

Constructing Human Dignity:
An Investment Concept

Submitted by Daniel Jonathan William Bedford to the University of Exeter
as a thesis for the degree of
Doctor of Philosophy in Law
In December 2014

This thesis is available for Library use on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature:

A handwritten signature in blue ink, appearing to read 'D Bedford', is written below the signature label.

Abstract:

This thesis explores the meaning of human dignity in law and its potential value as a legal concept. It claims that existing methods of analysis are predominantly caught up with seeking a fixed and conventional meaning, which has proven difficult and has invariably led to claims that the concept is vague or vacuous. In this light, the thesis proposes a fresh method of conceptual analysis that progresses the current debate on the meaning of the concept in a more fruitful and productive direction. It seeks to shift the focus of analysis away from the formal search for a clear concept that is simply there to be applied or repeated, in favour of constructing the concept to respond to the shifting problems that emerge in life, as well as unlocking new pathways to promote more dynamic, rich, active and joyful modes of living. In this respect, it is argued that a concept of dignity should be assessed not by how well it reflects the past, but how it can be constructed to produce change that unlocks new potentialities and creative tendencies in the present.

In deploying this methodology, the author seeks to construct a theoretically informed concept of human dignity that progresses beyond the limited focus on dignity as autonomy to encompass a more holistic, dynamic and interdependent view of human personality. The author explores a notion of dignity that he terms an 'investment concept'. On this account, the value of human life is situated in its creative potential that is inherent, which requires investment from the community and the individual in order to be nurtured. It depends on a relational view of humanity that sees the creative potentiality of an individual as always unfolding in relation to others in the community. This potential is promoted through increasing the power of acting and rest for both the body and mind that is joyful rather than sad. This establishes a multifaceted view of humanity that moves beyond the mainstream separation of mind-body, independence-dependence, emotion-reason, in favour of a more joined up and connected perspective on humanity that recognises that humans are vulnerable beings whose development depends upon the relationships and connections of which they are always a part.

The thesis explores the implication of this construction for the law in England and Wales, considering how the concept can be connected to existing legal pathways, as well as extending or unlocking new legal paths to create a better future for the most vulnerable. The process of connecting the concept to the existing legal framework is also treated as an important foundation for refining and enriching the concept by drawing on the complexity of human experience. In this sense, connecting human dignity to law is treated as a basis for reflecting on the way in which dignity can be refined, adapted or modified to address the concrete problems or experiences faced in life. The final part of the thesis explores the potential transformative implications of investment dignity for concepts that have been connected to human dignity, such as the rule of law

and democracy, which affect the relationship between the individual and the community.

Contents

Introduction.....	9
1. Background and Context: The Emergence of Human Dignity in the Law of England and Wales	9
2. Research Aims: Protecting the Most Vulnerable in the Law of England and Wales	13
3. Methodology: Constructing Human Dignity.....	16
3.1. Key Issues.....	16
3.2. Existing Methodologies in Philosophy and Law.....	18
3.2.1. Conventionalism	18
3.2.2. Interpretivism	20
3.2.3. Constructivism as a Methodology	21
3.2.4. Concepts as Open Multiplicities	22
3.2.5. Responding to Problems.....	23
3.2.6. The Becoming of Concepts.....	24
3.2.7. Connecting Concepts.....	25
3.2.8. Improving the Future	26
4. Structure of Thesis.....	27
4.1. Section One: Constructing an Investment Concept of Dignity.....	27
4.2. Section Two: Testing the Investment Concept of Dignity	29
4.3. Section Three: Implications of Investment Dignity.....	30
Chapter One: Human Dignity as an Essentially Triadic Concept.....	32
1. Introduction	32
2. Different Constructions of Dignity	33
2.1. Introduction	33
2.2. Teleological Dignity	34
2.2.1. Imago Dei	34
2.2.2. Naturalism	36
2.2.3. Conclusion.....	41
2.3. Deontological Dignity.....	42
2.3.1. Moral Autonomy.....	42
2.3.2. Personal Autonomy	44
2.3.3. Conclusion.....	46
2.4. Status Dignity	47
2.4.1. Source of Status	49
2.4.2. Determining Honour.....	50
2.4.3. Acting Honourably	51
2.4.4. Conclusion.....	52
3. Common Components: The Triadic Nature of Human Dignity	53
3.1. A Triadic Concept.....	53
3.1.1. Discerning the Nature of Humanity	53
3.1.2. Seeking the Value of Humanity.....	54
3.1.3. Defining Respect for the Value of Humanity	54
3.2. Assembling Human Dignity in Response to Problems	55
3.2.1. Conflict.....	57
3.2.2. Loss of Control.....	57
3.2.3. Resistance to Oppression.....	58
3.2.4. Marginalisation and Subordination.....	59
4. A Problematic Concept	59
4.1. Introduction	59
4.2. Exclusion of the 'Other'	60

4.2.1.	Gender Bias.....	60
4.2.2.	Excluding the Physically Disabled	61
4.2.3.	Excluding the Irrational	62
4.3.	Obscuring Lived Experience	64
4.3.1.	Recognising Human Vulnerability and Interdependency	64
4.3.2.	Creating Systems of Subordination	65
4.4.	Connecting to Change.....	66
4.4.1.	Obstructing Creativity	66
5.	Conclusion.....	67
Chapter Two: An Investment Construction of Human Dignity.....		69
1.	Introduction.....	69
2.	The Substance of an Investment Concept.....	73
2.1.	Positioning Value in the Inherent Potential of Human Life.....	73
2.2.	The Multifaceted Nature of Humanity	76
2.2.1.	Powers of Acting and Capability	76
2.2.2.	Mind and Body.....	81
2.2.3.	Emotion and Reason	83
2.2.4.	Joy and Sadness	86
2.2.5.	Motion and Rest.....	89
2.2.6.	Becoming and Unfolding.....	90
2.2.7.	Inter-Dependency and Connectedness	91
2.2.8.	Recognising Human Vulnerability	91
2.2.9.	Mutual Becoming and Reflexivity.....	96
2.3.	Respecting Inherent Potential through Sufficient Investment.....	97
2.3.1.	Collective Investment into Conditions that Promote Inherent Potential.....	97
2.3.2.	Active Investment, Reason and Productive Encounters	99
2.3.3.	Individual Responsibility and Active Agency	101
2.4.	Conclusion	105
3.	Testing the Investment Construction of Human Dignity	105
3.1.	Test I: A Defence	105
3.1.1.	Inclusion of the 'Other'	105
3.1.2.	Addressing Vagueness.....	106
3.1.3.	Responding to Lived Experience	108
3.1.4.	Enabling Freedom	109
3.1.5.	Endorsing Creativity.....	111
3.2.	Test II: Anchoring the Concept in Law.....	112
3.2.1.	Bodily Dimension	112
3.2.2.	Psychological Dimension	115
3.2.3.	Social Dimension	117
3.2.4.	Recreational Dimension.....	117
4.	Conclusion.....	118
Chapter Three: Potential Protection in the Common Law		119
1.	Introduction.....	119
2.	Human Dignity as a Value in the Common Law	123
2.1.	Introduction	123
2.2.	Incidental Protection of Human Dignity	124
2.3.	Intentional Protection of Human Dignity	124
2.4.	Integral Protection of Human Dignity	128
2.5.	Conclusion	130
3.	Human Dignity as an Investment Concept in the Common Law.....	131

