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DIGNITY, RIGHTS AND RESPONSIBILITIES

Jeremy Waldron

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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Introduction

1. The Rights and Responsibilities Green Paper

Last year (March 23, 2009), the government in the United Kingdom issued a Green Paper entitled “*Rights and Responsibilities: Developing our Constitutional Framework*.”¹ In it, the authors (Jack Straw, Secretary of State for Justice in the Gordon Brown administration and Michael Wills, a minister in the same department) deplored the fact that “[a]lthough we have a latent understanding and acceptance of our duties to one another and to the state,” responsibilities “have not been given the same prominence as rights in our constitutional architecture.”² They published their paper in order to launch a debate about how to “ensure that our responsibilities to one another are discharged,” and “to examine a range of options for drawing up a [new] Bill of Rights and Responsibilities.”³

In the consultation that followed the publication of the Green Paper, there was considerable support for the idea of a legal charter of responsibilities. But it was balanced by some quite fiercely argued misgivings.⁴ Many people were unclear about the meaning of the term “responsibilities” and about what the Green Paper meant when it said that responsibilities are a “cousin” – if a “poor cousin”—to rights in our national discourse, or when it spoke of “responsibilities inherent in our rights.” There was concern about the type of deontic requirement a responsibility was supposed to represent; was it simply an obligation or a duty or something different from that? And there was concern too about whether responsibilities were the sort of things that should be declared and enforced by law. Summing up the responses, the Department of Justice said:

some responses felt that it was simply not the role of the State to articulate ... responsibilities, which more properly belong to the civic and social spheres and to individual communities and families.⁵

The Ministry reported that “the kinds of responsibilities discussed in the Green Paper were seen as more transient and lacking ‘equivalence’ to core human rights, which in turn risked being ‘devalued’ by being discussed in parallel.”⁶

Evidently, respondents expressed considerable anxiety about possible dilution of the Human Rights Act—and the concomitant European Convention on Human Rights (ECHR) structure in the United Kingdom—for the government felt it necessary to emphasize (in its summary of responses to the Green Paper) “that there would be no retreat from the protections in the Human Rights Act.”⁷ Many people felt that in any new constitutional instrument there should be, at most, just a preamble-style declaration of responsibilities. As one response noted:

Codifying responsibilities for declaratory purposes may have a role in expressing a standard to which individuals, communities and government should aspire. The sanctions which help enforce declaratory principles need not always be legal sanctions. The court of public opinion is an effective one.⁸

¹ Green Paper, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK (Cm 7577), available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf> (last visited June 27, 2010).

² *Ibid.*, p. 8.

³ *Ibid.*, p. 62.

⁴ See the account of responses received by the Ministry of Justice at <http://www.justice.gov.uk/publications/docs/rights-responsibilities-response-april-2010.pdf> (last visited June 27, 2010).

⁵ *Ibid.*, p. 13

⁶ *Ibid.*, p. 12.

⁷ *Ibid.*, p. 10.

⁸ *Ibid.*, p. 22.

It is not clear what will become of the Green Paper in the wake of the recent General Election in the UK. The Green Paper itself was not specifically referred to in any of the party manifestoes, although Labour's manifesto insisted that "[i]n everything we do, we will demand the responsibilities that must come with rights: to work when you can, not to abuse your neighbour or neighbourhood, to show respect for Britain as a newcomer, to pay your fair share of tax."⁹ The Conservatives eschewed all discussion of the document or its leading ideas in their manifesto, saying simply that "[w]e believe in responsibility: government responsibility with public finances, personal responsibility for our actions, and social responsibility towards each other"¹⁰ and that "to protect our freedoms from state encroachment and encourage greater social responsibility, we will replace the Human Rights Act with a UK Bill of Rights"¹¹ as well as their "Big Society" thesis: "Our alternative to big government is the Big Society: a society with much higher levels of personal, professional, civic and corporate responsibility."¹²

But it was noticeable that when David Cameron entered 10 Downing Street to assume the premiership on the evening of May 11, he went out of his way to use the rhetoric of rights and responsibilities, saying that "he wanted to build a society in Britain 'in which we do not just ask what are my entitlements, but what are my responsibilities, one where we don't ask just what am I ... owed, but more what can I give."¹³ Commentators however heard in this more an echo of John Kennedy—"Ask not what your country can do for you, ask what you can do for your country"—than of Jack Straw's Green Paper.¹⁴

2. Various meanings of "Responsibilities"

"Responsibilities" is certainly a slippery term. Mostly I think the authors of that Green Paper meant it in the sense of ordinary social duty. They mentioned criminal and regulatory law and private law obligations as well, such as duties of care.¹⁵ But the Green Paper also referred to "responsibilities inherent in our rights."¹⁶ What might that mean? And consider this usage in the 2010 Conservative manifesto: "As Conservatives, we trust people. We believe that if people are given more responsibility, they will behave more responsibly."¹⁷ Evidently the syntax of "responsibility" is going to be quite complicated, and it will be a challenge to do for this term what Hohfeld and other analytic thinkers have done for the idea of rights.¹⁸

I think the idea is to add some sense of constraint or obligation to the context in which rights are claimed and exercised. But there are multiple possibilities. Consider some of the ways in which ordinary people may be constrained in and around the exercise of their rights.

(i) Duties correlative to rights.

One obvious idea is that our rights are constrained by respect for the rights of others. My rights correlate with your duties; your rights correlate with my duties. So when rights are equal, each person has duties in regard to the rights of others. This is not always apparent because it is often assumed that our most important rights—our human or constitutional rights, for example—are primarily rights

⁹ The Labour manifesto ("A Future Fair for All") p. 05. This document is available at <http://www2.labour.org.uk/uploads/TheLabourPartyManifesto-2010.pdf> (last visited June 27, 2010).

¹⁰ The Conservative manifesto ("Invitation to Join the Government of Britain"), p. vii. This document is available at http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf (last visited on June 27, 2010)

¹¹ *Ibid.*, p. 79.

¹² *Ibid.*, p. 37.

¹³ THE GUARDIAN, May 12, 2010, p. 1

¹⁴ THE GUARDIAN preceded the above quotation as follows: "With echoes of the US president John Kennedy, he said..."

¹⁵ RIGHTS AND RESPONSIBILITIES, *supra* note 2, p. 16

¹⁶ *Ibid.*, p. 12.

¹⁷ Conservative manifesto, *supra* note 11, p. ix.

¹⁸ Cf. WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919).

against the state (which bears the correlative duties) rather than rights against individuals like ourselves. But though this may be true of human and constitutional rights, it is by no means true of ordinary legal rights, which are as often held against other private individuals and firms as they are against the state. (And the authors of the Green Paper do refer to our ordinary private law obligations as among the responsibilities they have in mind.)¹⁹ In addition, the demand for citizen responsibilities may also be read as a demand for a “horizontal” reading of some of the rights contained in the ECHR.²⁰ So, for example, the right to privacy might be thought to constrain private businesses, if not directly, then through the courts’ use of the Human Rights Act to interpret existing common law arrangements; or the right to freedom of religion might be thought to impose limits on an employer’s freedom in regard to holidays, religious observances; and so on.

