historical contexts that provide the framework within which individuals engage in moral reasoning about not just how to pursue given ends but, importantly, which ends are worth pursuing.

This framework has two dimensions to it. The first is meta-ethical. The socio-historical contexts within which individuals exist provide the motivational basis for the adoption of a moral standpoint: the belief, if you will, that something matters. If individuals were not embedded in such socio-historical contexts, they would not form the affective attachments to others that are a prerequisite for 'caring' for their well-being and interests. One of the standard criticisms made by communitarians against impartial or rationalistic philosophies is that they are both wrong and in fact destructive. They engender support for a nihilistic standpoint wherein the atomized individual is the centre of the moral universe, gradually ebbing support for the socio-historical contexts out of which affective attachments grow. This leads to individuals adopting an increasingly immoral – or 'unvirtuous', if you will – outlook. Some commentators would go even further than this position. Following the later work of Alasdair MacIntyre, and demonstrating admirable sensitivity to the dangers of relativism, some communitarians such as Jeff Nicholas take the strong position that the capacity to reason is itself conditional upon individuals operating within certain pre-given socio-historical contexts.[40] On this outlook, the attempts of epistemic and meta-ethical foundationalists were always doomed to failure, since they looked for grounds for their viewpoints by up-ending the soil upon which they could be built. This echoes the pragmatist standpoint

on epistemology and meta-ethics defended by philosophers such as Richard Rorty and Robert Brandom, to name a few.

The second aspect of this framework is more ambiguous. This is because once the communitarian establishes that all individuals inhabit a given socio-historical framework that establishes the affective attachments necessary for morality, it becomes important to examine the substantive norms that flow from each given socio-historical framework. To put it according to the typical slogan, modern individualism overemphasizes the procedural means by which people pursue ends.[41] It ignores the more substantive discussion about which ends are indeed worth pursuing. Here the communitarian says that each individual develops a hermeneutic within which they interpret the context-specific values present in the socio-historical framework(s) in which they live, and decide which ends are worth pursuing. Some may even live in several socio-historical frameworks – or 'spheres', to invoke Walzer – each with its own context-specific affective attachments and value sets.[42] Within each of these frameworks, the virtuous individual develops their own best interpretation about which ends are morally excellent, and behaves in a manner to achieve those ends. Standards of excellence are constituted by those who perform particularly well within a given socio-historical framework, demonstrating what can be achieved through the application of time and effort.

To give a representative example, baseball players evaluate the excellence of their behaviour not by the standards established by an excellent doctor, but by those of people who have achieved excellence within the athletic world. A soldier is not held to the same moral standards as a doctor, because the role that they play in a given set of socio-historical frameworks is quite different. A moral soldier will hold themselves to abiding by the rules of a just war, or *jus in bello*. However, they will not hesitate to use force and kill, since not to do so would be to refrain from achieving excellence when the use of violent force against an enemy is the end required. Meanwhile, few of us would ever think that a moral doctor could ever be engaged in activities that would entail the use of violent force against an enemy.

The foregrounding discussion of the two aspects of communitarian thought are meant to demonstrate why they would be unlikely to

endorse the conception of dignified self-authorship discussed earlier. First, most non-religious communitarians would have to reject the meta-ethical argument that dignified self-authorship has any value in and of itself. Since value comes to exist substantively only within a given socio-historical context, dignity and self-authorship can obtain value only when individuals exist within a community that ascribes importance to them. Secondly, and more to the point, the communitarian would argue that while self-authorship is indeed an important goal, it is misrepresented here. They would claim that my conception of dignified self-authorship is overly individualistic, particularly in its emphasis on context-transcendence. The communitarian would claim that this once again replicates the dangerous dualism between means and ends, and therefore misunderstands what self-authorship entails. Self-authorship is not primarily a process by which individuals transcend the contexts within which they exist, but a matter of the ends that individuals take to be of value and choose to pursue. According to the communitarian, the choice of ends is determined by the socio-historical contexts within which individuals exist – the very contexts that I suggest they should transcend.

If I have conceived of this properly, the communitarian objection to my conception of dignified self-authorship is powerful and warrants discussion. I will raise two rebuttals to these objections. The first operates at the meta-ethical level, and the second deals more substantively with the different conceptions of self-authorship offered by me and by the hypothetical communitarian critic.

The communitarian argues that the socio-historical contexts within which individuals operate provides the motivational basis for their adopting the moral standpoint. Stronger communitarians, such as MacIntyre and Thompson, even argue that socio-historical contexts provide the basis for evaluating more general truth claims and are therefore foundational for the exercise of reason itself. This position echoes that of pragmatists such as Rorty and Brandom.[43] Personally, I am sympathetic to the anti-foundationalist project offered by communitarians and by pragmatists. But I think that it puts the case too strongly, and more importantly underestimates what is most radical and exciting about the

'pragmatic' outlook more generally. Following Unger, I take the anti-foundationalism of pragmatism – and, by extension, the communitarian position – to be a rejection of the idea that socio-historical contexts have any strong reason-giving authority over us, even though as descriptive matter any given socio-historical context may engender support for its particular rationalization of what is epistemically and morally authoritative. To put this another way, we might indeed say that, as a matter of fact, many individuals accept the socio-historically contextual reasons for adopting one position or another on epistemic or moral questions. But this does not mean that they should feel any strong obligation to accept these socio-historically contextual reasons beyond that these are simply the brute traditions into which they were existentially thrown. Again, following Unger, I take the pragmatic tradition to be offering a far more radical possibility. Once foundationalism is rejected, it offers individuals the chance to transform the socio-historical contexts into which they were thrown, and to fashion new ones that might be more conducive to their interests and, indeed, more useful in framing their moral outlooks in an increasingly complex postmodern world. This does not mean that they need to reject these socio-historical contexts wholesale, but they should not feel bound to respect them.

This brings me to my second rebuttal to the communitarian's more substantive objection to dignified self-authorship. This is that it replicates the modernist dualism between means and ends, and therefore cannot serve as a robust conception of self-authorship. This is because self-authorship can occur only in contexts in which individuals have strong inclinations to pursue certain ends, and therefore engage in behaviours and tasks that would enable them to embody the virtues that characterize that end. Again, without having a contextual standard upon which to judge what constitutes the end of excelling in baseball, no one could wish to be a good baseball player. This position, I believe, is entirely correct in certain respects. It is true that individuals pursue certain ends because they pre-existed them and are regarded as worth achieving. However, I again think that the communitarian overstates their position here. They take the given set of ends that exists within any socio-historical context to be exhaustive. This is where the

conservative dimension of communitarianism comes in. What my conception of dignified self-authorship attempts to demonstrate is how, by transcending given socio-historical contexts and becoming authors of both their own lives and the legal and political institutions that govern them, individuals are capable of deciding which ends should be maintained as worthy of pursuit. More importantly, they can bring new ends worth pursuing into being. For instance, through the application of their linguistic expressive capabilities, individuals can establish new forms of aesthetic excellence and beauty that could not have been conceived before. This is what many marginalized communities have done – for instance, through the development of emancipatory forms of expression such as slam poetry and the more sensitive variants of hip-hop.

This brings me to my final observation about the communitarian position. There is much to value in it, including its emphasis on the wisdom of the past. However, as Whitehead observed in relation to the Ancient Greeks, fetishizing the wisdom of the past will often mean that we fail to live up to it.[44] Great civilizations, like the Greeks, were not staid and traditional. They boldly created new ways of thinking and being in the world. Nothing could be less Grecian than choosing to live as the Ancient Greeks did. The point of my project is to capture this quality and give it a directly political twist. I do not wish to suggest that individuals should simply efface the past in some act of radical liberty, echoing some existential thinkers such as Sartre. Rather, I wish them to have the capacity both to choose which ends should be retained as valuable, and to bring new ends into the world. This has a clear political dimension. One individual's worthy tradition is another person's malignant ideology. Individuals should be capable of determining whether they regard their traditions as worthy or malignant, and deciding whether they wish to retain or reject them as needed. Otherwise, tradition is just another form of unsubstantiated and illegitimate authority, operating for its own sake. This is why the model of rights associated with my conception of dignified self-authorship is crucial to understanding its value. I now turn to discussing this model of rights in considerably more detail.