3.1.	Introduction	131
3.2.	Multifaceted Personality	132
3.3.	Becoming and Developmental Personality.....	137
3.4.	Human Vulnerability	138
3.5.	Conclusion	142
4.	Investment Dignity and the Spirit of the Common Law	142
4.1.	Introduction	142
4.2.	Work-In-Progress: Encountering Difference and Openness to Change 143	
4.3.	Change: Implications for the Common Law	147
4.4.	Conclusion	151
5.	Overall Conclusion	151
	Chapter Four: Potential Protection under the Human Rights Act 1998	154
1.	Introduction	154
2.	Protection of Human Dignity under the Human Rights Act 1998	156
3.	Investment Dignity and Positive Obligations	159
3.1.	Article 3: Investment into a Minimum Core	160
3.1.1.	Scope for Protecting and Promoting Dignity	160
3.1.2.	Existential Conditions of Investment Dignity	163
3.1.3.	Human Vulnerability and the Spectrum of Dependency	166
3.2.	Article 8: Holistic Humanity and Dignity as a Prism	171
3.2.1.	Scope for Protecting and Promoting Dignity	171
3.2.2.	Potential for Positive Investment under Article 8: <i>Deploying Dignity in the High Court</i>	173
3.2.3.	Limiting Positive Investment under Article 8: <i>Dignity in the Supreme Court</i> 180	
4.	Convention Rights and the Openness of Human Dignity	201
4.1.	Openness and Difference.....	201
4.2.	Openness and Multifaceted Humanity.....	203
4.3.	Openness and Dialogue.....	204
5.	Conclusion	210
	Chapter Five: The Rule of Law as a Productive Encounter.....	212
1.	Introduction	212
2.	The Protection of Human Dignity and the Rule of Law	214
2.1.	An Immanent Connection to Human Dignity	214
2.2.1.	Respect for Rational Autonomous Agency	214
2.2.2.	Solution to Conflict.....	215
2.2.3.	Equal Respect	216
2.3.	Dignity at the Crossroads	218
2.4.	Conclusion	223
3.	Stability in the Promotion of Human Dignity	224
3.2.	Introduction	224
3.3.	Active Agency	224
3.4.	Insecurity Vulnerability	225
3.5.	Active Striving	226
4.	Justification as a Condition of Dignity	227
4.2.	Introduction	227
4.3.	Active Agency	227
4.4.	Exclusion Vulnerability	228
4.5.	Conclusion	229
5.	The Rule of Law as a Productive Encounter.....	229

5.2. Introduction	229
5.3. Law as Knowledge	230
5.4. Law as an Encounter.....	231
5.5. The Becoming of Law.....	234
5.6. Stabilising the Becoming of Law	237
5.7. Dialogue with those Most Affected	240
5.8. Conclusion.....	241
Chapter Six: Respecting Investment Dignity through Dialogic Democracy	242
1. Introduction.....	242
2. Democratic Theory and Human Dignity	244
2.1. Introduction	244
2.2. Majoritarian Democracy	245
2.3. Partnership Democracy.....	247
2.4. Communicative Democracy	248
2.5. Conclusion	250
3. Democratisation and Dialogue.....	251
3.1. Introduction	251
3.2. Communication and Interrelationality	251
3.3. Openness to Difference	253
3.4. Disruption of Repetition.....	254
3.5. Conclusion	255
4. Enhancing Dignity through Democratic Dialogue	256
4.1. Introduction	256
4.2. Becoming-Active	256
4.3. Becoming-Minoritarian	258
4.4. Becoming-Other.....	259
5. Conclusion.....	261
Conclusion.....	264
1. Constructing Human Dignity	264
2. Creating Connections	269
2.1. Promoting Constructive Dialogue	269
2.2. Developing Capabilities in a Relational Framework	270
2.3. Openness to Otherness and Difference.....	271
2.4. Co-Operation and Interdependence.....	273
2.5. Stability and Creativity	273
3. Investing in the Future	274

Introduction

1. Background and Context: The Emergence of Human Dignity in the Law of England and Wales

The past two decades have seen an explosion in references to human dignity in the law of England and Wales. It has progressed from an idea on the very margins of legal discourse to one that is now deployed in legal argument in response to a seemingly endless array of issues. It has been deployed in such distinct fields as immigration¹, social welfare², discrimination³, detention⁴, defamation⁵, end-of-life decision making⁶, harassment⁷, procedural fairness⁸, and sexual abuse.⁹ It is perhaps therefore unsurprising that human dignity has become of increasing interest to legal scholarship in England and Wales where, up until 1999, there were no concentrated studies evaluating the role of the concept.¹⁰ These developments represent a widening of the relevance of human dignity in England and Wales. At the same time, there has been a deepening of significance. A concept that was once described as 'less fundamental'¹¹ than values such as security and autonomy, is now being described as '*the* core value of our society' and even a 'core value of the common law.'¹²

The deepening of the significance and widening of the relevance of human dignity is unquestionably a consequence of the introduction of the Human Rights Act (HRA) which in 2000 gave further effect to the European Convention on Human Rights (ECHR). Despite the absence of human dignity anywhere in the text of the HRA, or the ECHR, human dignity has been recognised by the judiciary as the essence of all the human rights enshrined in those

¹ *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152.

² *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33.

³ *Hall v Bull* [2013] UKSC 73.

⁴ *R. (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220.

⁵ *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972.

⁶ *Airedale N.H.S. Trust v Bland* [1993] AC 789.

⁷ *London School of Economics and Political Science v Lindsay* [2013] EWCA Civ 1650

⁸ *Osborn v the Parole Board, re Reilly* [2013] UKSC 61.

⁹ *AT & Ors v Dulghieru & Anor* [2009] EWHC 225.

¹⁰ David Feldman 'Human dignity as a legal value: Part 2' (2000) PL 61.

¹¹ David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 132.

¹² *R (On the Application of A, B, X and Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (East Sussex case) [86].

instruments.¹³ In addition, the HRA has accelerated the development of human dignity in the common law of England and Wales, as a result of the obligation on domestic courts to act compatibly with Convention rights and, by necessary implication, the interests they protect. The extraordinary growth in the use of human dignity shows very few signs of abating and, in fact, is very likely to increase due to two key developments in European Union Law. Firstly, human dignity is being expressly referred to in an increasing number of secondary sources of EU law, which impose obligations on Member States to protect human dignity in particular contexts.¹⁴ Secondly, human dignity is now an important concept in the primary sources of EU law, which imposes an obligation on Member States to comply with the duty to respect and protect human dignity when implementing Union Law.¹⁵

These developments in the use of human dignity in the law of England and Wales have not led to the emergence of a single or complete definition of the concept. A number of commentators have therefore described the meaning of the concept in the law of England Wales in terms that suggest it is uncertain, unclear and unfinished.¹⁶ The growth in jurisprudence on human dignity has not necessarily therefore been matched by an improvement in its understanding.¹⁷

Domestic developments occur at the same time as the use of the concept internationally has been the subject of significant philosophical controversy. The judicial use of human dignity in England and Wales is not insulated from such controversy. Dignity as a legal concept is often understood to reflect different philosophical conceptions.¹⁸ In this regard, major controversy surrounds the competing legal definitions of human dignity that reflect competing ideas of the Good. This has led to a deep-rooted scepticism by those who argue that dignity is vacuous, or that the many incompatible senses make it incapable of resolving

¹³ *Pretty v United Kingdom* [2002] ECHR 427, [65]; *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 [39].