(ii) Acceptance of limitations on rights.

When the Green Paper spoke of “responsibilities inherent in our rights,” I think they meant to refer to the way in which instruments like the ECHR sometimes mention, in the very same clause as they laid down a given right, certain legitimate limitations that might be imposed upon it. For example, Article 10 of the ECHR, sets out the right to freedom of expression; but at the same time it specifically recognizes that the exercise of this freedom “carries with it duties and responsibilities.” Article 10(2) of the Convention provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Or consider more broadly the very common formula, for example, the clause in section 5 of the New Zealand Bill of Rights Act: “The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²¹ You’ll find something similar in many bills of rights the world over, in Article 1 of the Canadian Charter of Rights and Freedoms,²² for example, or in section 36 of the South African Constitution.²³

So, in the words of the Green Paper, “there is a recognition that our rights do not exist in isolation. There are limitations on our conduct which allow us to co-exist harmoniously.”²⁴ These limitations can be internal or external; they can be internal in the sense that they govern the way we define and specify the right in question²⁵—this is often the approach taken in US constitutional law,

¹⁹ RIGHTS AND RESPONSIBILITIES, *supra* note 2, p. 16.

²⁰ See the discussion in Thomas Raphael, *The problem of Horizontal Effect*, 5 *EUROPEAN HUMAN RIGHTS LAW REVIEW* 493 (2000).

²¹ New Zealand Bill of Rights Act 1990 No. 109, section 5: “Justified limitations. Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

²² Article 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

²³ South African Bill of Rights: s. 36 “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

²⁴ RIGHTS AND RESPONSIBILITIES, *supra* note 2, p. 16.

²⁵ There is a discussion of the contrast between internal and external limitation in Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 *JOURNAL OF POLITICAL PHILOSOPHY* 191, at 197-8 (2003), reprinted in *JEREMY WALDRON, TORTURE, TERROR AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE* 20, at 30-31 (2010)

which does not have an explicit limitation clause of the kind we have been discussing—or they can be external in referring to justified restraints which may legitimately be imposed upon the exercise of an independently defined right.

Of course a limitation on a right is not in and of itself the imposition of a responsibility: what it represents is the clearing of space for the imposition of a responsibility by other legal means, which might otherwise be obstructed or prevented by an expansive formulation of the right. So, for example, article 10(2) of the ECHR does not actually impose any responsibilities for “national security ... public safety, for the prevention of disorder or crime, [or] the protection of health or morals.” But it leaves room for the imposition of responsibilities under these headings.

(iii) Duties governing the exercise of rights.

A third category of constraint might be the moral restraints that apply to the way we exercise our rights. Many years ago, in one of the first papers I ever published, I talked of “a right to do wrong,” which was intended not so much as a legitimation of license, but as an indication that ordinary moral categories of right and wrong don’t disappear or are not displaced when rights are at issue; we continue to be governed by moral reasons even when we are exercising our rights. And so moral or social criticism of someone for the way they exercise their rights is never inappropriate.²⁶

So for example, when newspapers and magazines all over Europe and North America, published and republished the notorious Danish Cartoons in 2005-6 and when they were criticized for their irresponsibility in publishing them, they often replied to these criticisms by citing their right to free expression and freedom of the press.²⁷ We have a right to publish the cartoons, they would say, when someone said the publication was insensitive, reckless and irresponsible. But the claim that you have a right to do something is no answer to a criticism of the way you exercise your right. Or put it the other way round: having a right in and of itself does not give you a reason, let alone a moral reason, for exercising the right in any particular way. My own view is that there was something foul and offensive in the self-righteousness with which Western liberals have clamored for the publication and republication of the Danish cartoons in country after country and forum after forum, and that is perfectly compatible with the acknowledgement that those who embarked on this offensive course of conduct had a right to do so. The best they could say for this was that they were showing they had a right to publish them. But a right does not give the right-bearer a reason to exercise the right one way or another, nor should it insulate him against moral criticism.

This, by the way, is not necessarily a distinction between law and morality. A claim that one had a *moral* right would also not be a legitimate way of rebutting moral criticism. Moral rights do not give their bearers moral reasons for acting. But if we are talking about legal rights, it is probably true that most of the criticism of the way a legal right is exercised will be moral criticism. And the Green Paper might be read as urging a greater readiness in society to advance and sustain moral criticism of this kind. People should not be allowed to think that they are insulated from moral criticism of their irresponsibility simply because they are exercising a legal right which is not subject to any legal limitation. Still, as many of the respondents to the Green Paper said, the responsibilities that are invoked here are “of a very different nature to the rights” that are under discussion, and it is probably not appropriate to enforce them legally, although of course there are other ways in which a culture of moral assessment can be channeled and nurtured by the law.

3. Rights as Responsibilities

There is one additional sense of “responsibility” that really doesn’t get mentioned in the Green Paper, but I want to mention it, and then spend the rest of this lecture discussing it. This is a sense of responsibility that goes along with rights (can even be equated with certain rights) rather than being

²⁶ Jeremy Waldron, *A Right to do Wrong*, 92 *ETHICS* 21 (1981), reprinted in WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991* (1993).

²⁷ The cartoons were originally published in the Danish newspaper *JYLLANDS-POSTEN*, Sept. 30, 2005, at 3. In the United States, they were republished in the *NEW YORK SUN*, February 2, 2006, in the *PHILADELPHIA INQUIRER*, February 4, 2006, the *HARVARD SALIENT*, February 8, 2006, and in at least 25 other newspapers.

opposed to them or just correlative to them or applicable to limit their exercise. I believe it is possible to think of certain rights themselves as responsibilities.

Here's a preliminary example of what I mean: parental rights—the rights of parents in regard to their children—implicit in Articles 8 and 10 of the European Convention, but set out explicitly in Article 6 of the German Basic Law, which states:

(1) Marriage and family enjoy the special protection of the state. (2) Care and upbringing of children are the natural right of the parents and a duty primarily incumbent upon them. The state watches over the performance of this duty.

What's interesting in this formulation is the designation of the “care and upbringing of children” as both a right and a duty incumbent on parents. It is a task that has to be assigned to someone; it is assigned by natural law and the law of the state to the parents; and the parents are then protected in that position, protected for example against the interference of others.

The English philosopher Elizabeth Anscombe once argued that rights of this sort are like assignments of authority. Now we normally think of authority as going along with a duty of obedience: the parent has authority; the child must obey. But as Anscombe points out, authority has additional dimensions:

Authority stemming from a task does not indeed relate only to obedience. ... A small baby does not obey, but we may acknowledge the authority of a parent in decisions about what should be done with it. So authority might be thought to be a right to decide in some domain, and its correlative not to be obedience, but respect. For you can go against someone's authority not merely by being a disobedient subject of it, but also by being an interfering outsider.²⁸

Or even if a child is of an age where obedience is at issue, a parent's authority still has this outward-looking aspect. Suppose a stranger intervenes (on a bus or somewhere) to reprimand a little kid for acting boisterously. The parent may protest: “It is not for you to discipline my child; that is my responsibility.” What she is claiming here is something like a right that she holds, but it is a right that is kind of synonymous with a responsibility.