A Critical Legal Model of Rights

In this section, I will link my conception of human dignity to a critical legal model of human rights. I will draw substantially on the literature surrounding what I earlier called the relational stream on human dignity.[45] This is because I believe that dignity operates on a continuum determined by an individual's set of expressive capabilities, and that political structures should be reoriented to amplify this set wherever possible. In my framework, dignity is normatively mobilized to transform the social contexts within which individuals pursue their interests and various life goals.

I reject that immanent quality of many moral arguments that flow from the stream of thought that takes dignity to be inherent. This position often results in a rather static form of moral reasoning, wherein political institutions and human rights assume the particular form the author thinks is most respective of the inherent dignity of human beings. My model of human rights is significantly more flexible, in that its central idea is that individuals themselves should largely be authors of the political institutions that govern them.

Arguably since Marx's brilliant and pioneering criticism of rights in his seminal 'On the Jewish Question',[46] many on the Left have been deeply sceptical or outright hostile towards the idea and theory of rights. This extends doubly towards social institutions oriented around the professed protection of such human rights.[47] Ironically, some of the radical critiques of rights discourse – that it is grounded in Western ideas, inevitably hegemonic, and replicates the neo-liberal subject[48] – echo points made by famous conservative icons such as Edmund Burke.[49] Burke would have agreed entirely that 'natural rights' at least served as an insidious idea that undermined the more realistic claim that rights were creatures of positive law that, in turn, historically evolved out of the accepted mores of a given culture. Some critics on the Left have noted and accepted this connection, even going so far as to link the Burkean and Marxist critiques in an innovative way.[50]

I think that this is an unfortunate development that speaks to deeper challenges in the general orientation of Leftist and critical thought over

the last several decades. The collapse of grand narrative theories, such as Marxism, has engendered a strangely conservative Leftism. It either takes identity as it exists – embedded in socio-historical contexts – to be the locus of normativity, or focuses itself exclusively on so problematizing the very concepts of identity and normativity that very little conceptual space remains for constructive thinking. To the extent that there has been a constructive dimension to contemporary left-wing and critical thought, it has been focused on taking identity as it exists in socio-historical contexts and protecting it from invasive colonization by neo-liberal capitalism and other hegemonic forces. I believe that this is a worthy goal. But taking identity as it exists to be the sole locus of normativity undermines a commitment to dignified agency and context transcendence that I see as necessary for the advancement of any true critical progressive agenda. Individuals should be made capable of transcending and shaping the socio-historical contexts in which they exist. They should not just be shielded from colonization by other and more insidious external forces. In other words, we should look concretely to respect and amplify the dignity of all individuals by increasing their general capacity for dignified self-authorship.

This is where I think that rights can serve as important conceptual and political tools for realizing a more constructive agenda. This is in part because the language of rights is simultaneously popular enough both to mobilize attention and to articulate concrete demands, and semantically open enough to express the interests and commitments of many different groups in the formal pragmatics of their linguistic community. There are some who might say that the rhetoric and history of rights are too closely aligned with liberalism, but I think that this grants too much semantic determinacy to a term that in no sense 'rigidly designates'.[51] There is no reason why, even if these associations exist, the term 'rights' could not be decoupled from liberalism and put to more critical and radical purposes, such as the realization of the robust conception of human dignity fleshed out here.

Much more could be said on this point, but I will leave it aside here. Instead, I wish to conclude this chapter by sketching a preliminary 'twinned' model of foundational rights. I call them foundational

because they are expressed in the broadest possible terms to be generative of more positive specific rights that could arise depending on the socio-historical contexts of claimants, and of course their interests and commitments. This approach is rather similar to the one described by Justice Aharon Barak, who characterizes human dignity itself as a 'mother right' that gives birth to various 'daughter rights'. [52] Another way of understanding these foundational rights would be to think of them as 'jurisgenerative': they operate as general principles that should engender a more concrete set of positive rights that are sensitive to empirical specificities.[53] I feel that this model, at an abstract level at least, has the principled heft and conceptual sweep to capture both the constructive and critical dimensions[54] of the conception of human dignity discussed earlier. If this twinned model of rights were realized, we would have gone a long way towards respecting and amplifying the dignity of all individuals.

I believe that two foundational twinned rights must be realized in order that human dignity can truly be respected and amplified. The first is a right for all citizens to be democratic co-authors of their governing social institutions and the coercive rules that flow from these. The democratic right is secured by the implementation of fair decision-making procedures that value each individual citizen equally as they engage in a deliberative process of conceiving and establishing the design of political and legal institutions and subsequently determining the laws that flow from these.[55] The democratic right is not secured by appeal to historical contingencies, such as culture, or to the abstract formulations that are common to many liberal theories. Individuals in a democratic framework must possess the actual capabilities required both to make their claims heard and to have them deliberated in a forum that formally accords equal value to all members regardless of the specific content of their deliberative claims. Their jurisgenerative rights to such democratic capabilities must be respected by the establishment of fair decision-making procedures that equally value each individual's opportunity to participate in the deliberative authorship of the laws that govern them.[56] This right to participation cannot be revoked by any democracy worthy of the name, though, of course, it does not mean that one's interests

will always carry the day. This is the formal requirement to satisfy the dimension of democratic right. To the extent that such fair democratic procedures are implemented in practice, and are engaged in by individuals who are able to employ their expressive capabilities, the right of individuals to democratic self-authorship would be secured.

The second is the right of all citizens to enjoy equal sets of expressive capabilities except where inequalities flow from their morally significant choices.[57] This right would be realized by ensuring that each individual had the equal overall capacity to engage in dignified self-authorship except where differences result from morally significant choices. I have chosen to focus on an equality of expressive capabilities, rather than on goods or resources, for two interrelated reasons. The first, and most important, is that capabilities refer concretely to what people are actually able to choose in given contexts. What one is generally capable of doing is not something abstract (such as what one could transcendentally will), or even something contingent (such as what one would do with certain goods). The second, and related, point is that the focus on expressive capabilities treats people as individuals with context-specific needs and interests. A focus on capabilities takes into account the special circumstances of people's lives. The capabilities approach to justice seeks ways in which to achieve a fair distribution of expressive capabilities in a manner that is tailored to the unique status of each individual. For instance, it might be uniquely sensitive to the needs of individuals with substantial physical or mental disabilities, and look at what they need in order to enjoy a life of dignified self-authorship.[58] And, as mentioned before, it can look at variables such as an individual's overall capacity to use language to bring new richness into our semantic worlds.

The decision to distinguish two distinct rights was deliberate and at least partly inspired by Thomas Nagel, who made a similar argument in his book *Equality and Partiality*.[59] I maintain that the first right (to democratic authorship) precedes the second. Individuals should have the opportunity, in a democratic context, to choose whether they wish to ensure an egalitarianism of human capabilities. Choice is important to my conception of how to realize human dignity. This is because my conception is fundamentally democratic at both theoretical and practical

levels. It rests upon the claim that legitimacy is minimally bestowed by consent and increases to the degree that subjects become authors of social institutions and the coercive rules that flow from them.

The link between the two foundational rights – the right to democratic authorship and that to equality of human capabilities – is that both are jurisgenerative legal tools[60] to be used to amplify an individual's total set of expressive capabilities and so realize the dignity-oriented account of human flourishing. As mentioned, expressive capabilities are those that enable individuals to transcend socio-historical boundaries and assume responsibility for their subjectivity. This is what enables people to lead a life of dignified self-authorship. Only in this way would their status as morally individual subjects be respected. Therefore, the first step to respecting and amplifying expressive capabilities is to democratize political and legal institutions. After this, one can make the more challenging argument for establishing the agency-enhancing[61] right to a full equality of expressive capabilities.[62]

There is another important respect in which the twinned rights are linked. Like other authors in the relational school, in my model, rights occupy a middle position between the morally abstract idea of amplifying human dignity and concrete instantiations of positive law. They express the overall normative orientation that a legal system should adopt in order to make human dignity central. Rights occupy this middle position so that they can be deployed by individuals in a variety of ways that would be expressive of and conducive to their self-authorship by transforming state institutions and the laws that flow from them. How this can be achieved will be explained in the next few chapters, as I look more closely at what law can do to amplify human dignity.