¹⁴ Art 3(3) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L303/16.

¹⁵ Article 1, Charter of the Fundamental Rights of the European Union (2000/C 364/01) OJ C326 12.

¹⁶ Justin Bates, *Human Dignity – An Empty Phrase in Search of Meaning?* [2005] JR 165; Conor Gearty, *Principles of Human Rights Adjudication* (OUP, 2004).

¹⁷ Conor Gearty, *Principles of Human Rights Adjudication* (Ibid) 91.

¹⁸ Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183, 186; David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 128.

difficult disputes.¹⁹ The consequence is that recourse to human dignity enables a judge to adopt whatever conception of dignity would support their convictions.²⁰ This is a criticism that has been directed at judicial uses of human dignity in England and Wales, in light of the apparent lack of a singular authoritative definition.²¹

The controversy surrounding dignity is not only based on the fact that disagreement exists about its meaning, but also on the perception that certain uses of dignity threaten other legal and ethical concepts, such as autonomy. Thus, in some quarters, human dignity has gained a reputation for being a potentially paternalistic concept that is used to restrict individual choice and impose the value choices of judges or the community.²² Although this has not become a prominent feature of the law in England and Wales, some cases have suggested that human dignity might be used as a tool of constraint as opposed to empowerment.²³ Moreover, the vagueness of human dignity, and the risk of discretion it affords to judges, has been argued as antagonistic to the rule of law and to democracy.²⁴ Thus, whether human dignity is treated as an empty concept, or a paternalistic concept, it is treated (by some) as best left out of the legal discourse or, at the very least, out of the hands of judges.²⁵

The hostility towards the concept of dignity in the literature, whilst prominent, is not a universal theme. In a number of recent works dignity is being treated as an essential value that supplements, precedes or replaces concepts such as autonomy or best interests (values that are familiar to the law in England and

¹⁹ Ruth Macklin, 'Dignity is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy' (2003) 327 *British Medical Journal* 1419-20; Steven Pinker, 'The Stupidity of Dignity' (2008) *The New Republic* 28; M Bagaric and J Allan, 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 257.

²⁰ David Feldman 'Human dignity as a legal value: Part 1' (1999) PL 682, 685. Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655, 655.

²¹ Bates (n 10); Conor Gearty, *Principles of Human Rights Adjudication* (n 10).

²² Neomi Rao (n 18); David Feldman 'Human dignity as a legal value: Part 1' (n 11); Stephanie Hennesse-Vauchez, 'A human dignitas? Remnants of the ancient legal concept in dignitary jurisprudence (2011) *International Journal of Constitutional Law* 32.

²³ *C v A Local Authority* [2011] EWHC 1539. See Roger Brownsword, 'Human Dignity, Human Rights, and Simply Trying to do the Right Thing' in Christopher McCrudden (eds), *Understanding Human Dignity* (OUP, 2013); David Beylveled and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP, 2002) Ch 2 and 3.

²⁴ Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (n 20) 721.

²⁵ Conor Gearty, *Principles of Human Rights Adjudication* (n 16) 162.

Wales).²⁶ A recurring theme is the claim that human dignity is not subject to the same limitations as autonomy on the grounds that the latter concept places significant emphasis on rationality and independence, which is incapable of addressing the needs of some groups who may not fit the autonomy mould.²⁷ It is in this light that commentators are increasingly connecting dignity to issues of compassion, care, holism, vulnerability and disadvantage.²⁸ Whilst there is no all-encompassing definition of human dignity in England and Wales, the concept has, at the very least, been closely connected by judges to the protection of marginalised groups whose needs and desires may not be encompassed within established social or legal structures.²⁹

The use of human dignity to protect marginalised groups has had important transformative implications for other core legal values. The principles of democracy and the rule of law, for instance, have both been interpreted through the prism of human dignity to require that minority groups be treated with equal respect, even if the majority do not respect them or designate them as unworthy.³⁰ Some commentators have even suggested that human dignity might be an important foundational value of democracy and the rule of law.³¹

Perspectives on the utility of human dignity as a legal value therefore fundamentally differ. On the one hand, dignity is understood to have a potentially key role to play as a concept used to address the issues experienced by the most vulnerable. The protection of the dignity of such groups carries important implications for concepts like democracy and the rule of law, which need to be understood as substantive concepts (as opposed to formal or procedural) that require people to be treated with equal respect. On the other

²⁶ Lord Justice Munby, 'What Price Dignity?' (Lag Community Care Conference: Protecting Liberties, July 2010); Foster (n 10).

²⁷ Martha Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (US Independent Agencies and Commissions 2008); Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) EHRLR 190.

²⁸ See David Beylveid and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2002); George Harris, *Human Dignity and Vulnerability: Strength and Quality of Character* (University of California Press 2007); Mary Neal, 'Not gods but animals: human dignity and vulnerable subjecthood' (2012) 23 *Liverpool Law Review* 177.

²⁹ *East Sussex case* (n 12) 67; *R (on the application of Bernard) v Enfield LBC* [2002] EWHC 2282 [34] [93]; Baroness Hale, 'What Can the Human Rights Act Do for my Mental Health?' (2005) 17 *Child and Family Law Quarterly* 295, 305.

³⁰ *Ghaidan* (n 13) 132.

³¹ Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263, 273; Daly, *Dignity Rights* 132.

hand, dignity is understood to be unclear and lacking in definition. It does not supplement autonomy, but undermines it. It does not solve disputes, but makes them more complicated.

It seems highly unlikely that such scepticism will mean human dignity disappears from legal discourse.³² The major issue (and perhaps better question to ask) is therefore not whether the concept of human dignity should be recognised as a legal value, but whether it is possible to carve out a legitimate and distinctive role for the concept in the existing legal and theoretical framework. One that reflects a more complex image of humanity and provides protection for those who are most vulnerable, which more familiar concepts may not be able to achieve to the same extent, whilst responding to the complaints that it is vague, vacuous or potentially paternalistic.

2. Research Aims: Protecting the Most Vulnerable in the Law of England and Wales

This thesis seeks to justify and carve out such a distinctive role for human dignity in the law of England and Wales. It firstly proposes a philosophically informed definition of human dignity that develops the relationship between dignity and the concepts of vulnerability, holism and creativity. Although connections between these concepts are often made in legal practice, as noted above, there is not a great deal by way of theoretical justification that explains how, why and in what way the concepts are connected. It argues that existing accounts of dignity (particularly autonomy-based models) are not always successful in encompassing the rich complexity and diversity of our shared humanity. This thesis seeks to develop the connection between dignity and vulnerability by firstly positioning dignity within the wider capabilities approach to realising justice, which has, at its core, a central concern with promoting and protect the development of the most vulnerable.³³ The thesis reorients the capabilities approach to dignity around the philosophical thinking of Baruch Spinoza and Gilles Deleuze, whose theories are centrally concerned with what a person is capable of being and doing, but, at the same time, avoid the

³² Christopher McCrudden, 'Introduction' in *Understanding Human Dignity* (British Academy, 2013) 1.