The German provision suggests that a right of this kind can also be conceived as a duty. In the parenting case, we may say that the right is something which a person, if she is a parent, has a duty to exercise. It is her job; it is something incumbent on her; but it is *still* a RIGHT that she has: it's something which (in the normal case) she holds against others. And, as far as the parent is concerned, the duty aspect of the right is not just a matter of submitting to a set of rules. Often what it involves is continual and active exercise of intelligence and choice; and these are her choices to make, her intelligence to exercise. She is privileged in this regard.

True, in the parenting case, there are limits, beyond which we will collectively intervene to take the right/responsibility away from her. As the German provision says: “The state watches over the performance of this duty”, and it adds in subsection (3) of Article 6:

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

But that is an extreme back-up provision and it leaves an immense amount of space for the freedom and choice of the parent. The parent's privileged position and the legitimate choices that are open to her in this regard, plus the perceived interest or benefit to her—in a broad (not necessarily egoistic) sense of interest or benefit—of being in this position, are what justify us in talking of this responsibility as also a right.

Is this one of things that the authors of the British Green Paper had in mind? I am not sure. They did at one point quote Article 6 of the German Basic Law as an example; but they did not dwell

²⁸ G.E.M. Anscombe, On the Source of the Authority of the State, in *AUTHORITY* 142, at 148 (Joseph Raz ed., 1990).

on it. But it is an interesting sense of responsibility for us to think about, particularly because it offers an alternative analysis of rights rather than standing in opposition to rights to or as a limitation upon them. The idea of a hybrid of right and responsibility comes close to the suggestion from the Conservative party manifesto that I have already mentioned: “We believe that if people are given more responsibility, they will behave more responsibly.”

I actually think lots of rights are like this, especially political rights (and I am going to say more about that in a moment). They have this dual character of right and responsibility, involving:

- (1) the designation of an important task,
- (2) the privileging of someone as the person to perform the task, making the decisions which the task requires,
- (3) doing so in view of the particular interest that that person has in the matter,
- and
- (4) the protection of their decision-making pursuant to this responsibility against interference by others and even by the state (except in extreme cases)

This seems to me to be a distinctive form of right and one worth studying in some detail. I shall call rights of this kind “responsibility-rights,” and I shall call the formal analysis I have just sketched the “responsibility-form” of rights. I don’t think it applies to all rights. But it can be useful in the analysis of a great many of them.

Let me give you another preliminary example. You must forgive me; it is a specifically American example, though it is well-known, indeed notorious around the world. It involves the Second Amendment (1791) to the US Constitution, the one about the right to bear arms (cited continually by opponents of gun control). What is remarkable about this provision is that it has a preamble, which specifies a role or a task for those who bear arms. It says:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. (My emphasis)

Those who are utterly opposed to gun control—like Charlton Heston and the National Rifle Association—tend to minimize the preamble and just emphasize the entitlement end of the provision.²⁹ Defenders of gun control, on the other hand, tend to put great emphasis on the preamble and use this to qualify the right, either by saying that the right to bear arms doesn’t matter much these days when we depend for “the security of a free state” on a professional all-volunteer standing army rather than a civilian militia. Or they may propose to condition the right to bear arms on the responsible discharge of civic functions, i.e. the functions of a member of a well-regulated and well-trained citizen militia.³⁰

But certainly the way the Second Amendment is drafted presents it as a responsibility right, which admittedly does not obliterate the restraint on government—indeed the citizen militia is supposed to be a potentially anti-government force—but also does not leave it as a simply libertarian entitlement. The responsibility aspect is a way of informing and conditioning the individual possession and exercise of the right.

²⁹ For a suggestion that the NRA believes that the entitlement provision of the Second Amendment stands quite independently of the preamble, see The Honorable Diane P. Wood, *Our 18 Century Constitution in the 21 Century World*, 80 N.Y.U. L. REV. 1079 at 1088 (2005).

³⁰ See also the discussion in David C. Williams, *Civic Constitutionalism, the Second Amendment, and the Right of Revolution*, 79 INDIANA L.J. 379 (2004).

4. Responsibilities and Dignity

The title of my lecture today referred not only to rights and responsibilities but to dignity, and I want to turn now to the relation between responsibility-rights and the idea that rights are either founded upon or expressive of the value of human dignity.³¹

Dignity, as you all know, has been associated with the idea of human rights and constitutional rights throughout the modern period of the growth of human rights law. The Universal Declaration of Human Rights (UDHR) says that “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”³² and the International Covenant on Civil and Political Rights asserts that the rights it contains “derive from the inherent dignity of the human person.”³³ And we find it in the foundation of national constitutions as well, most significantly in Article 1 (1) of the German Basic Law: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

But until the last few years, dignity has not been a particular focus of academic study. That is changing, and now legal scholars and moral and political philosophers are devoting more and more attention to dignity as a foundational idea, as well as to dignity as itself a human right (e.g. in provisions that prohibit various forms of degrading treatment³⁴ or, in the words of Common Article III of the Geneva Conventions, “outrages upon personal dignity.”)

5. Dignity and Rank

Those who study dignity know that there was a time when dignity was associated with rank and hierarchy. In Roman usage, *dignitas* embodied the idea of the honor, the privileges and the deference due to rank or office,³⁵ perhaps also reflecting one’s distinction in holding that rank or office. And the Oxford English Dictionary still gives as its second meaning for the term “Honourable or high estate, position, or estimation; ... degree of estimation, rank” and as its third meaning “An honourable office, rank, or title; a high official or titular position.”

So people would talk about the dignity of the monarch. A 1690 indictment for high treason against a Jacobite spoke of an “intent to depose the King and Queen, and deprive them of their Royal dignity, and restore the late King James to the government of this kingdom.”³⁶ Blackstone tells us that “the ancient jewels of the Crown are held to be ... necessary to ... support the dignity, of the sovereign for the time being.”³⁷

It is not just monarchy. Kant talks about the various dignities of the nobility.³⁸ In England, nobles have dignity, in the order of duke, marquis, earl, viscount, baron. Degrees have dignity according to law; certainly a doctorate does. Clergymen have dignity, or some do. Ambassadors have dignity according to the law of nations. And France’s Declaration of the Rights of Man and of the Citizen, approved by the National Assembly in 1789, says in Article 6 that “[a]ll citizens ... are

³¹At this point I should warn you that my analysis is sailing into direct confrontation with the work of Stéphanie Henne-
Vauchez (who I believe is a Marie Curie Fellow here at the Robert Schuman Center) and the argument of a fine paper she
published in 2008 entitled *A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of
an Ancient Legal Concept*, EUI Working Papers LAW No. 2008/18 available at <http://ssrn.com/abstract=1303427>. More
of that in a moment.

³²UDHR, Preamble.

³³ICCPR, Preamble.

³⁴For example, ICCPR, Article 7; ECHR, Article 3.