Some might object that my account of rights is insufficiently critical, since it still leaves substantial room for both the state and international institutions to play a large role in the lives of citizens. There are some left-wing theorists for whom leaving room for any kind of state or institutional interference is unacceptable. The strongest objections of this sort typically come from the anarchist tradition, which seeks to discredit the very idea that any state or international institutions can be justified. For my money, the strongest such anarchist objections typically draw

on the radicalized Kantian claim that any process that treats individuals as a mere means, rather than ends in themselves, is ultimately immoral and cannot be justified. Since the state and international institutions invariably deploy coercion to force individuals to pursue ends that they themselves might reject in non-coercive contexts, they can therefore never be morally justified.

While this argument is interesting and important, ultimately I do not agree with its thrust. Discussing why in elaborate detail would require giving a full justification for the state, which I cannot entertain here. I will simply say that, following Nagel, I feel that most critical legal scholars are in a bind when it comes to choosing between their libertarian and egalitarian inclinations. There is a substantial temptation to believe that full freedom, such as that found in a non-state context, would be consonant with a more egalitarian distribution of capabilities, but I do not believe this to be the case. Robert Nozick discussed why in some detail in *Anarchy, State, and Utopia*.[63] Any egalitarian theory must invariably seek to establish some patterned distribution that would not necessarily accord to a distribution of capabilities that would be established if individuals were just left to interact with one another over a period of history. An egalitarian theory has to redistribute capabilities in accordance with some pre-set and fairer design, and to continue to do so even where that might interfere with the totally free economic transactions that individuals might otherwise make. Doing so, to my mind, would require a state. This is even more the case if we want to talk about expounding an egalitarian theory that accords significant distributive weight in the pattern to non-citizens.

Of course, this is not intended to provide ideological support for the most robust possible state. Protection against the undue growth and expansion of state power is provided by the first right, which stipulates that citizens must be democratic authors of the political and legal institutions that govern them, and the laws that flow from these. Once a robust democracy is engendered, egalitarians can and should begin pushing for the realization of the second right, to an equality of human capabilities. This model of rights is critical legal because it historically[64] makes central the capabilities that citizens have to transform political

and legal institutions, while still strongly emphasizing the need to adopt an egalitarian pattern in the distribution of capabilities. It obtains legitimacy by creating a great deal of room for us to pursue the projects of democratization and redistributive justice.

Realizing the twinned rights to democratic authorship and to an equality of expressive capabilities constitute an ideal towards which, I argue, all social institutions should strive. A just society would seek to respect and amplify human dignity, and so realize the twinned rights that are necessary for this task. But this does not imply that there is only one way to realize the two rights. The argument for such rights stems from the existential priority that my model places on dignified self-authorship. That is to say that there are many ways in which the ideal of the twinned rights could and should be realized. This is especially true with regard to the right to an equal set of expressive capabilities. Here, democratic communities must not only choose whether my conception of equality is what they wish to realize, but decide how they might wish to achieve it.

Individuals who exist within diverse socio-historical boundaries would undoubtedly prioritize some features of my argument over others, for both principled and pragmatic reasons. Ensuring an equality of expressive capabilities would enable individuals to become authors of their own lives in a political system that respected their dignity through treating them as being of equal value. However, expressive capabilities themselves are likely to be understood in radically different ways across various cultures. While my model's emphasis on dignity and dignified self-authorship is undoubtedly individualistic, and there is a potentially infinite number of ways in which individuality might express itself, this will always take place within pre-established socio-historical contexts steered by social institutions. Individuals define the narrative of their lives in different ways, by redefining the same socio-historical contexts within which they exist.

Given this, it is extremely likely that individuals from different cultures would choose to give more weight to certain forms of expression than others and, concurrently, would choose to maximize different expressive capabilities. They may decide to prioritize fostering the more

basic expressive capabilities, such as those of bodily health and agency of thought, before committing resources to fostering those that are almost or equally important but less immediately pressing. Such decisions cannot be made theoretically, even if theory might offer some hermeneutic guidance. They must be left to those who know and understand the socio-historical contexts within which they live.[65]

This chapter has ranged across a wide swathe of theoretical issues to sketch out my conception of human dignity and its affiliated twinned model of human rights. In subsequent chapters, I will begin to turn to more concrete and practical issues concerned with how to amplify human dignity in practice and to realize the model of rights in given socio-historical contexts. This poses significant challenges, and requires an examination of the political and legal structures and cultures which reinforce policies which either constrain or at the very least do little to amplify human dignity through realizing the twinned rights.

I think that if most social institutions were measured against how effectively they respected and amplified human dignity by realizing the twinned rights, they would fall considerably short of the mark. Many states deploy highly coercive social institutions that are designed to limit, or even preclude, the possibility of substantive democratic participation. This includes even developed liberal democratic states such as the USA – perhaps the most egregious modern example – where, famously, many laws are designed to undermine the participation of African-Americans and other marginalized groups in the formal political process.[66] Many of these efforts at marginalization have been worryingly successful. And while there are many respects in which the welfare of the world's poorest has improved in the past few decades, it is also clear that inequality has also ballooned, consequently transferring greater and greater powers to the world's elite.[67] Such a concentration of wealth and expressive capabilities at the expense of others is not only damaging to the dignity of individuals; it undermines the capacity of social institutions to move beyond calcified policies that benefit the well-off while precluding full participation of the marginalized.[68] This suggests that there is a very long way to go before human dignity is fully respected, and there are many critical efforts that need to be undertaken

to expose the social institutions and ideologies that preclude its full realization.

This is where I think that international human rights law can play a crucial role in ensuring the amplification of human dignity. If international human rights law were reoriented around the amplification of human dignity I believe that this would substantively transform its interactions with states. Rather than being driven primarily by the interests and power politics of states, international human rights law would be responsible for ensuring that states maintain the proper conditions for the exercise of sovereignty by doing all that they could to amplify the human dignity of both their own citizens and, crucially, vulnerable individuals abroad. It is to these issues that I will turn in Chapter 4.

4

The State, International Human Rights Law and the Amplification of Human Dignity in Practice

Introduction: Critical Legal Theory, Human Rights and International Human Rights Law

> Consolidated in the second half of the twentieth century, the human rights project entered history's large pantheon of visions for human betterment. Scaled down in operation, it differed from the grand schemes of socialist equality rooted in the inexorable laws of history, from the Manichean struggles for racialist utopias, and from religious futures sanctioned by God's plans. Some analysts place human rights under the notion of progress, although the designation is difficult to reconcile with its own historical record. Rooted in struggle rather than in one universal, moral Truth, right gains can be lost. Propelled by the genocidal wars, brutalities, and the Holocaust of the mid-century, human rights principles offered alternatives to war and destruction in an agreed-on set of universal criterial for human dignity, fundamental justice, equality, and security.[1]

While there has recently been a notable shift towards taking an interest in global issues, historically, critical legal theorists have paid relatively little attention to international law or, indeed, international affairs in general. This can no doubt be explained by pointing to the foundations

of the critical legal studies movement in the law schools of the United States. Despite their comparatively radical stance, critical legal theorists seemed just as prone to the national fixation peculiar to American legal thought as their less radical colleagues. Few of the major authors in critical legal theory have written extensively on international law, leading to a notably theoretical gap in the literature.[2] While there is an abundance of critical legal theory pertaining to the structure and power of the state and national law, Crits have had little to say about non-law or supra-state law and its power structures.

One of the major goals of this work is to fill this gap in a comprehensive manner, by sketching out some worthwhile paths that might be taken in the future. Adopting a critical legal approach to international human rights law, and looking at how it can be reformed along more democratic and egalitarian lines, is an important task. Doing so means normatively decoupling critical legal thought from its moorings in the critique of the state and national legal institutions, and moving a set of constructive norms affiliated with critical legal thought to centre stage. These norms, centred on the ideal of human dignity, are set out more concretely as the twinned rights to democratic self-authorship and to an equality of human capabilities. Approaching international human rights law in this manner has two implications. First, it means that I deploy critical legal theory in a constructive way to offer moral priorities that international human rights law should pursue. Secondly, it means that I retain an important role for the state, which is to serve as a vessel for redistributing expressive capabilities.