³³ See Amartya Sen, *The Idea of Justice* (Belknap Press: HUP, 2009); *Creating Capabilities: The Human Development Approach* (Belknap Press: HUP, 2011).

perfectionism of Aristotle and the narrow Kantianism of Rawls.³⁴ The purpose is to show how, in providing an alternative capabilities model to understanding dignity, Spinoza and Deleuze offer convincing insights into the way capabilities are necessarily related to respect for diversity, inter-dependency, experimentation, emotional needs, rest, becoming, inclusion, community and individuality.

These thinkers situate vulnerability at the core of their conception of human capabilities, recognising the radically open and immanent nature of human subjectivity, in which people are necessarily open to development and composition, as well as decomposition and destruction.³⁵ Vulnerability, on this account, is not merely a negative concept, but is also, it will be argued, central to the very type of dignity that we possess as human beings. These different components of humanity are then used as a framework to construct an 'investment' concept of human dignity.

The investment concept takes a holistic approach to humanity, providing a distinctive role for the concept; it requires investment in to the creative potentiality of human life by promoting and protecting *activity* and *rest* for the *mind* and *body* that is *joyful* rather than *sad*. This occurs within a network of interrelationality, in which people necessarily depend upon making connections with other people and bodies in the world to sustain and develop their capabilities. Investment, on this account, is prioritised for the most vulnerable, who live in the most circumscribed and isolated conditions, restricted in terms of making those important connections. It is hoped that this conception, which focuses on wider philosophical discussions on the meaning of human dignity, will shed new light on the development of human dignity in England and Wales, as well as open new vectors for the development of human dignity to respond to and address the needs of particularly vulnerable people.

The second part of the thesis tests the concept of investment dignity by considering how it connects to existing judicial uses of human dignity in the law of England and Wales. The purpose of this is to consider how the theoretically rich concept of investment dignity could be realised in the messy practice of law

³⁴ Daniel Smith, *Essays on Deleuze* (Edinburgh University Press, 2012) 176.

³⁵ See p90.

and, at the same time, potentially shed light on aspects of the use of human dignity, including its connection to vulnerability, which are not always fully articulated by the judiciary. Moreover, connecting investment dignity to existing judicial uses of the concept, as discussed further in the methodology session, can draw on existing elements of legal normativity to suggest ways in which the law might be developed to create a better future. Importantly, testing a concept, by relating it to a particular factual situation, is not merely about determining how a pre-determined abstract concept applies to a set of facts, but is also a process of deepening and enriching the concept.³⁶

In order to test the concept of investment dignity against the current legal framework in England and Wales, the thesis considers two major sources of legal protection in the form of the common law (defined broadly as causes of action and remedies developed through judicial precedent) and the HRA, both of which have already been expressly linked to the protection of human dignity.³⁷ This thesis does not seek to evaluate the entire range of potential mechanisms for the protection of human dignity, neither, of course, does it seek to undermine them. There are clearly a wide range of statutory mechanisms that may effectively protect human dignity.³⁸ However, unlike the common law or HRA, such provisions remain narrowly focused and therefore do not attend to wider definitional issues. Moreover, the common law and HRA are treated, to a degree, as providing constitutional oversight of existing legislation, or supplying the omission of statute.³⁹ Focusing on the common law and HRA will allow for indirect consideration of the protection afforded to human dignity in statute, at the same time as focusing on the most significant issues and limitations concerning the protection of human dignity in England and Wales.

This thesis does not directly address the protection of human dignity under the EU Charter of Fundamental Rights. The central aim of this section is to test the investment concept of dignity against the existing protection of human dignity in law, whereas the Charter, whilst entailing significant potential, is still only in the

³⁶ See p118.

³⁷ *East Sussex* (n 12) 86.

³⁸ Protection from Harassment Act 1998; s26(1) Equality Act 2010; See Gay Moon and Robin Allen, 'Dignity discourse in discrimination law: a better route to equality?' (2006) EHRLR 610.

³⁹ *Regina v Secretary of State for the Home Department, Ex parte Pierson* [1998] A.C. 539; *Regina v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 A.C. 115.

very early stages of judicial development.⁴⁰ It is hoped, however, that an analysis of existing dignity protection can provide an informed basis for a discussion on the way that instruments like the Charter may develop.

The introduction of investment dignity into the legal and theoretical framework is unlikely to correspond to all existing aspects of legal discourse in England and Wales. Nor necessarily should it, if it is to bring about improved social and living conditions for particularly vulnerable people who may be subject to isolation, indifference or prejudice. Investment dignity is very likely therefore to have important implications for some other core legal concepts. This is particularly the case in respect of the rule of law and democracy that have been recognised as having their foundation in human dignity (as noted above). The final aim of the thesis is therefore to consider the implications of the proposed definition of human dignity on democracy, which informs the doctrine of parliamentary sovereignty, and the rule of law, which affects the distribution of powers.

3. Methodology: Constructing Human Dignity

3.1. Key Issues

The methodological problem of how to identify the meaning of human dignity is one of, if not the most, important issues faced by scholars.⁴¹ It is the first question that needs to be asked in determining the meaning and function of dignity. Each methodological approach to understanding dignity begins with, and brings with it, different assumptions or expectations of how to discern the meaning of a concept.⁴² More importantly, different methods conceive of the utility and function of concepts in different ways. A deductive approach might, for instance, place significant emphasis on the value of concepts as tools to

⁴⁰ Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 *Liverpool Law Review* 281; Catherine Dupré, 'Article 1 of the European Union Charter of Fundamental Rights' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014). in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014).

⁴¹ Christopher McCrudden, 'Introduction' in *Understanding Human Dignity* (British Academy, 2013) 54.

⁴² Marcus Duwell, 'Human dignity – concept, discussions, philosophical perspectives' in Roger Brownsword (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP, 2014)

resolve disputes, whereas an inductive approach might place a stronger emphasis on dialogue.⁴³

It is therefore surprising that a number of definitional approaches have proceeded to define the concept without a self-reflective or critical attitude to the methods that are deployed, or a consideration of the implications of alternative methods. Recent studies, however, demonstrate an emerging focus on the importance of methodology to understanding human dignity, especially in terms of interdisciplinary dialogue.⁴⁴ One important trend is the recognition of the close and symbiotic relationship between philosophical and legal approaches to human dignity. Interpreting a legal concept does not take place in a vacuum and is likely to be heavily informed by, or at least reflect, a particular vision of the good.⁴⁵ In turn, philosophical approaches can, as McCrudden has argued, benefit from 'exposure to legal debates because lawyers focus on concrete cases'.⁴⁶ Much might therefore be gained by paying attention to the intersection between legal and theoretical approaches.⁴⁷

This section argues that attempts to understand dignity as both a legal and theoretical concept predominantly, although not exclusively, conform to a leading taxonomy proposed by Dworkin on the different conditions under which a concept can arise.⁴⁸ According to Dworkin, conventionalist, or interpretivist methods offer different forms of conceptual analysis.⁴⁹ These (sometimes implicit) methods of conceptual analysis are, it is argued, applied to dignity as a theoretical and legal concept, with the exception that the latter conceptual analysis focuses primarily on its formation within a particular institutional framework, potentially constrained by notions of fairness, tradition and procedural due process. Each of these methods and its assumptions has different limitations for understanding a rich and complex concept like dignity.

⁴³ Ibid

⁴⁴ Roger Brownsword (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP, 2014); Christopher McCrudden, *Understanding Human Dignity* (n 41).

⁴⁵ See n 18.

⁴⁶ McCrudden, *Understanding Human Dignity* (n 41) 54.