³⁵See Teresa Iglesias, *Bedrock Truths and the Dignity of the Individual*, 4 LOGOS 111, at 120-1 (2001).

³⁶Patrick Harding’s Case, 86 Eng. Rep. 461, 2 Ventris, 315.

³⁷William Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND Ch. 28. And the 1399 statute that took the crown from
off the head of Richard II (1399 Rolls Parl. III. 424/1) stated that he “renounced and cessed of the State of Kyng, and of
Lordeshipp and of all the Dignite and Wirsshipp that longed therto”—cited in the OXFORD ENGLISH DICTIONARY entry for
“dignity.”

³⁸IMMANUEL KANT, THE METAPHYSICS OF MORALS 103-4 (Mary Gregor ed., 1996), or 6: 330 of the Prussian Academy
edition of Kant’s works.

equally eligible to all dignities and to all public positions and occupations, according to their abilities....”

Now, this equation of dignity and rank may seem an unpromising idea for human rights discourse, inasmuch as human rights ideology is associated specifically with the *denial* that humans have inherent ranks distinguishing some of them as worthy of special dignity in the way that a duke or a bishop might be.³⁹ Some have suggested that the old connection between dignity and rank was superseded by an alternative and really quite different conception of dignity⁴⁰—a Judaeo-Christian notion⁴¹ of the dignity of humanity as such, with roots in Stoic ideas found in the work of Cicero, Seneca and others; and that this was a separate tradition that always existed in parallel, and as a rival, to the more hierarchical conception.

There is something to that, but I believe the connection between dignity and rank was not lost with the triumph of the more egalitarian idea. What happened was that the idea of general human dignity associated itself with the notion that humans as such were a high-ranking species, called to a special vocation in the world, and that in a sense each of us was to be regarded as endowed with a certain nobility or royalty, each of us was to be regarded as a creature of a high rank. High rank was generalized rather than being simply repudiated. So the strategy I pursued in an article entitled “Dignity and Rank” published in in 2007 and in my 2009 Tanner Lectures on “Dignity, Rank, and Rights” was to explore various ways in which 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.⁴²

Something similar has been explored extensively in James Whitman’s recent work on dignity.⁴³ I was actually inspired in this direction by arguments pursued many years ago by the great classical scholar Gregory Vlastos, whom I knew at Berkeley in the 1980s, in a neglected essay “Justice and Equality.”⁴⁴ In an extremely interesting discussion of equality and rights, Vlastos argued that we organize ourselves not like a society *without* nobility or rank, but like an aristocratic society which has just one rank (and a pretty high rank at that) for all of us. Or (to vary the image slightly), we are not like a society which has eschewed all talk of caste; we are like a caste society with just one caste (and a very high caste at that): every man a Brahmin.⁴⁵ Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone’s person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege.

6. Dignity and Role

I said that dignity was traditionally associated not just with rank, but with office. In Roman times, Julius Caesar’s dignity as a leading citizen had to do not just with his high birth, but with his civic

³⁹ In the United States, for example, we associate the egalitarian rights-talk of (say) the opening lines of the Declaration of Independence with the Constitution’s insistence that “[n]o title of nobility shall be granted by the United States”—U.S. Constitution, Article 1: 9 (8).

⁴⁰ See Iglesias, *Bedrock Truths*, supra note 36.

⁴¹ See, for example, JOSHUA A. BERMAN, *CREATED EQUAL: HOW THE BIBLE BROKE WITH ANCIENT POLITICAL THOUGHT* (2008).

⁴² Jeremy Waldron, *Dignity and Rank*, 48 *ARCHIVES EUROPÉENNES DE SOCIOLOGIE* 201 (2007). The Tanner Lectures are published as Jeremy Waldron, *Dignity and Rank and Law, Status, and Self-Control* in 29 *THE TANNER LECTURES ON HUMAN VALUES* (Suzan Young ed., 2010); or they can be accessed at <http://ssrn.com/abstract=1461220>

⁴³ See JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). See also his articles ‘Human Dignity’ in Europe and the United States: The Social Foundations, 25 *HUMAN RIGHTS LAW JOURNAL* 17 (2004), The Two Western Cultures of Privacy: Dignity versus Liberty, 113 *YALE LAW JOURNAL* 1151 (2004), and From Fascist ‘Honour’ to European ‘Dignity,’ in *THE DARKER LEGACY OF EUROPEAN LAW: PERCEPTIONS OF EUROPE AND PERSPECTIVES ON A EUROPEAN ORDER IN LEGAL SCHOLARSHIP DURING THE ERA OF FASCISM AND NATIONAL SOCIALISM* 243 (C. Joerges and N. Ghaleigh, eds., 2003).

⁴⁴ Gregory Vlastos, *Justice and Equality*, in *THEORIES OF RIGHTS* 41 (Jeremy Waldron ed., 1984), originally published in 1962.

⁴⁵ *Ibid.*, 54.

functions, including being a general and being, for a period, *pontifex maximus*. One would talk of the dignity of an ambassador, and that would have to do not with his likely noble birth but with his role as representative of another nation and the general function of diplomacy in a world that needed honest brokers between nations. One might speak of the dignity of a judge, in regard to his judicial appointment—again not just his noble status (in a country like England, for example), but in terms of the important tasks that needed to be performed by the judiciary. Or one might speak of the dignity of a clergyman, such as a bishop, in terms of his responsibility for the administration of a diocese, or even the dignity of a rector, in terms of his elementary right to administer the sacraments (or direct their administration) in a particular parish.

There is a natural fit between the idea of role-based dignity and the idea of responsibility-rights as I have defined them. One may associate the dignity of parenthood with the right/responsibility for the upbringing of a child; and the Second Amendment example I gave associates the dignity of the citizen of a free republic with the right/responsibility of bearing arms in preparation for the work that a citizen militia might have to do to protect the freedom of such a republic. I find this connection between dignity, as associated with role or office, and rights conceived as responsibilities interesting and intriguing.

7. Roles for Everyone? (a) The Rights of the Citizen

When I emphasized the rank and honor aspect of the traditional notion of dignity, I had in mind the idea that as a matter of social and ethical decision, we might just *decide* to treat everyone as royalty. But the role idea is perhaps not as easily generalisable as the rank idea, and it may be thought that this connection that interests me—the connection between responsibility-rights and role-based conceptions of dignity—will not get us very far beyond rights that are associated with particular social functions in particular societies. It will seem quite difficult to extend this to human rights generally.

I am willing to concede that; but it is worth exploring how far we can extend the responsibility analysis, moving step by step from specific roles (like parenthood) in the direction of certain responsibilities that people in general might be thought to have in relation to their human rights as such.

One obvious first step is to think of the roles associated with citizenship—since this is a high status (a dignity)⁴⁶ assigned, if not universally, then very broadly in modern democratic societies. We might think of citizenship as a role and see if that role can be used as the basis of a responsibility analysis of the rights of the citizen (distinguishing for the moment as Karl Marx did, between the rights of the citizen and the rights of man.)⁴⁷ I have already intimated an analysis along these lines of the Second Amendment right to bear arms in the United States.