In the previous chapters, I took steps in this direction by arguing for a critical legal conception of human dignity and an affiliated model of rights. In the next several chapters, I will demonstrate how international human rights law can be conceived and used so as to make the amplification of this conception of human dignity its fundamental orientation. This first chapter will be primarily concerned with theoretically sketching out how making human dignity the fundamental orientation of international human rights law can be carried out. It will therefore operate at a relatively high level of abstraction (though not as much as Chapters 3 and 4). In Chapters 6 and 7, I will discuss how

this project can be carried out in a more practical manner by looking at actual cases that pertain to the amplification of human dignity through the application of the twinned rights.

A Very Brief History of International Human Rights Law and the State

Virtually everyone who studies international human rights law quickly runs into the contrast between the Westphalian system of independent state-centric legal systems emphasizing the absolute importance of sovereignty and the new, aspirational human rights order, which is to place limitations on the exercise of sovereign power. The most familiar and rather Eurocentric narrative runs along these lines: by the end of the Thirty Years War, most European powers were exhausted and deeply frustrated by the attempts of other states to interfere in their religious practices. The temptation to do so was affiliated with the natural law tradition pioneered by Augustine, Aquinas, Vittoria and others. These authors were all held to claim that, since all individuals have a natural right to know God, it was just and correct to wage wars if necessary to defend Christianity, and in some cases even to convert the heathen.[3] This natural law understanding of the world as spatially divided between Christendom and the Others[4] – oftentimes, as Said pointed out, the Islamic 'orient'[5] – operated smoothly enough until the Reformation and the inter-Christian conflicts that it sparked. Frustration with religious war finally led to the signing of the Treaty of Westphalia in 1648, which entrenched the idea that states had the unlimited right to do as they wished within their own territorial boundaries, and should not be interfered with by other states. While this certainly did not have the effect of ending war, it did curb the propensity towards religious war, and European relations were defined by the Great Power politics for the next two and a half centuries. The new spatial regime that overtook the old binary between Christendom and its Others was between so-called Western civilization and its peripheries, and the subordinates in the colonies. These peripheral subjects retained no rights to sovereign authority that were not ceded to them by the so-called 'mother countries'.

However, the grant of absolute sovereignty eventually became problematic. As Great Power politics gave way to the massive and intensely violent ideological conflicts of the nineteenth and early twentieth centuries, many began to question whether it was genuinely wise to cede so much power to the state – the proverbial 'mortal God'. This fear was realized with the emergence of the totalitarian regimes of Hitler and Stalin, who justified the brutal murder of their own citizens by appealing to positive law and the sovereign rights of states. It is, rightly, taken as one of the great travesties of history that very little was done to curb the violent impulses of these regimes within their own borders. It was only once they began to expand outwards, bringing with them all the machinery of death, that many Westerners finally abandoned the old Westphalian consensus.

By the mid-twentieth century, the horrors of the World Wars and growing unhappiness with imperialism convinced states to begin constructing the formal legal architecture that would constrain what sovereign states were able to do within the limits specified by human rights. The formal commencement of this paradigmatic shift was with the adoption of the UDHR in 1948, outlining which rights would serve as the threshold for the retention of sovereign power. Unfortunately, while a number of binding legal conventions further entrenching these rights were adopted in the latter twentieth century, the Cold War prevented the development of any robust legal mechanisms to enforce international human rights law. This ended with the collapse of the Soviet empire in 1989, which led to a pronounced legal thaw and indeed the remarkably fast development of international legal instruments designed to punish those who committed grave atrocities against human rights. This was a considerable victory for cosmopolitanism in the modern era. Many of the institutions formed during this period remain at the forefront of much jurisprudence in international human rights law and international criminal law. They include the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and finally the International Criminal Court (ICC).

Simultaneous with the postwar formation of the United Nations, the same European states that established the Westphalian system were gradually abandoning it and coming together in a novel, European international union with its own human rights convention and court. This gave many hope that we were entering a new cosmopolitan era, which some authors famously argued constituted the 'end of history' properly understood.

Unfortunately, the rise and fall of American adventurism during the War on Terror in the early twenty-first century and its subsequent retreat into nationalist anomie under the Trump administration have put a halt to this development. Under the Bush administration, the world's most powerful state withdrew from the international order being formed – one that was, however, consistent with the United States' own Enlightenment heritage – and pursued a ruthless policy of aggressive and unilateral interventionism. This famously resulted in the near destruction of both Iraq and Afghanistan, and the ultimate descent of both countries into ongoing warfare and secretarian conflict. It also established a disconcerting precedent of unilateral interventionism and crackdowns on domestic enemies in the name of curbing the threat of 'terrorism'. To invoke only two examples: Russia justified its intervention into the Crimea through in part appealing to the United States' history of militaristic interventionism, and the Syrian regime of Bashar al Assad continues to invoke the threat of terrorism to justify extensive crackdowns on his political opponents and the use of illegal forms of force against dissent. So, barely twenty-five short years after peaking in the 1990s, international human rights law often seems as though it is on the retreat. It has been unable to curb the nationalist and fundamentalist forces that it was expected to have extinguished, indicating that the cosmopolitan moment was just that: a brief flash of idealism in the sordid history of conflict between nation states and peoples. The reasons for this failure are complex and ongoing.

At the normative level, international human rights law was never able to orient itself around a sufficiently powerful moral ideal to motivate anything more than a perfunctory loyalty. This is true at the level of theory, where much of international human rights law remains

dogmatically and unimaginatively tied to a fairly shallow Kantianism. It is also true affectively, since this shallow Kantianism has never been able to inspire and motivate individuals who often remain bound to the communitarian ties provided by their national state. International human rights law remains grounded in a highly abstract set of ideals, many of which are given such diverse and conservative interpretations by individual states that even a believer in the last utopia could be forgiven for expressing cynicism.

Another reason for the failure of international law is more fundamental and relates to the practical failure of international human rights law genuinely to curb the exercise of power by channelling power to the pursuit of an aggregable normative project. At Nuremberg, Justice Robert Jackson famously claimed that the decision to hold a trial for the leading Nazi leaders was 'one of the most significant tributes that power has ever paid to reason'.[6] These inspiring words haunt the ongoing aspirations of international human rights law. It is transparently clear that the international order is still largely oriented around power – whether it be the power of states, multinational corporations, hidden networks of espionage and terror, or whatever. Power has yet to cede control to reason. At best, it has made a few perfunctory gestures. Many in the world still live in conditions in which they face gross restrictions on their civil and political rights. Just as pressingly, the dramatically unequal concentration of human capabilities concentrates wealth and power in the hands of an ever more withdrawn global elite who use their resources to ensure that dramatic reforms to the status quo will never take place. International human rights law has been largely ineffective in preventing the violation of civil and political rights, though the triumphs that it has enjoyed are noteworthy and impressive. It has also been very ineffective in engendering a more just redistribution of human capabilities. Indeed, with the exception of refugee law and the operation of a few well-meaning but sparingly funded UN aid agencies, it is difficult to see where international human rights law has meaningfully contributed to realizing the economic and social rights of global citizens.

This is an immense problem for international human rights law, since repeated failures to live up to its ideals by curbing political violence

and redistributing human capabilities has led many to adopt an increasingly cynical stance towards the whole project. This is true even among educated global leaders, who should be at the forefront of pushing the project of international human rights law. Indeed, many of the most influential globalists of the era, such as Bill Gates, seem willing to bypass international human rights law and the related institutions wholesale and just fund the projects in which they are personally invested. This is a tremendous tragedy, since such a piecemeal approach undermines efforts to form a more robust and ambitious international human rights-based system that could persist and deepen over time, independent of the altruism of the 1 per cent.

This failure either to develop a sufficiently powerful normative framework or to subordinate power to it demonstrates why we need to continue theorizing and advocating on behalf of international human rights law. Specifically, we need a theoretical account of international human rights law to meet two criteria. The first is to provide a sufficiently powerful normative framework that can successfully inspire theoretical and affective loyalty. I believe that my conception of human dignity and its affiliated model of rights offers a good start in this direction. Since I have covered extensively in the last two chapters how this operates, I will not rehash my argument here. The second criterion is to demonstrate how international human rights law can successfully devolve power to marginalized people, to ensure that their dignity is amplified and to prevent a return to the cynical belief that the international arena is destined to be dominated by power politics. Millennia ago, Thucydides famously wrote that questions of right and wrong can only exist between equals: 'Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.'[7]

Thucydides' quote has long been taken as a mantra for a realistic vision of politics and international affairs – ignoring, of course, that the Athenians who invoked it were ultimately brought down by their hubris and lust for power. The cosmopolitan moment offered us a brief flash of a different kind of international ordering. In the next section I will try to retrieve what is valuable in this moment, while developing

a more robust and critical account of international human rights law that might be forceful enough to avoid a long slide into calcification.