⁴⁷ Alexandra Kemmerer, 'Dignified Disciplinarity: Towards a Transdisciplinary Understanding of Human Dignity' in McCrudden, *Understanding Human Dignity* (n 41) 649.

⁴⁸ Ronald Dworkin, *Justice for Hedgehogs* (Belknap: Harvard University Press 2011) 158.

⁴⁹ Ronald Dworkin, *Law's Empire* (Hart, 2010).

In light of some of the limitations of the leading methods, this section will set out an alternative methodology to be used to understand the concept of dignity. This section will explain how the thesis uses a constructivist method of conceptual analysis developed by Gilles Deleuze. This entails constructing dignity by developing, refining and modifying its different components, as well as the relationship between them, to respond to the shifting problems and differences that invariably emerge in time. This methodology, it is argued, has the benefit of moving the current legal and theoretical debate beyond the formal search for the fixed meaning of the concept, to construct the concept to unlock new possibilities for life-enhancing modes of being that address the needs of the disadvantaged or excluded.

3.2. Existing Methodologies in Philosophy and Law

3.2.1. Conventionalism

The conventionalist methodology seeks to uncover existing convergence in the criteria by those who use the term dignity. In the context of law, the focus is shifted to finding convergence in the use of the term by particular legal actors, such as judges.⁵⁰ This method of analysis is often adopted in such a way that leads to one of three outcomes, which all treat dignity as a concept lacking practical value. The first is that dignity has a shared meaning, but it is of such a high level of generality that it remains vague or vacuous.⁵¹ The second is that dignity means many different things, representing different concepts that are governed by different criteria. In this light, solving practical dilemmas comes down to an arbitrary choice between different uses of the term dignity.⁵² The third is that some of the criteria used to identify dignity are identical to the criteria used by other concepts, such as autonomy, which makes the concept largely superfluous.⁵³

The first possible limitation of the conventionalist methodology is that it leads towards vagueness and contradictory understandings, not only of human dignity, but all value concepts. It is notable that the conclusions that dignity is vague or contradictory that are reached by some scholars are largely treated

⁵⁰ Rao (n 18)

⁵¹ Ibid; See also M Bagaric and J Allan, 'The Vacuous Concept of Dignity' (n 19).

⁵² Rao (n 18).

⁵³ Macklin (n 19).

either explicitly or implicitly as isolated issues for dignity.⁵⁴ These characterisations, however, appear to express an unfair bias against dignity, for they do not consider how the conventionalist approach would apply to concepts such as freedom or equality. Over half a century ago Isaiah Berlin demonstrated how there was no consensus on the use of the term freedom and very different conventional accounts.⁵⁵ On a conventional analysis it seems unfair to label dignity as exclusively a vague or contradictory, when the same method might lead to similar conclusions in relation to other concepts.

The second possible consequence of applying the conventionalist methodology to any value concept, including dignity, is that it can tend towards emphasising conflict. Where there are different criteria concepts, no rational standpoint exists from which to choose between concepts.⁵⁶ The conventionalist approach to concepts therefore emphasises the disagreement, even conflict, over the choice of values underplaying the reality that although there are differences there are some shared concerns which are 'common across the differences, and in spite of them.'⁵⁷

Conventionalist accounts of dignity therefore place particular emphasis on reporting on the way in which the term has been used historically and comparatively. Importantly, the method does not address the issue of who has used the concept of dignity to their advantage and *who* has influenced its formation. Over time, certain actors may have a more dominant or subordinate roles in the influence in the formulation of particular criteria to further particular interests. It may thus be the contention of some feminists, or disabled persons, that leading conventionalist concepts have largely been formulated with masculine ideals, or the able-bodied as the central case.⁵⁸

The conventionalist methodology therefore largely detaches the use of the word dignity from the context within which it was formed. This is true also in the way the conventionalist approach to dignity does not consider the related question of *why* the concept was so formed. In seeking the shared criteria used in the

⁵⁴ Rao (n 18) 190; Macklin (n 19) 1420.

⁵⁵ Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty* (Ian Harris tr, OUP 2002) Ch 3.

⁵⁶ Rao (n 19) 192.

⁵⁷ Mark Olssen, *Liberalism, Neoliberalism and Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education* (Routledge 2009) 111.

⁵⁸ Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011).

meaning of the concept, criteria methodology detaches concepts from the issues and problems they are addressed to solve.

3.2.2. Interpretivism

The second type of conceptual analysis that is commonly applied to dignity is in what Dworkin terms an interpretive approach.⁵⁹ The interpretive method largely seeks to determine the meaning of a concept, such as dignity, by providing a particular characterisation of that value, which best justifies shared paradigms.⁶⁰ This methodology therefore begins with proposing paradigm cases in which most people share a conviction that a certain treatment is right or wrong and then proposes a conception that justifies it. In turn the interpretive methodology commonly seeks to explain how the concepts cohere with other concepts that correspond to the largest number of paradigms possible.⁶¹

This interpretive model is mirrored in law, according to Dworkin, when judges or doctrinal scholars seek to offer the best possible interpretation they can of as many paradigm legal cases as possible by proposing principles that explain those cases in a way that is at the same time coherent with other principles.⁶² This approach is clearly reflected in Dworkin's attempt to define dignity as authenticity and personal responsibility. He does so by trying to provide a coherent interpretation of particular legal paradigms, such as the prohibition of torture, or the idea that the innocent should not be punished.⁶³ This method is also implicit in the work of Susanne Baer who seeks an interpretation of dignity, equality and autonomy that inform each other and make sense of paradigm human rights violations.⁶⁴

The interpretive methodology invariably offers a less sceptical view of dignity than a conventionalist methodology, as it suggests there are better and worse ways of interpreting paradigm cases. However, it does so through the formation

⁵⁹ Ronald Dworkin, *Justice for Hedgehogs* (n 48) 158.

⁶⁰ Ibid 161.

⁶¹ Ibid 108-109.

⁶² Ronald Dworkin, *Law's Empire* (Hart 2010) 225-276.

⁶³ Dworkin, *Is Democracy Possible Here? Here: Principles for a New Political Debate* (Princeton University Press, 2006) 161. The interpretive method espoused by Dworkin is similar to John Rawls idea of the reflective equilibrium. Indeed, Dworkin explicitly recognises that his methodology is inspired by Rawls, see Dworkin, *Justice in Robes* (Belknap: Harvard University Press 2008) 241-261.

⁶⁴ Susan Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 U of Toronto L J 417, 466-467.

of a grand overarching theory that seeks coherence or equilibrium between concepts. It is in the pursuit of such a theory that the interpretive methodology fails to explain some central features of the formation of concepts. Firstly, it does not explain how existing judgments and concepts change over time. Individuals quite regularly change their individual convictions and their understanding of concepts, but not only because they find incoherence in their thought processes. Most notably, individual judgments are changed by experiencing difference or otherness, new encounters with individuals and forces in the world, or experiences new problems or issues that were not faced in the past..⁶⁵

This leads into a second concern with the use of the interpretive methodology as it appears to endorse an underlying assumption of isolationism and separateness in the formulation of concepts, as it predominately focuses on the model of the herculean man⁶⁶, or hypothetical council of rational individuals behind a veil of ignorance.⁶⁷ This carries an undeniable risk that a concept becomes exclusive in its scope, accounting for the convictions (preconceptions or prejudices) of the predominant or ideal group in the interpretive community.⁶⁸

The third possible limitation with the interpretive methodology is that it often leads to abstractness and broad generalisations that become detached from the issues faced by persons in particular circumstances. Dworkin often seeks to interpret concepts by appealing to, by his own admission, contrived and bizarre cases that are detached from the world that we encounter.⁶⁹ This form of knowledge is more concerned with orderliness in the way that concepts cohere, then with addressing the specific needs and problems faced by persons in real cases.⁷⁰

3.2.3. Constructivism as a Methodology

This section proposes a third alternative method for analysing dignity that seeks to avoid the limitations of the criteria or interpretivist methods discussed above. This is a constructivist methodology that is grounded in the political philosophy

⁶⁵ Amartya Sen, *The Idea of Justice* (Belknap Press: HUP 2009) viii.