But if I may be excused for introducing another American controversy—we may think in this way also about the campaign to allow openly gay men and women to serve in the military. This is seen by most of those who campaign for it as a right, and I imagine it would still be seen as a right even if the army were not an all-volunteer force. Even if there were conscription, even if military service were a matter of social duty, the case might be made that openly gay men and women have the right to assume this duty as well. Now there is not necessarily a great deal of liberty or discretion associated with this responsibility, so it is somewhat distinct from the parenthood case.⁴⁸ But it may still satisfy the basic form that I set out, in that it involves the identification of a certain task and of people as having an interest in being designated—if need be an interest in being designated among lots of others—as the appropriate people to perform that task.

⁴⁶ Kant describes it as such in the *METAPHYSICS OF MORALS*, supra note 39, at 104 (6: 330): “Certainly no human being can be without any dignity, since he at least has the dignity of a citizen.” (Notice, by the way, how different this is from the discussion of inherent moral dignity of man as an end-in-himself in Kant’s *GROUNDWORK*.)

⁴⁷ See Karl Marx, *On the Jewish Question* (1844), in *NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN* 137 (Jeremy Waldron ed., 1987).

⁴⁸ Refer back to the responsibility-form analysis on p. 10 above.

A second set of citizenship rights are political rights, such as the various forms of citizen participation in the political life of a democratic community. Here the notion of responsibility, and rights conceived as responsibilities, seems to find a natural home.

The patron saint of this lecture series spoke of politics as a vocation, in terms of the politician or statesman assuming a “*personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer.” Politics, said Max Weber, “is a strong and slow boring of hard boards.”⁴⁹ It takes both passion and perspective,” he said, and for this task he famously contrasted an “ethic of ultimate ends” with an “ethic of responsibility” saying that there is

an abysmal contrast between conduct that follows the maxim of an ethic of ultimate ends—[such as] “The Christian does rightly and leaves the results with the Lord”—and conduct that follows the maxim of an ethic of responsibility, in which case one has to give an account of the foreseeable results of one's action.⁵⁰

That is true of political leadership and perhaps it is also true of the political and participatory rights of ordinary citizenship.

The democratic franchise, for example, the right to be enrolled as an elector and to vote—these are classic political rights but they can also be viewed as responsibilities in the sense that the person who exercises them is fulfilling a function (along with millions of others) in running and managing the democratic community. In some countries, most notably Australia, there is a legal duty to exercise the right to vote.⁵¹ Section 245(1), of the Commonwealth Electoral Act 1918 states that “[i]t shall be the duty of every elector to vote at each election.” The actual duty of the elector is to attend a polling place, have their name marked off the certified list, receive a ballot paper and take it to an individual voting booth, mark it, fold the ballot paper and place it in the ballot box.⁵² All this is enforced with a fine of \$50. Other countries that impose a legal duty to vote include Argentina, Fiji, Peru, Singapore, Switzerland, and Turkey; in addition there are countries like Italy, where in theory there is a legal duty to vote but there is in fact no enforcement of it. It is interesting that in Australian discussion of whether to repeal the provision, the element of compulsion is often opposed on the ground that voting is properly regarded as a right, and therefore ought to be voluntary; and defenders of the compulsion element appeal to the fact that many rights are limited in various ways by social duties. Both positions it seems to me neglect the point that rights themselves may be considered as responsibilities; and that the importation of the element of compulsion is not necessarily to be conceived as something, whether justified or unjustified, brought in from the outside to limit the right but as part and parcel of the right and dignity of voting.

Also, the element of right in this case has a clear sense of empowerment and choice that is largely unaffected by the element of compulsion. The voter may exercise her right as she pleases, voting for whomever she likes or even none of the above; and her voting in this way represents a degree of control over the political system, assigned to her, on an equal basis with its assignment to every other citizen. These elements of choice and empowerment are not limited by the duty of compulsion; on the contrary the compulsion represents a requirement that a choice be made and that the citizen accept the empowerment offered to her by the democratic franchise. On the other hand, she may exercise it as she pleases. (Contrast this with the parenting case mentioned earlier: in the political case, but not always in the parental case, you can exercise your right frivolously without having it taken away.)

⁴⁹ Max Weber, *Politics as a Vocation* in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 128 (H. Gerth and C. Wright Mills eds., 1991).

⁵⁰ *Ibid.*, 120.

⁵¹ In many more countries—in fact, in most democracies apart from the United States—there is a duty to register to vote, even though there is no duty to actually participate in elections.

⁵² Tim Evans, *Compulsory Voting in Australia* (Australian Electoral Commission, 2006), available at http://www.aec.gov.au/pdf/voting/compulsory_voting.pdf (last visited June 27, 2010).

If there were more time, I would want to attempt a responsibility analysis of freedom of speech as well—an analysis which would emphasize the responsibility of contributing to public deliberation and would downplay the conception of free speech that associates it simply with any willful form of self-expression no matter how dangerous, how hateful or how offensive it may be. I spoke about this at length in the Holmes Lectures I gave at Harvard Law School last October, connecting dignity with the idea of restrictions upon hate speech and group defamation.⁵³ I am happy to talk about it in discussion, but before I leave this topic of participatory rights (and responsibility-analysis of participatory rights) there is one more example I want to consider.

The example is jury service, in countries with a common law heritage, like Britain, the United States, Canada, Australia and New Zealand, where a great deal of legal decision-making in criminal and civil cases is entrusted to panels of ordinary citizens rather than professional judges. There is a wonderful book by Linda Kerber, who is a professor of History at the University of Iowa, entitled *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998). The fourth chapter of her book discusses the campaign by women to secure the right to serve on duties, and this—like the case of military eservice—was emphatically like seeking a responsibility, equal to the civic responsibility shouldered in this regard by men. Voting is not compulsory in the US (even registration to vote is not compulsory). But in other respects, Kerber says jury service, like voting,

is one of the basic rituals by which Americans confirm their participation in society. Unlike voting, it is a civil obligation; the citizen who does not respond to a summons to serve on a jury faces sanctions ranging from fines to contempt of court.⁵⁴

As in the military case, the element of choice or liberty is not the key here: the jurors have a choice to make, in determining the guilt or innocence of the defendant in the matter before them, but it is supposed to be a matter of judgment, structured and responsible choice, rather than a matter of pure liberty. And the State most definitely does watch over and supervise the way in which it is exercised, even if it cannot second-guess the outcome.

8. Roles for Everyone? (ii) Natural Rights as a Vocation

What if we take the next step and think not just of the rights of the citizen, but human rights generally? Can they be conceived as responsibilities associated with the dignity of important roles? Here I admit the analysis starts to become a little strained.

There are some traces of the responsibility idea in the classic theory of natural rights. In Virginia in 1785, James Madison described the right to religious freedom in terms that also used the language of duty

[W]e hold it for a fundamental and undeniable truth, ...[that] [t]he Religion ... of every man must be left to [his] conviction and conscience; and it is the right of every man to exercise it as these may dictate. This right is in its nature ... unalienable, because ... what is here a right towards men, is a duty towards the Creator.⁵⁵

The duty is owed to God, but as against other men it represents itself as a right, imbued with the choice “of every man to render to the Creator such homage ... as he believes to be acceptable to him.”