Theorizing a New Relationship between International Human Rights Law and the State

I: A Reply to Schmittian Arguments

Theorizing on a new relationship between international human rights law and the state presupposes a robust account of what constitutes international human rights law and what constitutes the state.

On the first point, as mentioned in the section above, I will primarily be proposing a normative rather than a descriptive account of what constitutes international human rights law. Mine is a normative reconstruction of international human rights law that argues that its fundamental orientation should be the realization of a critical legal account of human dignity.

On the second point, on what constitutes the state, there is no space here to engage in an extensive theoretical and practical reflection on what constitutes statehood. Rather than engaging in such a complex task in a limited space, I will instead follow Habermas by adopting Carl Schmitt as a theoretical foil.[8] This is done for three reasons. The first is that, to my mind, among his contemporaries, Schmitt presents the most powerful arguments against the possibility of a sovereign state being constrained by a higher set of norms. For Schmitt, sovereignty is defined by a state deciding what constitutes right and wrong. To be limited in this capacity is to efface the state. The second reason is that Schmitt is hostile to the idea of democracy. In *Constitutional Theory*, he claims that Rousseau is fundamentally correct that the only true democracy can be one in which a general will exists that embodies the real interests of all citizens.[9] Since this cannot occur in practice, there will always be some groups that possess more political power than others, and they will use the power of the state to crack down on dissent. Finally, the third reason is exactly this last point. As a hard-edged realist, Schmitt is sceptical that the operation of power can ever be mitigated in state politics. Any political order that faces a fundamental threat to the ontological beliefs

of the political theology that it seeks to uphold will always crack down on dissent, even where doing so compromises important facets of this moral order. For instance, this is the case in most liberal democracies. So, the idea of a rights-respecting state that seeks to secure the dignity of all is deeply compromised, since those who willingly accept and support the political theology protected by a state will always be legally privileged over those who merely feel obliged to accept it due to force and coercion (or not, in the case of revolutionaries).

These problems pose fundamental challenges to making the realization of human dignity the goal of a just state and using international human rights law to steer states in such a direction. Some of them can never be fully overcome. But, as I shall argue, I feel that Schmitt overstates his case in many respects. His account of politics, the state and political theology is far too totalizing. There is little room for recognizing the possibility of overcoming false necessity to establish a new form of state ordering, in particular by following Foucault in 'cutting off the head of the king' by making retention of sovereign authority subject to respecting and amplifying human dignity. My argument is that international human rights law can play a fundamental role in the last regard. I shall discuss this in more depth after further analysing the specifics of Schmitt's thought.

Schmitt's philosophical outlook can be nicely understood as being: power is never innocent, because it is always determinative and decisionist. This is why Schmitt was largely dismissive of any idealization of a robust democracy, such as the one formulated by Rousseau. Since politics will always be about deciding what and who to prioritize and not – a democracy oriented by the 'General Will' of all was something of a fantasy.[10]

The closest that one could get was a liberal representative democracy, in which coalitions of friends and enemies organized themselves into political parties and competed for public attention and legislative power. Because this is the closest that Schmitt believed one could get to a true democracy, we will mostly be examining his opinions on liberal democracy and ignoring his comments about a more robust democratic polity. Schmitt believed that a liberal democracy would always be partial,

since one party would take power and enact its agenda at the expense of another, even if it claimed to represent the people as a whole. The only truly democratic feature of such a system was that elections were held, allowing other parties to take power and enact their own agenda for a time. But Schmitt was deeply sceptical about the stability of even such a liberal democracy, believing that it would also be faced with the burden of making decisions on who was to be allowed to participate politically and who not. We shall examine in some depth why he felt this way.

One of the things that Schmitt disdained about liberal democracy was its belief that there could be established a given legal order that left people free to live their lives as they wished, without state interference or control. This belief can still be seen in the work of seminal liberal theorists such as John Rawls[11] and Martha Nussbaum,[12] who remain committed to the idea of a 'political' rather than 'metaphysical' liberalism that can be legally and politically endorsed by individuals from a wide variety of philosophical perspectives. Such arguments made belief in 'liberal pluralism' and multiculturalism cognitively possible.

To Schmitt, these liberal pretensions were nonsensical for two interrelated reasons. First, Schmitt thought that liberalism's claim truly to respect difference was a sham. This reason is fundamentally related to Schmitt's more general account of how law and politics operate in both liberal and illiberal regimes. For Schmitt, ideologically, all politics is based on incompatible secularized theological concepts. In practice, this means that the fundamental concept of the political is the friend/enemy distinction.[13] Political friends are those who conform to our own political theologies, and who wish to see a state and a legal order that conform to our own outlook. Political enemies are those who hold to a different political theology that is incompatible with our own. The practice of politics is always a form of violence, whether literal or figurative, as different groups of friends and enemies attempt to overcome one another and seize control of the state.

Liberal democracies attempt to quiet politics through the operation of parliamentary democracy. They believe that by giving different groups of friends and enemies space in which to engage peacefully, as political parties in the legislature, the friend/enemy distinction on which

politics is predicated can ultimately be overcome. But, for Schmitt, this is ultimately an illusion, since the daily to and fro of normal parliamentary politics shows us very little about where the real power in political societies ultimately resides. For Schmitt, there is always one sovereign body that rises above the morass of everyday politics, including in a liberal democracy. This sovereign is the person or body that 'decides the exception' – that is, they are capable of suspending the normal operation of politics as organized by law and cracking down on dissent to reaffirm a given order based on a given political theology. In other words, the Sovereign decides the exception to maintain the existential consistency and homogeneity of the body politic through the repressive power of the state.

> Every general norm demands a normal, everyday frame of life to which it can be properly applied and which is subjected to its regulations. The norm requires a homogenous medium. The effective normal situation is not a mere 'superficial presupposition' that a jurist must ignore, that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.[14]

This gloomy picture of liberal democracy and politics in general has a tremendously levelling effect. Schmitt is effectively saying that all politics is about groups of friends and enemies who organize themselves along fundamentally incompatible theological lines. The attempt to avoid this is an attempt simply to avoid politics. The extraordinary consequence of Schmitt's line of reasoning is to conclude that there is little that distinguishes a liberal democratic regime from a more authoritarian one. Indeed, the chief distinction is that authoritarian regimes are simply more honest about what they are doing. Liberal democrats, with their idealized conceptions of rights and respect for difference, will always be faced with two choices when truly confronted with the stark face of the 'Other' who holds to a very different political theology. They may either

attempt to hold consistently to their beliefs in difference, in which case the Other might well overcome them and establish an illiberal regime, or they can deploy sovereign authority to decide that the Other is a dramatic exception to the 'normal' rule of respect for difference.

The second reason why Schmitt felt liberal democracies were fundamentally unable to manage difference in the way they claimed is related to his broader understanding of politics. Since all 'political' concepts and doctrines are fundamentally based on secularized theological concepts, the differences between them are irreconcilable. From the time of Hobbes onwards, liberalism was based on a theological belief that the individual was the ontical centre of the world, and that political power is exercised to enable individuals in the pursuit of their material interests in this world. This political theology is fundamentally at odds with the outlook of groups such as Catholics, Communists and, of course, the Nazis, who understood the world in very different terms. For Schmitt, this posed fundamental problems for the liberal claim to respect difference. To invoke Rawls as a foil, Schmitt would claim that liberals reveal their true respect for difference and the Other when they say that differences in opinion and political theology can be tolerated where they are 'reasonable'.[15] In practice, this means that acts and ideological concepts that deviate too far from liberal political theology will most often be forbidden by the state. Where the liberal state fails to crack down on such differences, it runs the existential risk of being overthrown by those who hold to different political theologies.