⁶⁶ Dworkin, *Law's Empire* (n 62) 239.

⁶⁷ John Rawls, *A Theory of Justice* (5th Ed, HUP 2003).

⁶⁸ See John Rawls, *Political Liberalism* (Columbia, 2005) 20.

⁶⁹ Dworkin, *Justice for Hedgehogs* (n 59) 280.

⁷⁰ Hans Georg-Gadamer, *Truth and Method* (Garrett Barden and John Cumming trs, Sheed and Ward 1975) 317.

of Baruch Spinoza and Gilles Deleuze.⁷¹ Their method of conceptual analysis can, it is argued, help to take current debate on the meaning of dignity at the intersection of law and theory in a more productive and fruitful direction. Constructivism, unlike existing approaches to the concept, which has invariably led to disappointment in the failure to uncover a singular authoritative definition, does not seek to merely repeat or capture the existing meaning of the term 'dignity'.

Constructivism moves beyond the search for the fixed meaning of the term, or an abstract interpretive unity, to construct the concept in response to the emerging differences and shifting problems that occur in time. The aim of constructivism is therefore to create concepts that can extend existing legal movements and open new ones in order to unlock enhanced modes of being. More importantly, the constructivist methodology treats the 'openness' of a concept as a key advantage to its ability to respond to the nature of human life, which is marked by creativity and difference that emerges in time.⁷²

Whilst constructivism does emphasize the inevitable need for creative adaptation, it is not a completely unrestrained practice. As seen below, any construction of the concept will need to bear some resemblance to existing concepts and must connect to, as well as advance, existing legal (and social) developments. Moreover, and as noted above, any construction should open up pathways that further enhance creativity, activity and life, contributing to a better future for the disadvantaged.

3.2.4. Concepts as Open Multiplicities

A key strength of the constructivist method of analysis is its ability to explain how concepts of dignity may differ, but may, at the same time, share common features. The constructivist method treats concepts as a complex body that is made up of different component parts, which themselves may be made up of other components.⁷³ According to Deleuze, a concept is always a singular multiplicity, a characteristic relationship between its component parts. It is the

⁷¹ Gilles Deleuze and Felix Guattari, *What is Philosophy?* (trs Hugh Tomlinson, Graham Burchill, Verso 1994); Paul Patton, *Deleuze and the Political* (Routledge, 2000) 1-18; Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008).

⁷² Alexandre Lefebvre, *Human Rights as a Way of Life: On Bergson's Political Philosophy* (Stanford University Press 2013) 90.

⁷³ G Deleuze and F Guattari (n 71) 15-16.

'point of coincidence, condensation or accumulation of its own components.'⁷⁴
 This method unlocks a new way of analysing and understanding dignity by being attentive to the manner in which the component concepts or parts of dignity are arranged and relate to one another in a particular relationship. Where the different components of dignity are arranged in a particular way or a particular interpretation is given to a component, or a component is added or subtracted, then the characteristic relationship of a concept of dignity changes. As a useful comparison, consider the following example of the social contract provided by Paul Patton:

[T]he state of nature, the restless desire for power, the natural laws of human reason and the artificial person or...[Sovereign] which results from the compact.⁷⁵

The concept of the social contract is therefore made up of different component parts (state of nature, power, natural law, sovereign), but its meaning shifts according to a change in one or more of the elements, so that, for instance, a difference can be made depending on whether the subject relinquishes or lends power to a sovereign authority.⁷⁶ This method therefore has the benefit of explaining how the meaning attributed to dignity is not static and may vary over time. In the following chapters, the key will therefore be to highlight the ways in which component parts of the concept of human dignity are creatively changed, added to and subtracted from the concept over time, in ways that alter its singular meaning by causing it to enter into a new characteristic relationship.

3.2.5. Responding to Problems

A constructivist approach to dignity not only provides an understanding of how human dignity may vary, but also provides reasons for why the components of dignity are sometimes assembled in a particular way. In this regard, and according to Deleuze, the key to the formation of a concept is the recognition of the creative genesis of the problem. This means, for Deleuze, that a 'concept lacks meaning to the extent that it is not...linked to a problem that it resolves or helps to resolve'.⁷⁷ This provides the advantage of methodologically being able to explain the history of variations in the concept of dignity, as concepts will vary

⁷⁴ Ibid 20.

⁷⁵ Patton (n 71) 12.

⁷⁶ Ibid.

⁷⁷ G Deleuze and F Guattari, *What is Philosophy?* (n 71) 79.

when they undergo ‘migration from one problem to another’.⁷⁸ Again, as an example, Patton suggests that the concept of a contract is ‘transformed in part by virtue of the specific problem to which it relates in each case, whether this is the constitution and legitimation of civil authority, of morality, or the distinctive political relations between rulers and ruled’.⁷⁹ On this account, there is no single concept of the contract that stays the same, only a concept that is transformed whilst retaining a family resemblance in each horizon, a concept that has a ‘distinct character and serves a specific end’.⁸⁰

Deploying the Deleuzian model of the relationship between concept creation and problem determination will provide beneficial insights into the manner in which dignity is formed. Firstly, it will enable a critique of the ways in which those concepts address the problems and needs of today. Secondly, it opens up the possibility for the creation of a new concept of dignity, which provides a more effective tool for addressing the problems or issues faced by individuals in society. Finally, a constructivist method entails a democratic dimension to concept-creation in which concepts are constructed in light of the problems and needs that are defined by persons who are most directly affected by decisions.⁸¹ In this respect, law is a particularly suitable and valuable site for considering the construction of human dignity, as it is typically law that deals with concrete and specific problems that emerge in time.

3.2.6. The Becoming of Concepts

As noted above, the constructive methodology recognises that concepts are not rigid or inflexible but are an *open multiplicity*. The open nature of concepts means they are amenable to change, which Deleuze defines as the state of *becoming*.⁸² Concepts are thus in a state of change, as they become different in the way they transition through new problems or issues in different horizons.⁸³ The becoming of concepts is fundamentally tied to a central notion that Deleuze has termed the encounter. An encounter represents the situation in which a

⁷⁸ Paul Patton, *Deleuzian Concepts: Philosophy, Colonization, Politics* (Stanford University Press, 2010) 68.

⁷⁹ Patton, *Deleuze and the Political* (n 71) 13.

⁸⁰ Ibid.

⁸¹ Ibid 3.

⁸² “[A] concept...has a becoming that involves its relationship with concepts situated on the same plane.” G Deleuze and F Guattari, *What is Philosophy?* (n 71) 18.