And certainly the religious grounding of many theories of natural rights produced rights which have exactly this responsibility form. John Locke grounded the basic right to life and physical integrity in this way. Men, he said, are

all the workmanship of one omnipotent and infinitely wise Maker; ... sent into the world by His order and about His business; [and so] they are His property, whose workmanship they are[,] made to last during His, not one another's pleasure. And, being furnished with like faculties, sharing all

⁵³ See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010), available at http://www.harvardlawreview.org/issues/123/may10/2009_Oliver_Wendell_Holmes_Lectures_7058.php

⁵⁴ LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 128 (1998)

⁵⁵ JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* [1785] opposing a Bill in the Virginia Legislature “establishing a provision for Teachers of the Christian Religion.”

in one community of Nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours.⁵⁶

I may not destroy my life, said Locke, since it is something assigned to me, entrusted to me, by my Creator, to be used for his purposes; and by the same token you may not destroy my life either, because that too would be encroaching upon a responsibility that has been assigned to me.

Equally, property rights (natural rights of property) were sometimes conceived in this light—not simply as privileges of use and exclusion but as modes of affirmative response to God's commandment to be fruitful and multiply and make the earth fit for greater and greater numbers of inhabitants.⁵⁷ "God, by commanding to subdue, gave authority so far to appropriate"—there we hear that same combination of right and duty.

Beyond that, things get vaguer and less determinate so far as the responsibility dimension of rights is concerned. In the Enlightenment, rights were associated with the idea of a calling or a vocation for every person, in the words of Condorcet, "rights to which we are called by nature."⁵⁸ There is a task to be performed, namely the moral governance of the lives of individuals, and the idea behind natural rights is that this task is properly assigned, individual by individual, to the person himself. We do not have to be governed by others. As a right-bearer, every human is capable of self-mastery and self-control, and if there is any further governing to be done, it is to be done under the auspices of political institutions set up by the free choice of self-governing individuals.

That natural rights are in this sense responsibilities and that they are associated with the dignity of an assignment to a being capable of bearing these responsibilities—this theme is also echoed in what the Enlightenment philosophers say about the way we bear and conduct ourselves in our individual and social lives. Also, there is a sort of moral orthopedics associated with rights—what some Marxists, following Ernst Bloch, used to call "walking upright."⁵⁹—having a certain sort of presence or uprightness of bearing, self-possession and self-control, indomitability, self-presentation as someone to be reckoned with, and not presenting oneself as abject or overly submissive in circumstances of adversity.⁶⁰ "Be no man's lackey," said Immanuel Kant, "Do not let others tread with impunity on your rights. ... Bowing and scraping before a human being seems in any case unworthy of ... human [dignity]."⁶¹ We are responsible for standing up indomitably for our own rights, without fuss or moral embarrassment, and equally we are capable of standing up for the rights of others, taking joint responsibility with all others for the whole regime of rights which has been entrusted to us, jointly and severally.

These are diffuse ideas, largely background to the specification of particular rights. Still it would be a misrepresentation of the natural rights tradition not to see it in the light of these convictions about human capacity and human responsibility—a misrepresentation, because it would make the idea of *inalienable* rights (so crucial to the revolutionary generation of the 1770s and 1780s) unintelligible. So let me talk for a moment about inalienable rights.

⁵⁶ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, II, §6 (Peter Laslett ed., 1988)

⁵⁷ *Ibid.*, II, §31: "God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth—i.e., improve it for the benefit of life and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him."

⁵⁸ Condorcet, *Sketch for the Progress of the Human Mind*, in *CONDORCET: SELECTED WRITINGS* (Keith Michael Baker ed., 1976).

⁵⁹ See Jan Robert Bloch and Caspers Rubin, *How Can We Understand the Bends in the Upright Gait?* 45 *NEW GERMAN CRITIQUE* 9 (1988).

⁶⁰ See also the account in Aurel Kolnai, *Dignity*, 51 *PHILOSOPHY* 253 (1976).

⁶¹ KANT, *METAPHYSICS OF MORALS*, *supra* note 39, 186-7 (6: 435).

9. From Subjective to Inalienable Rights

It used to be thought that the discourse of rights progressed from what is called an objective notion in medieval times—where rights were more or less equated with duties (like the right of a priest to say mass)—to a subjective notion, where rights were conceived much more voluntaristically, as faculties of will, or perhaps as property, which the individual proprietor could use (exercise) or dispose of as he saw fit. And it is sometimes said that you don't really get the modern notion of rights until we are in possession of this full subjective will-based conception. From this perspective, responsibility-rights—the sort that I have been emphasizing—will seem like throw-backs (except perhaps to the extent that they privilege important ranges of choice or individual discretion).

Richard Tuck has traced aspects of this trajectory in his book, *Natural Rights Theories*, and it is true that there was a movement of this kind from objective rights to subjective rights. By the 16th century, in the work of Spanish thinkers like Molina and Suarez, we find rights being treated entirely like individual property, utterly subject to the will of those who have them. But Tuck shows that it was not an uninterrupted trajectory. The effect of the Molina / Suarez position was that a man “conceived as *dominus* (owner) not only of his external goods, but ... of his own liberty,” might according to natural law be in a position to “alienate it and enslave himself.” A theory that appeared to be empowering of the individual will could therefore be used, at least in principle, to justify slavery or absolute subjugation,⁶² since people could be thought of as having sold or abdicated their liberty, for the price of subsistence or security, to a master or a king.

Tuck tells the story of how in the seventeenth century, many thinkers were prepared to accept this position only as a matter of abstract principle. In practice, they held the view that interpretive charity would require us to reject any account of what a person had said or done that had him alienating his liberty. And by the time you get to the late seventeenth century, you have thinkers like Hobbes and Locke insisting that certain rights are just in principle inalienable—for Hobbes it is a minimal right of self-defense and self-protection which, as he says, no one can be deemed to have given up; while for Locke it is a full scale inalienability position:

[A] man, not having the power of his own life, cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another power over it.

This thesis was crucial to Locke's idea of limited government:

Though the legislative ... be the supreme power in every commonwealth, yet ... it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself.... . A man, as has been proved, cannot subject himself to the arbitrary power of another.”⁶³

And it is this notion of inalienable rights that is referenced by Jefferson when he drafts the Declaration of Independence for the American states in 1776. Inalienable means they are not ours to give away; and that means that a contractarian defense of slavery or subjection to an absolute monarch is simply out of the question. You see what is happening here: something close to objective rights fought a strong rearguard action in the 17th and 18th centuries in the inalienable rights theories of Locke and Jefferson and others. The idea of rights being wholly matters of individual freedom is a radical idea; but it has conservative and repressive political implications. To combat those implications people are retreating to a more objective conception of inalienable rights, which I think corresponds in many regards to the idea of rights as responsibilities which I have been emphasizing.