This concludes my account of Schmitt's criticisms of liberal democracy. From here on, I will argue for the limitations of his approach, before demonstrating how international human rights law can provide a response to many Schmittian dilemmas.[16]

Schmitt develops a very powerful account of the limitations of democracy in a liberal democratic context. His claim that the state sovereign will always be responsible for making an existential choice about which group's political theology to accept has proven salient in the past. But Schmitt is also prone to generalizing too broadly. His arguments about the state are too totalizing and too bleak. There is little room in his thinking for degrees of democratic participation. Here,

his theological background perhaps influences him too much. Just as God is a figure whose rule is always absolute, so, too, does the mortal Sovereign always attempt to establish an ontologically complete body politic. This may be so in some instances. However, Schmitt fell into the trap, common to some intellectuals, of tending to venerate power even while being reflective on how it was exercised.

For Schmitt, the moment at which the sovereign decided the exception demonstrates that political power can almost always re-establish the homogeneity of the body politic. Indeed, it is inherent in the very logic of sovereignty to do so. But Schmitt ascribes this logic a false necessity. That logic of sovereignty is not immanent to law and politics, but is the product of the socio-historical contexts of late modernity in which state power was organized in this way. There is no inherent reason why state power cannot be redirected and mollified through the passage to a new set of socio-historical contexts. But there is little room for such a possibility in Schmitt's work, because he remains so enamoured by power that he cannot conceive how it might ever be limited or put to more normatively worthwhile purposes. Indeed, this myopic fascination with power at times borders on self-parody. For instance, consider the depth of Schmitt's totalizing attitude, which goes so far as to criticize Hobbes's conception of the Leviathan for leaving too much space for personal deliberation on theological matters:

> All those multifarious, countless, and indestructible reservations regarding inner vis-à-vis outer, invisible vis-à-vis visible, conviction vis-à-vis attitude, private vis-à-vis public, stillness vis-à-vis noise, esoteric vis-à-vis ordinary united themselves, without any plan or organization, into a front that did not need to exert any great effort to transform the positively understood myth of the leviathan. All the mythical forces embodied in the image of leviathan now strike back at the state that Hobbes had symbolized.[17]

One can criticize Hobbes for many things, but I would never have expected one of them would be giving the state too little power and leaving too much room for personal agency.

For Schmitt, the moment of exception demonstrates the sovereign's power because it is where it decides the exception and determines what and who remains within and what is to be excluded from the body politic. I think that this is deeply wrong. The moment of exception does not demonstrate the sovereign's strength. Rather, it demonstrates its weakness: in exceptional moments, power needs to become naked and stark in order to re-establish homogeneity. But in the moments where the bare application of power becomes apparent, the state is actually at its weakest. Schmitt believes that the state is always compelled to establish homogeneity across the body politic. By contrast, and following Laclau and Mouffe, I think that it is more productive to see the body politic as always fundamentally incomplete and in tension.[18] In moments where the theological pretensions break down – to put it in psychoanalytic terms, when there is broad recognition that the Big Other does not exist – it is necessary for hegemonic groups to turn to state power to enforce by violence what is no longer sustainable through ideology. These are precisely the moments at which violence becomes a real possibility, since violence is almost always the reaction of a castrated power complex that can no longer function simply through the operation of its disciplinary and ideological mechanisms. And so, it is exactly in these moments that international human rights law can play a fundamental role in preventing violence and establishing a more dignity-respecting and therefore just society.

II: International Human Rights Law and the Establishment of the Rightful Condition

In this section, I will normatively reconstruct the role that international human rights law should play in relation to domestic law. My argument will be that international human rights law should curb Schmittian-type propensities by making the retention of state sovereignty dependent on maintaining what Kant called the 'rightful condition'. This, I will claim, is one in which the dignity of all individuals is amplified to the extent possible because the state realizes the twinned rights to democratic authorship and equality of capabilities. But before discussing this, I will briefly run though some of the

theoretical conceptions of international human rights law that have been developed over the centuries.

The special status of international law relative to its domestic counterpart has long been an issue that has perplexed legal scholars. There have been claims at both extremes – from those such as the mature Hegel, who have claimed that international law is not law at all, to those, such as Kant, who have maintained that the very right to legislate domestic law should gradually become dependent on the state's acquiescence to cosmopolitan norms.[19,20] This rich and complex intellectual history, as well as the problems raised throughout, obviously imposes a burden on any scholar who is willing to defend a normative approach to international jurisprudence. They must show not only how such a conception would be defensible with respect to domestic law, but also how it can be applied rigorously and adaptively to the unique conceptual and practical problems posed by international law.

The two most basic criticisms concerning the existence of international law have come from the traditions of descriptive and normative legal positivism. The first, exemplified by Kelsen and Hart, sees the task of legal philosophy as being to describe the law accurately without rendering moral judgements on its form or content.[21] The second, extending from Hobbes to modern conservatives such as Oakeshott, maintains that one should engage in legal philosophy clearly to demarcate the realm of law from that of freedom.[22,23] Normative legal positivists regard this as an important task, since a system of law, whatever its content, is morally valuable and should not be abandoned even in situations in which it competes with other moral values. Underpinning this conception is a fear of anarchy.

Descriptive legal positivists hesitate to dignify international law with full ontological status, because it does not appear to have many of the features that characterize a domestic legal system. Most notably, the international legal system does not have a source of sovereign authority – either a sovereign legislative body in the Austinian sense,[24] or a constitution stipulating rules of recognition *à la* Hart. This descriptive problem relates to a deeper difficulty for the descriptive positivist and, for that matter, the international realist: that the international legal

system lacks sources of power with which to enforce its norms. For these reasons, many descriptive legal positivists have been hesitant to call international law 'law' to all intents and purposes.[25] This prejudice has persisted to the present day, when, in his otherwise fine book *Legality*, Scott Shapiro does not even address the question of international law when defending his neo-Hartian positivism.[26]

Normative positivists also maintain the points articulated by descriptive legal positivists, but they go deeper. They argue not only that international law does not possess the status of legality in practice, but that, on principle, it should not. Such arguments were 'a dime a dozen' during the heyday of the Bush administration. The essential argument flows from the Herderian idea of national determination, which itself rests upon deeper Hobbesian points about the nature of statehood as expressing the interests of the governed.[27] It is felt that each naturalistic 'community' should have the right to assert its unique moral conception without interference from the outside world.[28] Though this might appear to be precipitously close to cultural relativism of the most romantic sort, the normative positivist argument can be saved by giving it a further twist by criticizing international law for being undemocratic and unrepresentative. This makes it unlike liberal-democratic states, which at least have built-in mechanisms for assessing the actual interests of the people. Such is the position, for instance, of the late Robert Bork and Antonin Scalia.[29]

Ultimately, I do not think that either of these arguments is defensible. In the first case, the argument of the descriptive legal positivist leans too heavily on claims of efficacy. They believe that since it is unlikely that the international legal system can ever develop enforcement mechanisms as robust as those seen in a domestic legal system, it is therefore wrong – or at least misleading – to characterize it as law. But this claim grants too much weight to the ontology of the present, and therefore ascribes a false necessity to the contemporary socio-historical context. As we briefly glimpsed in my history of international law, the reasons for the failure of the international legal system do not stem from natural limitations. Powerful states and other hegemonic social actors have been unwilling to grant sufficient authority and resources to the international

legal system to ensure that it operates effectively. An international realist might claim that this is very unlikely to change, but there is no built-in reason why it cannot. The decision of powerful states and hegemonic social actors not to grant sufficient authority and resources to the international legal system is a knock against their commitment to a more just global ordering. It does little to impugn the idea itself at a purely normative level. If it is unlikely that states and hegemonic social actors would grant international human rights law so much authority, it is not impossible. Far stranger things have happened, and we should not measure the normative value of a conception exclusively by the difficulties that may be faced in realizing it. Granting too much weight to such concerns moves very close to a strong conservative position that is antithetical to the spirit of both international human rights law and critical legal studies.