⁸³ Lefebvre, *The Image of Law* (n 72) 231.

person meets something else in the world that forces them to think. On this account, thinking is not merely recalling past categories or knowledge, but entails a recognition that 'clichés, habits, categories and propositional certitudes are no longer sufficient to account for, think, and react within a situation'.⁸⁴ Thought requires openness to thinking anew by formulating problems in respect of how to respond to situations between persons that are not mere repetitions of past events, but are in some sense different.⁸⁵ Dignity may therefore need to be responsive to differences and otherness, perhaps, and better still, even encompassing or embracing those dimensions of life.

This aspect of a constructivist approach requires the shedding of the image that dignity should somehow have a fixed and clear content, which is simply there to be applied. This is because the process of understanding is not merely a matter of applying a fixed concept of dignity to specific issues, but involves a genuinely creative process whereby the encounter is truly productive in deepening, refining, modifying and clarifying the meaning of dignity. In this respect, law, it is suggested, not only offers the potential to give theoretical concepts a more specific content, as McCrudden suggests, but also provides an opportunity to enrich and develop those concepts in response to the differing experiences of people encountered in cases over time.

3.2.7. Connecting Concepts

One of the important repercussions of adopting a Deleuzian image of the concept is that it provides new tools for explaining connections between the concept of dignity and other concepts. Interpretivists often take a monistic view, in which dignity is seen as part of a coherent body of mutually supporting values.⁸⁶ In contrast, conventionalists focus on the idea of pluralism, so that concepts like dignity will conflict with the meaning of liberty and equality.⁸⁷ Deleuze's image of the concept provides a distinct way of comprehending the connections between concepts, which transcends the monist/pluralist dispute. According to Deleuze, any concept –

⁸⁴ Alexandre Lefebvre, *The Image of Law: Deleuze, Hegel, Spinoza* (Stanford University Press, 2008) 231

⁸⁵ Gilles Deleuze, *Difference and Repetition* (Columbia University Press 1994).

⁸⁶ Dworkin, *Justice for Hedgehogs* (n 59).

⁸⁷ Rao (n 18) 183.

[H]as a becoming that involves its relations with concepts situated on the same plane...In fact, having a finite number of components, every concept will branch off towards other concepts that are differently composed but that constitute other regions of the same plane, answer to problems that can be connected to each other, and participate in a co-creation. A concept requires not only a problem through which it recasts or replaces earlier concepts but a junction of problems where it combines with other existing concepts.⁸⁸

Each concept is therefore always made of component parts, usually 'bits or components that come from other concepts, which correspond to other problems and pre-suppose other planes'.⁸⁹ Establishing bridges to other concepts may therefore be important in order to address a specific problem. However, the establishment of these connections will be truly creative in terms of formulating a concept that exists in a distinctive relationship.⁹⁰ Concepts neither definitely cohere, nor conflict, but are instead 'centers of vibrations, each in itself and every one in relation to all the others. That is why all resonate rather than cohere or correspond with each other.'⁹¹

Constructivism provides a way of explaining the connections between dignity and other concepts in a unique way. It is possible to explain how connections might arise in the way that component parts of concepts, such as autonomy, might migrate and be connected to other component parts of the concept of dignity. This may be because each concept answers problems that might be connected, or it might be that connecting them together provides a better way to address a new problem, which neither could achieve alone.

3.2.8. Improving the Future

The use of the Deleuzian image of a concept to construct dignity presupposes what Deleuze has called the idea of immanence.⁹² This entails thinking new problems, developing new possibilities and ultimately creating 'a new earth, a

⁸⁸ G Deleuze and F Guattari, *What is Philosophy?* (n 71)18.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid 23.

⁹² "The image of thought is a pre-philosophical series of presuppositions which structures both the understanding of thinking and the character of the conceptual production which ensures on that basis." Patton, *Deleuze and the Political* (n 71) 18

new people'.⁹³ Importantly, this image of thought fundamentally rejects any appeal to transcendental ideals outside of human experience as a basis of knowledge. Instead, there are only immanent possibilities for life, possibilities that are capable of being evaluated 'through itself in the movements it lays out and the intensities it creates on a plane of immanence'.⁹⁴ Modes of thinking that create concepts by reference to transcendental ideas.

This does not lead to scepticism. Instead, the immanent nature of thought means that a concept is 'good or bad, noble or vulgar, complete or empty, independently of Good and Evil or any transcendent value: there are never any criteria other than the tenor of existence, the intensification of life'.⁹⁵ Dignity cannot therefore be a fixed transcendental concept, but it can be a more or less adequate concept to the extent that it enhances the immanent modes of being, those that are active and excessive, leading to new possibilities.⁹⁶ In this respect, the strength of a particular notion of human dignity is to be assessed not by how accurately it represents the past, but how it acts on present legal arrangements to create possibilities for more active and dynamic forms of life. In order for the realisation of a concept to be an immanent possibility, it is necessary for an account of human dignity to draw on 'elements of present political [and legal] normativity to suggest ways in which the injustice or intolerability of existing institutional forms of life can be removed'.⁹⁷

4. Structure of Thesis

4.1. Section One: Constructing an Investment Concept of Dignity

The thesis deploys the above methodology to construct the concept of dignity. The first chapter - Dignity a Triadic Concept - analyses existing concepts of dignity and proposes that each retain a family resemblance in that they make use of three important components value, respect and humanity. Drawing on an extensive philosophical and legal literature review, it is argued that there are three main concepts of dignity, namely deontological, teleological and rank,

⁹³ G Deleuze and Felix Guattari, *What is Philosophy?* (n 71) 108. See also Paul Patton, *Deleuzian Concepts: Philosophy, Colonization, Politics* (Stanford University Press, 2010) 41.

⁹⁴ Deleuze and Felix Guattari, *What is Philosophy?* (n 71) 74.

⁹⁵ Ibid.

⁹⁶ Patton, *Deleuze and the Political* (n 71) 31.

⁹⁷ Paul Patton, 'Deleuze's Political Philosophy' in Danial Smith, *The Cambridge Companion to Deleuze* (Cambridge University Press, 2012) 214.

which all make use of the core components, but each have different sub-components. In addition, each connects the components of dignity in a distinctive relationship in a way that addresses particular historical and contextual problems. It argues that some of the concepts exclude those that deviate from a paradigmatic image of humanity as male, able-bodied, economically productive and fully rational.

Deploying the constructivist model of conceptual analysis, chapter two proposes an alternative concept of dignity that moves beyond the narrow focus on singular facets of human personality, or the prioritisation of a norm that leads to marginalisation. It establishes a more holistic concept, which protects a number of facets of humanity, as well as encompasses and responds to otherness and difference. Moreover, it requires action on the part of the community to support the positive development of human personality for the most vulnerable.

The thesis argues that dignity requires investment into the inherent potential of human life, but not in a teleological sense of being directed towards an ideal end. In light of the limitations of some of the existing concepts of dignity, chapter two - Constructing an Investment Concept - proposes to connect the different component parts of dignity in a distinct relationship. It adopts a concept of potentiality inherent in the work of Baruch Spinoza, particularly the reading of his work proposed by Gilles Deleuze.⁹⁸ Spinoza subverts teleological perfectionism in favour of creativity, experimentation and diversity.