⁶² RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 56-7 (1982).

⁶³ LOCKE, *TWO TREATISES*, supra note 57, II, §22 and §135.

Now perhaps under the influence of free market ideas, some people want to go in the opposite direction, and privilege the freedom of people to subject themselves to exploitative arrangements, or sell themselves into sex-slavery or degradation. If they do that they should be aware of how much of a hard-fought heritage of natural rights ideas they are giving up and how bad a bargain that has proved in the past.

10. The Hennette-Vaucher critique

As I have said,⁶⁴ I am acutely aware of the disagreement on almost all of these matters between the view that I have set out and the view set out in Stéphanie Hennette-Vaucher's critique of the human dignity principle in the paper she published on SSRN in 2008.⁶⁵

Hennette-Vaucher's critique is directed at the uses that are made of human dignity—a principle which she believes has proved a “two-edged sword” in human rights discourse—oriented as much towards grounding legal obligations (or even prohibitions) as towards genuinely emancipatory rights. She is concerned about the use of dignitarian ideas, not to empower people by providing a secure foundation for their rights, but to “limit rights in the name of social values” and to express “the idea of duties and obligations of the individual.”⁶⁶ Hennette-Vaucher does not address the particular conception of rights that I have set out, in terms of responsibilities (though she does address the theme of inalienable rights in some very interesting passages towards the end of her paper). But I have no doubt that she will find the responsibility analysis also uncongenial, not least because of the obvious links that I have set up between that analysis and the traditional hierarchical conception of dignity, defined in terms of rank and role.

There are a number of cases we could use to bring this disagreement into focus. One is the infamous “dwarf-tossing” case, from France, where the French authorities invoked the principle of human dignity to prohibit an activity which involved large men tossing dwarfs or little people along padded hallways or corridors, to see who could throw their dwarf the farthest. The dwarf would wear a little harness, with a handle on his back.⁶⁷ The dwarfs consented to this use of their bodies, and were apparently well paid. But the *Conseil d'État* upheld the ban on dignitarian grounds⁶⁸ and the UN Human Rights Committee refused to entertain a complaint of discrimination by one of the dwarfs—Manuel Wackenheim—that banning the activity was a form of economic discrimination.⁶⁹ Dr. Hennette-Vaucher believes this is an unacceptably paternalistic use of the human dignity principle, placing human dignity as a general idea inherent in humanity as such above the particular economic interests and self-determination of the individual.⁷⁰

To paraphrase Hennette-Vaucher: the way she reads the principle behind this decision is that every human being is treated as a repository (but not a proprietor) of a parcel of human dignity, in the name of which that person may be subjected to a number of obligations that have to do with this

⁶⁴ Supra, note 32.

⁶⁵ Stéphanie Hennette-Vaucher, A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept, <http://ssrn.com/abstract=1303427>

⁶⁶ Hennette-Vaucher, supra note 66, at 4.

⁶⁷ For a defense of dwarf-tossing in the United States, see Robert W. McGee, If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?, 38 AM. J. JURIS. 335 (1993).

⁶⁸ Conseil d'Etat, Ass., 27 oct. 1995, Commune de Morsang sur Orge, Recueil Lebon p. 372. The text of the decision—quite brief—is available at <http://www.conseil-etat.fr/cde/fr/presentation-des-grands-arrets/27-octobre-1995-commune-de-morsang-sur-orge.html> (last visited June 27, 2010).

⁶⁹ Manuel Wackenheim v France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002): “The French Council of State reasons in a very similar fashion as it upholds municipal orders prohibiting dwarf-throwing shows in accordance with the commissaire de gouvernement's plea that: ‘the respect for human dignity, absolute concept if any, can not accommodate to any kind of concession depending on subjective appreciations’. In these examples, the human dignity it is referred to is human dignity intended as a quality of the whole species, of humankind—and not of the sole individual.” (The text of the UNHRC's decision is available at <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Manuel%20Wackenheim%20v.%20Fr.pdf> (last visited June 27, 2010).

⁷⁰ Hennette-Vaucher, supra note 66, at pp. 9 ff.

parcel's preservation at all times and in all places. It goes right to the issue of inalienability: the dwarf's consent is treated as irrelevant. "Since human dignity relates to humankind more than it does to the human individual, it remains out of the latter's reach: [he] cannot renounce it, [he] is stuck with it."⁷¹

Another example cited by Dr. Hennette-Vachez is a 2002 decision from South Africa. In the case of *Jordan v. State*,⁷² the South African Constitutional Court used the principle of human dignity to uphold the terms of an old 1957 statute prohibiting prostitution, i.e., penalizing women for engaging in sex work, where that might be their only economic option. Now actually, what happened in the *Jordan* case was that the idea of dignity was interpreted in the context of prostitution to rebut a dignity-based challenge to the statute. The provision under which the sex-workers were convicted was challenged on a number of constitutional grounds: that it discriminated against women, that it violated the right to privacy, that it was incompatible with the "right to freely engage in economic activity and to pursue a livelihood," and that it violated the principle of human dignity. It was in response to the last of these challenges that two of the judges on the Constitutional Court—Albie Sachs and Kate O'Regan—said the following:

Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that [the provision prohibiting prostitution] can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself.⁷³

That is an eloquent statement of what Hennette-Vachez might regard as the paternalistic use of the human dignity principle. I should say that it is balanced by an additional statement, which insists that those arrested for this offense "must be treated with dignity by the police" and there must not be any subsequent "invasion of dignity, going beyond that ordinarily implied by an arrest or charge." "Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute." But still the O'Regan / Sachs position is uncompromising

Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by [the statutory provision] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.

One might reasonably worry, as Hennette-Vachez does, that this sort of talk represents a decisive separation between human dignity and what was once seen as its emancipatory potential, and a realignment of it with forces of conservative moralism and paternalism. And she almost certainly will take the same view of the idea of responsibility-rights, which, as I have said are closely aligned with this sort of dignitary analysis.

What can be said in response to the concerns voiced in the sustained and elegant arguments of Dr. Hennette-Vachez's paper?

Within the realm of dignity, what strikes me about these cases mentioned by Hennette-Vachez is that the principle she objects to is actually quite important in other contexts, where I believe both she and I would want to condemn various forms of degradation. We do think it is important, for example, that prisoners and detainees not be treated in a degrading manner (for example, by interrogators at Guantanamo Bay or by reservist guards at Abu Ghraib) and few of us think that the key to this prohibition is whether the prisoner can be deemed to have consented to the treatment in question. Or consider the treatment of people who are incapable by reason of infancy,

⁷¹ *Ibid.*, 21.

⁷² *Jordan v. the State*, Constitutional Court of South Africa, 9 Oct. 2002, Case CCT31/01.