The argument of the normative legal positivist is more powerful: that, if fully realized, international law would be a fundamentally undemocratic force in the world, imposing universalizing norms on unwilling cultures. Indeed, it has been the locus not only of conservative critiques, but of many postcolonial[30] and radical Left[31] critics (who would otherwise reject all forms of positivism) as well. It is not enough, in these instances, to defend how international law operates in practice, since the theoretical question rests on its moral legitimacy under ideal conditions. If a full international legal system were fleshed out, complete with the sources of power needed to make it effective, would it be an undemocratic force in the world? A normative jurisprudence of international law must answer this pressing question if it is to be effective.[32]

Here, the approach pioneered by Ronald Dworkin becomes of qualified value. Throughout his long career, and despite having many things to say about justice in general, Dworkin had very little if anything to say about international law. I suspect that this relates to the problematic classically liberal approach to statehood that still underpins his conception of legality. This comes most to the fore when he discusses the nature of the community in *Law's Empire*, and why individuals concerned with justice should embrace an understanding of law as integrity as the best approach to narrating their unique constitutional story.

> [Internally compromised statutes] cannot be seen as flowing from any single coherent system of principle; on the contrary, they serve the incompatible aim of a rulebook community, which is to compromise convictions along lines of power. They contradict rather than confirm the commitment necessary to make a large and diverse political society a genuine rather than a bare community: the promise that law will be chosen, changed, developed, and interpreted in an overall principled way. A community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy – that its collective decisions are matters of obligation and not bare power – in the name of fraternity.[33]

This extraordinarily rich paragraph does not just contain a defence of law as integrity; it also indicates the limitations of Dworkin's theoretical analysis. He claims that a 'community of principle, faithful to that promise' can morally determine the content of law. In other words, he is here defending the right of a sovereign state to do as it will, so long as its actions are continuous with the basic liberal principles of law as integrity. Here, Dworkin comes very close to undertaking a Kantian inversion and claiming that states that fail to abide by the liberal principles that underpin law as integrity do not possess the moral legitimacy necessary to determine the law and that, therefore, individuals within these states would be under no moral obligation to obey their purported masters even if they must for practical reasons.[34] But Dworkin does not explain whether another form of law can be developed as a source of appeal for those subject to such wicked regimes. This strikes me as an unusual gap in his approach.

This productive limit in Dworkin's thought is a jumping-off point for discussing how to approach international law from a normative perspective. His argument that a state can claim the legitimate right to impose laws on others only to the extent that it is based on principle can be generalized to the global realm. I believe that doing so would entail adopting a Kantian position that sovereignty itself should be conditional on maintaining the 'rightful condition' for human flourishing.[35]

The normative requirements for maintaining this 'rightful condition' are jurisgenerative, in the sense that they can be codified as an international system of rights to which all states must become party and embody in their own domestic legal systems.[36] Ideally, over the course of time, the link between domestic and international law would gradually become blurred as states internalized the democratic and economic requirements for sovereignty and regarded them as integral principles underpinning their own legal systems. International law would then overlap with domestic law in a self-reinforcing manner, as states increasingly affirmed international law as a matter of principle rather than simply as a legal requirement. This would, in turn, establish a mutually legitimizing chain through which both domestic and international legal systems would validate their positions relative to one another.

The reasoning behind this last point is to mitigate the power of Schmittian-type arguments. As discussed in the section above, Schmitt has a totalizing understanding of state power. For him, the exceptional moment at which the sovereign re-establishes who and what is included within or excluded from the network of legality demonstrates the power of the state. Again, I think that it demonstrates the state's fundamental and ongoing weakness, and particularly its inability to realize normative principles that would be sufficiently attractive to enable power to operate without requiring the threat of violence to serve as the ultimate guarantor of legitimacy. In the global context that I am discussing, international law and domestic law would gradually come to overlap in their commitment to the realization of human dignity. Assuming that a sufficient number of people admire this commitment, it would mitigate the need for the exercise of state power to quash dissent. Indeed, I argue that the state's very right to do so should be seriously checked. Instead, international human rights law should increasingly determine when the violent exercise of sovereign authority is warranted – which I suspect would be in a very few and highly qualified instances.

This position raises two questions. The first is: which principles should be adopted in international law to establish a 'rightful condition' that all states must maintain in order to be considered sovereign? The second is: how rigidly must these principles be imposed? The two

questions are deeply interconnected, since the first establishes a moral ideal for international law, while the second qualifies this ideal by clarifying how rigidly it should be enforced.[37]

In the first case, as one might expect, I believe that we can say that international law should codify the twinned rights to democratic authorship and equality of human capabilities. Here, one might think that the normative-positivist/postcolonial argument has bearing, since I am arguing that international law can enforce change on domestic laws. But I do not think that this is undemocratic per se, since there cannot be such a thing as democratic rights for states in and of themselves. The state, as an abstract entity, does not have a democratic right to uphold a non-democratic system unless that is what its own people have consented to.[38]

In the second case, I believe that we need to look at a number of factors to determine how rigidly the principles discussed above should be enforced. This will, in turn, require an anticipatory look at the rights to which citizens and non-citizens should be entitled. As we shall see, I believe that states do have special obligations to their citizens, which in some circumstances trump the needs of non-citizens. However, I do not believe that this is always the case. There are some circumstances in which respecting the rights of non-citizens is so important to the amplification of human dignity that the more high-end interests of citizens can be side-stepped. This includes cases in which one individual's right to private property might seriously impact our capacity to help those with the most pressing economic and social needs. In such cases, wealthy individuals should give up part of their wealth to the extent that is sufficient to make a concrete difference.

International Human Rights Law and the Twinned Rights: Bringing the Domestic and the International Together

In my model, the most important hermeneutical principle that one should adopt when interpreting international human rights law is a commitment to amplifying human dignity by realizing each citizen's expressive capabilities. Human dignity is the fundamental orientation

of international human rights law and should be hermeneutically linked to subsequent and increasingly more specific moral commitments, such as those required to realize the twinned rights given specific socio-historical boundaries. This, in turn, will be further concretized through realization in the positive law and jurisprudence of states. To show how this can be carried out, what was presented before at a relatively high level of philosophical abstraction must now be translated into more juridical language.

The commitment to amplifying human dignity is open ended because it is attached to agency and self-authorship. This has legal consequences. It suggests that one cannot adopt the juridical standpoint of classical liberal legal positivism when interpreting the law. Such a standpoint presupposes that the responsibility of the state is merely to forgo interference in the private lives of citizens.[39] Amplifying human dignity requires that law do more than that. To translate that into juridical language, we might say that amplifying a human being's dignity presupposes realizing a specific set of rights.

At a more abstract level, this would mean linking human dignity to positive legal rights that realize the twinned rights to democratization and to an equality of human capabilities. Concretely, we can begin to define how this would be carried out in international and domestic human rights law. In his book *Human Dignity: The Constitutional Value and the Constitutional Right*, Justice Aharon Barak has helpfully described how such a process could be carried out as an instance of dignity being a framework 'mother right' that gives birth to a number of 'daughter rights' through a process of interpretation.[40] Through this process we move from respecting human dignity at an abstract level and come to respect it as a right with real legal value.

> A constitutional right formulated as a principle serves as a 'common roof' under which a wide variety of situations crowd together. Common to all of them is that they are expressions of the general principle that shapes the right … Under the canopy of the constitutional framework right, constitutional rights derived from it or that radiate from it crowd together. These rights are inherently

> of a lower level of generality than the framework right … A framework right is therefore a mother right. From it are derived daughter-rights. If the daughter-rights themselves are framework rights at a lower level of generality, granddaughter-rights are to be derived from them. Other imagery expressing this concept views the mother right as a tree and the daughter-rights as branches growing from it.[41]

Another way of expressing the same point would be to see the protection of human dignity as *the* – not merely *a* – fundamental legal 'archetype'. A given socio-political community's commitment to protecting and realizing this archetypal right should frame our hermeneutic interpretation of any rights identified in various international treaties, customary law and *jus cogens* norms, as well as any attempt to establish new positive rights through establishing or updating old human rights treaties.[42] The amplification of human dignity should be the unifying ideal of international human rights law, and thus be expressed through the interpretive commitments of legal officials.

If we are committed to seeing the amplification of human dignity as an archetypal 'mother right', I believe that the first daughter rights that would flow from it would be the twinned rights identified in this work.[43] One can then further concretize what this would entail in practice, through realizing the twinned rights internationally. Realizing the twinned rights might include developing increasingly specific rights to democratic participation up to the threshold where citizens become both authors of legal and political institutions, and authors of the laws that flow from them. Ideally, democratic citizens would then express a further commitment to protecting and amplifying human dignity by embracing the second right through the widespread equalization of human capabilities. These jurisgenerative democratic and egalitarian rights would in turn serve as increasingly concrete interpretive bedrock for laws that further the process of expressing the international community's commitment to protecting and amplifying human dignity.

From the perspective of the hardened legal positivist, such spurious claims about dignity are the root of international law's problems. They

regard the references to human dignity and its related goods as, at best, harmless sanctimony and, at worst, dangerously open-ended principles masquerading under the guise of hard law. But this understanding is misguided, since, as I have argued, it mistakes legal procedures and the expedient production of specific laws for the normative purpose of law itself. It can never get beyond the tautologous claim that law should be obeyed because it is law, without entirely divorcing the question of legitimacy from that of legality. But this becomes even more tenuous in the international context, in which the issue of legitimacy is perhaps the foundational legal problem, and it can be resolved only through appeal to normative principles.

If we are to have a normative jurisprudence of international law, then Article 13 of the ICESCR is a good place to start recognizing human dignity as the unifying ideal towards which international law strives:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

While Article 13 lacks the striking economy of the references found in the Preambles to the ICCPR and the ICESCR, it programmatically delineates the connections between dignity, human rights, and other human capabilities in a fairly comprehensive manner. Most importantly, it is arguably legally enforceable. States that seek to realize this ideal in their particular contexts would be said to meet the requirements for maintaining legitimate sovereignty. Those that fail to meet it would move down the continuum of legitimacy to the point at which the international community might even be justified

in intervening to prevent serious infringements of the dignity of their citizens.

While it was perhaps a necessary strategic move on the part of Western states during the heyday of the Cold War, in hindsight the decision to divide the two Covenants has proven deeply unfortunate. It has led to a system in which the ICCPR is shown every respect and the ICESCR is virtually ignored, with claims that states are engaging in the 'progressive realization' of the rights within. There are many reasons for this position, which I shall discuss further later. Here I will just say that the international human rights system expressly references human dignity and, as I have tried to argue, is best understood as reflecting a commitment to its realization. Given this, we should abandon now outdated visions of human dignity as an absolute status that merely exists, and start to understand it more relationally in affiliation with agency and an overall capacity for self-authorship. In such circumstances, economic, social, and cultural rights are not the peripheral rights that they are often interpreted as being. They are also vital for truly amplifying human dignity in a meaningful way. Given this, I believe that seeking to amplify human dignity depends on realizing the expressive capabilities of individuals to define themselves by redefining the contexts within which they exist. Moreover, it is not enough to realize just a few expressive capabilities at a time while focusing potential resources on other priorities such as the national military. None of the expressive capabilities exists in isolation; as both Sen and Nussbaum stress, they are integrally connected in complex and contextually sensitive ways.[44] While this means that states may have a lot of leeway in how they choose to foster capabilities in their given socio-cultural contexts, it also means that they cannot ignore some expressive capabilities (such as those stressed by the ICESCR) and expect the others to be realized successfully. While resources are not unlimited, and states cannot be expected to do everything at once, officials must use their best efforts to foster the 'full personality' of the human person and their interrelated expressive capabilities. We must also begin to broaden our understanding of the obligations that states have towards the citizens of other states, especially along economic and social lines. On the normative

model of international law developed here, rich states may well prove to have obligations to the citizens of other states, which go beyond simply preventing moral catastrophes. For example, they might have an obligation to ensure that other peoples obtain a certain quality of life before they look to improve the lot of their own peoples if the latter already enjoy a certain quality of life.

I will now discuss both of the twinned rights specifically, and how they can be realized more effectively. With regard to the first right (to democratic authorship), I believe that international human rights law can play an important role in amplifying the participation of citizens in elections. This goes beyond simply allowing a few more parties to participate in elections. International and domestic courts can – and should – substantially expand the franchise; and indeed some, such as the ECtHR, have done so. In Chapter 5, I will discuss this at considerably greater length. However, they should also do what they can to make democratic rights more meaningful. When deciding cases that are centred on democratic rights, courts should rule in a way that best amplifies the dignity of the individuals in question by enabling them to redefine the socio-historical boundaries within which they exist. Courts should also ensure that democratic rights are of equal value to the broadest possible number of citizens. In Chapter 5 I will demonstrate in considerably greater detail how this could be carried out.

I would now like to discuss in more depth the right to an equality of human capabilities. We have seen that Article 13 of the ICESCR requires states to take steps to ensure that all citizens have access to a good education. Education is not connoted in purely instrumental terms here; rather, it is explicitly linked to the 'full development of the human personality and its sense of dignity'. This might very well be taken to be a positive instance of human dignity serving as a fundamental orientation for international human rights law. This is because the right to development of an important human capability – namely, education levels – is expressly linked to an open-ended goal beyond what is articulated in the text itself. In Rawlsian language, it expresses a teleological understanding of the good: in this case, for individuals to be able to realize the fullness of their personality and enjoy a sense of dignity.[45]

Following my account, the full development of the human personality – what I have called a capacity to engage in dignified self-authorship – means a great deal more than just the capacity to assume a prescribed role in a socio-historical context. It involves the capacity critically to analyse and assess the same contexts through the application of practical reason, and more importantly to choose to reject or revise the conditions within which we exist. This is because my approach emphasizes that the concrete choices that we are able to make are more indicative of what is morally significant in our personality than any other psychological features that have emerged as the result of existential and socio-historical determinants. A state that seeks to realize the dignity of individuals must use the law actively to create opportunities for the amplification of each individual's expressive capabilities to make such concrete choices, with the realization of the right to education being but one – albeit an important one – of many such positive actions.

This might appear to be an unrealistic goal. But we have seen some states that are willing to take steps in these directions, and we should employ international human rights law as a tool to get others on board. International law can especially have an impact on rich states that have the resources to commit to this project, but have been unwilling to do so for various ideological reasons.[46] By embodying a commitment to realizing the twinned rights, international human rights law can maintain a moral prerogative to guide states towards the realization of the 'rightful condition' for both their citizens and those of other states.[47]

This last point raises an important issue with which I would like to conclude this section. I do believe that international human rights law, by challenging the legitimacy of sovereign authority where the rightful condition is not maintained, also implies a further moral and legal obligation – that states have obligations to individuals beyond their borders. As mentioned before, this is bound to be an exceptionally controversial claim, especially given my argument for an expansive set of domestic obligations. How can any state be expected to respect both its expansive obligations to citizens and accept further obligations that pertain to non-citizens in far-away countries?

The Rights of Non-Citizens

The argument that states have obligations to non-citizens is hardly novel. It has long been recognized by international refugee law, the laws of war, and other standard features of the international legal regime.[48] However, I do not believe that these obligations go nearly far enough. In this section I will make the argument that states have considerable obligations to amplify the expressive capabilities of non-citizens if they have shown adequate concern for their own citizens and have the resources to do so. The consequence of this would be that rich states would have substantial obligations to transfer wealth to the developing world.

Unfortunately, such arguments still have little practical currency. Most states feel that their primary – and often exclusive – obligations are towards their citizens (if that). There is a deep history behind this rather unsettling reasoning, on which I can only touch here. Its deepest macro logical roots lie in the Westphalian consensus that has dominated European thinking – if not action[49] – on the relationship between state and citizens since the seventeenth century. The reification of the modern sovereign state in the seventeenth century, and the immense discursive and institutional authority granted to it, was an important precondition for the ideological formation of the nation.[50] The sovereign state achieved this by controlling, inter alia, various disciplinary and biopolitical[51] mechanisms that established criteria for citizenship, fostered reproductive programmes, and erected an immense array of symbolic apparatuses. Per Schmitt, the logic of these mechanisms was deliberately exclusionary: the state constituted the identity of the nation through denying identification and rights to those deemed unworthy or 'foreign'.[52]

Not coincidently, the political and legal theory of the time adopted a similarly exclusionary logic. The theories of Hobbes, Locke and even Rousseau were oriented around the twin goals of demonstrating the legitimacy of sovereign authority by demonstrating the existence of a bilateral agreement between ruler and ruled: the famous 'social contract'. The abstraction involved in many of these contractarian theories, often criticized by the Romantics, was undercut as the nation gradually