⁷³ *Ibid.*, per O'Regan and Sachs JJ., concurring (§74).

age, or disability (such as dementia) from giving their consent. In a recent decision, the English High Court insisted, I think quite properly that:

Treatment is capable of being ‘degrading’ within the meaning of article 3, whether or not there is awareness on the part of the victim. However unconscious or unaware of ill-treatment a particular patient may be, treatment which has the effect on those who witness it of degrading the individual may come within article 3. It is enough if judged by the standard of right-thinking bystanders it would be viewed as humiliating or debasing the victim, showing a lack of respect for, or diminishing, his or her human dignity.⁷⁴

If one makes the issue of degradation hostage to the consent of the victim in order to reach the non-paternalistic result that one wants for the dwarf-tossing case or the prostitution case, it is not clear what becomes of these other cases in which we seem to want an active and demanding prohibition on degradation that is not dependent on consent in that way.

There is a more general point here. I get the impression from Dr. Hennette-Vauchez’s paper that she is already in possession of some reasonably clear convictions about how cases like the dwarf-tossing case or the prostitution case ought to come out, and she is concerned that the foundational value of dignity, as I and others are conceiving it, is yielding different results from that—wrong results in her opinion. And that is her reason for criticizing this sort of dignitarian foundation. An alternative approach would be to begin with a strong foundational commitment to dignity and to be willing to follow that commitment wherever it leads us, even if it leads us to revise some of our well-established positions. After all the case of prostitution and the case of dwarf-tossing are hardly clear-cut; they are fraught with moral difficulty and we are supposed to be appealing to foundational values to help us think them through.

Probably the course of wisdom is some sort of reflective equilibrium. We sometimes modify our given judgments about particular cases in the light of foundational commitments and we sometimes modify our foundational commitments, when we have a choice, in the light of our settled convictions about individual cases. We work at both ends, so to speak. But then it really is an open question about what should be settled and what should be up for grabs in the South African case of *State v Jordan* or in the dwarf-tossing case. Certainly what is valuable about Hennette-Vauchez’s criticism is that it alerts us to various dimensions of conflict and difficulty that might attend the use of dignitarian foundations. But alerting us to a possible difficulty is not the same as resolving the matter.

11. Conclusion

Let me return finally to my analysis of rights as responsibilities. The analysis I have given does not overlap perfectly with the foundation of rights in an objective conception of inalienable human dignity. It doesn’t quite cover the prostitution case or the dwarf-tossing case. Or to make it cover them, one has to stretch the notion of responsibility so that it covers something like a person’s responsibility for taking care of the element of human dignity located in his or her person. Still there are important similarities.

In any case, I think it very important to acknowledge that the analysis of rights as responsibilities will not apply to all rights. It does not apply for example to the right not to be tortured, which is simply a right protecting us against the worst that can be done by the state; and it does not apply in any straightforward fashion to rights that govern detention, interrogation, trial and punishment—unless one wants to say that these rights specify an adversarial responsibility and the privileges of that responsibility for a criminal defendant.

In other cases it will be unclear how to analyze certain rights, for example, rights to consent to medical treatment in relation to this model. Do such rights include the right to refuse life-saving treatment in all circumstances? Do they include the right to assisted suicide? These are important controversies and we should not think they are going to be settled by the concept of a right or any

⁷⁴ Regina (Burke) v General Medical Council (Official Solicitor intervening) [2005] QB 424, at §178.

particular theory of its analytic structure. On the contrary, our analysis of the relevant rights may reflect our view of how these cases ought to be settled, rather than *vice versa*.

In general, we should beware of thinking that one size fits all in the analysis of rights. “Rights” is a heterogeneous category and sometimes one form of analysis will be appropriate and sometimes another one will be. The pedagogical practice—prominent at Oxford, for example—whereby students are taught that there is a big face-off between Benefit or Interest theories of rights, on the one hand, sponsored by Jeremy Bentham and Joseph Raz, and Choice or Will theories of rights, on the other hand, sponsored by Rudolf von Ihering or H.L.A. Hart is unhelpful if it suggests that rights have to fit just one form of analysis. Some of the participants in this face-off no longer accept that dichotomy. In a paper entitled “Legal Rights,” written in 1973 and published in his volume *Essays on Bentham*, H.L.A. Hart conceded, in a section entitled “The Limits of a General Theory” that his choice theory of rights was inadequate to cover all aspects of all rights and that for certain aspects of certain rights it needed to be at least supplemented, if not supplanted, by a Benthamite “Benefit” theory.⁷⁵

The virtue of Hart’s early work in 1955⁷⁶ is that he made the choice-form available as an analytic resource, for capturing one aspect of some of these multi-faceted and exasperatingly diverse normative considerations, not that he managed to convince anyone that the Choice Theory captured everything there was to say about the formal characteristics of rights. And that is how I want to think about the responsibility-analysis. It is available as an account of certain rights; but it may not be useful for analysis of other rights.

I can imagine that once the responsibility-form for rights is made available—once it is well-understood among participants in rights-discourses—there may be a temptation by some people to use it in ways that other people will want to resist. For example, I can imagine pro-life people (anti-abortion campaigners) arguing that a woman’s right over her body and her reproductive capacities is to be understood as a responsibility—akin to the responsibility of parents—rather than as a pure right of willful choice. And I can imagine the distress and anger this might occasion among pro-choice advocates who are used to regarding a woman’s right over her body in a more empowering and emancipatory light. So there will be controversy although, since we know the responsibility-form for rights doesn’t fit all rights, it would be wrong to think that the mere availability of this form settles anything.

Someone committed to the pro-choice position may say that it is a strategic mistake to even raise the possibility of the responsibility-form of rights or make it available as a possible structure for understanding rights claims, because this will only add to the armory of the pro-life opposition, giving them ways of co-opting the language of women’s rights to express their side of the debate. But I don’t accept that. We should not be so shackled to an advocacy position, that we fail to notice different modes in which rights can present themselves and different ways in which the multi-faceted value of dignity may contribute to their foundation and expression; we should not suppress a possible way of thinking about rights just in order to deny our opponents a way of articulating their position.

We have come a long way from the British Green Paper on rights and responsibilities. And I suspect that this discussion is probably not what Jack Straw and his co-author had in mind when they talked about the need for a debate about responsibilities. They had in mind a cruder and perhaps more repressive idea of limits on rights and the imposition of obligation. I have taken the opportunity provided by their Green Paper to consider this more subtle way in which rights relate to responsibilities. Unlike a crude obligation-analysis, this way of thinking can be genuinely empowering (though as we have seen, the limits of its empowerment implications remain controversial). It is a way of thinking about freedom as authority, not just freedom as some willfulness that the society has to put up with. And it is a way of connecting rights with socially important functions not just seeing them as an individualist limit on the ambit of social functions. It is also, as I have said, an important way of

⁷⁵ Originally published as H.L.A. Hart, Bentham on Legal Rights, in OXFORD ESSAYS IN JURISPRUDENCE (A.W.B. Simpson ed., 1973).

⁷⁶ H.L.A. Hart, Are There any Natural Rights?, in Theories of Rights, supra note 45 (originally published in PHILOSOPHICAL REVIEW 1955)

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connecting rights with dignity. For these reasons, then, I think the responsibility form of rights is a useful and important resource to add to our analytic repertoire.