This chapter connects these thinkers in a novel way to the capabilities approach to dignity of Martha Nussbaum. The approach claims that a life worthy of human dignity requires the development of human capabilities (emotions, practical reason, health) in order realise a range of human functioning. This theory has grown in prominence and significance in the field of human development. However, it is suggested that the existing literature on the capabilities approach is premised on a difficult and uncomfortable combination of theoretical sources.

Spinoza provides, it is argued, an alternative theoretical framework for a capabilities approach to human dignity, which is based on the concept of

⁹⁸ G Deleuze and F Guattari, *What is Philosophy?* (n 71). Commentators have stated that the “thought of Spinoza permeates all his works [Deleuze]” Keneth Surin, ‘Spinoza, Baruch’ in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005) 261.

potentiality as creativity, difference and experimentation, which subverts the perfectionism of teleological dignity, whilst maintaining a focus on the development of personality. It is argued that this creative potentiality, which is at the heart of dignity, is enhanced whenever a person is rendered more capable of affecting or being affected in an increased number of ways, whereas what diminishes it depends on that which renders a person less capable. It is further argued, drawing on the theoretical insights of Spinoza, that human dignity is a thoroughly holistic concept that connects physical, psychological, recreational and social dimensions as equally significant aspects of human personality. Impact on any one of these dimensions in turn impacts and affects the others.

4.2. Section Two: Testing the Investment Concept of Dignity

Having constructed a new concept of human dignity, the thesis then proceeds in its second section to test the concept of investment dignity in the legal system of England and Wales. It evaluates the extent to which the existing judicial uses of human dignity in England and Wales can be connected to the investment concept in order to, as mentioned earlier, provide a basis for demonstrating the practical usefulness of the concept and, potentially, enrich that concept by reflecting on the experience of applying it to a real life circumstances. Chapter three - Potential Protection in the Common Law - therefore tests the investment concept of dignity in the common law of England and Wales.⁹⁹

The chapter begins by setting out the current understanding of the role of human dignity in the common law and evolution of the concept from an incidentally protected interest to an intentionally protected and integral concept of the common law. It then argues that many of the judicial uses of human dignity appear to support the holistic nature of investment dignity, which embraces different interconnecting dimensions of humanity (social, emotional, recreational and physical) and encompasses the protection of the unfolding of human personality. Moreover, the concept of investment dignity, originally described in chapter two, is enriched by relating it to the experiences and a problem faced in particular cases. Although the protection of investment dignity does not perfectly connect to the common law, it is argued that, due to the inherent capacity of the common law to adapt to the changing needs of

⁹⁹ *Airedale NHS Trust v Bland* [1993] A.C. 789. See Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) EHRLR 190, fn 36.

individuals, it is able to protect an 'open' concept of human dignity based on potentiality, otherness and difference.

Chapter five - Potential Protection under the HRA - proceeds to test the concept of human dignity in the context of the HRA. Although not expressly mentioned in the text, human dignity has been recognised as an essential value underpinning and justifying the rights protected by the Act.¹⁰⁰ Of particular relevance to testing investment dignity is the potential connection between that concept and the existence of positive obligations established under the HRA to provide for the welfare needs of marginalised and vulnerable groups.¹⁰¹

The chapter specifically focuses on prohibition of torture, inhuman and degrading treatment (Art 3 Sch 1, Part 1 HRA) and the right to private life (Art 8 Sch 1, Part 1 HRA) which have been used to promote the mobility and quality of life of vulnerable people, such as the disabled and have both been closely connected to human dignity.¹⁰² It contrasts cases in this field where human dignity had a central role in the majority reasoning with cases where human dignity has been largely neglected. It argues that a number of themes emerge, which can be explained through the prism of investment dignity. Most notably, where human dignity does play a central role in majority reasoning, in contrast to where it does not, the decision is responsive to the context-specific needs of an individual, rendering human rights practice more 'open' through inclusivity, responsiveness, dialogue and multifaceted humanity.

4.3. Section Three: Implications of Investment Dignity

Once an evaluation of the existing content of the law in England and Wales against core dimensions of an investment concept of dignity has been completed, and the concept has been refined, the thesis progresses to consider the transformative implications of an investment concept. It considers the implications for concepts that govern the relationship between the individual and the wider social or political community, such as democracy and the rule of law. These are concepts that have, as discussed above, been treated as having dignity as their foundation or dignity as, potentially, their antithesis.

¹⁰⁰ See p155.

¹⁰¹ See p158.

¹⁰² *McDonald v United Kingdom* [2014] ECHR 492, [47]-[49]. .

Chapter six - The Rule of Law as a Productive Encounter - begins by considering the existing connections that are made between the concept of the rule of law and different concepts of human dignity. It is argued that direct connections exist, which is demonstrated by accounts of the rule of law that focus on the stability of rules and those that focus on principled justification. This chapter argues that the concept of dignity proposed in this thesis would entail resonating effects impacting on the meaning of the rule of law. It is argued that, inherent in an investment concept of dignity, is the image that persons are developing or becoming in experimental encounters over time, as well as active beings who are capable of contributing to the formulation and understanding of the interests that affect them. This requires the law to be responsive to change and capable of justifying the imposition of force. At the same time, it is argued that the experimental nature of becoming requires careful development of the law in order to avoid destructive interactions.

Chapter seven - Dialogic Democracy and Investment Dignity - argues that democracy is closely connected to dignity and changes according to the meaning attributed to the latter concept. This is established by considering three main models of democracy (majoritarian, partnership and communicative). It is suggested that inherent in the investment concept is an idea of dialogue. This dialogue requires a continual expansion of the potential experimental and creative connections between persons in a way that provides protection of difference or otherness, as well as the disruption of oppression and subordination. Dialogue is, in this regard, conceived as an ongoing process of democratisation that entails a number of potential productive developments in human personality.

Ultimately this thesis seeks to develop a new construction of dignity that draws the experience of those who are on the margins of law into the mainstream, at the same time as challenging the legal norm, as a poor reflection of human experience. It is hoped that this construction will contribute towards a reimagining of human personality, which extends beyond a narrow focus on autonomy, to encapsulate some of the different dimensions of human life, as well as connect them through a rich notion of holism.

Chapter One: Human Dignity as an Essentially Triadic Concept

1. Introduction

Human dignity is an ancient concept with connections to many different disciplines, including philosophy, law, politics, history, theology and psychology.¹ Perhaps the oldest and deepest roots are in the field of philosophy where discussions on dignity extend as far back as Aristotle in antiquity.² Dignity has continued to play a role in the ethical theories of leading scholars, including Cicero and Seneca in Stoicism³, Hobbes and Kant in the Enlightenment⁴, Dworkin and Habermas in contemporary philosophy.⁵ Many philosophers from different schools of thought have therefore given used the concept of dignity as a central organising idea to ground and shape the content of normative claims in their theories of political morality.⁶

Dignity has had a much shorter history in law. Although some references to dignity appear in national constitutional documents as early as the 18th and 19th Century,⁷ dignity did not reach true prominence in law until after World War II and the signing of the Universal Declaration of Human Rights. Since then there has been a proliferation of national and international legal instruments that have codified the concept as a right, or recognised it as the foundation of fundamental rights.⁸ Even where human dignity has not expressly referred to, judges from different jurisdictions have treated the concept as a core interpretive value.⁹ The increasing prominence of

¹ See Christopher McCrudden, *Understanding Human Dignity* (OUP 2013), Robert Brownsword (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014).

² Lukman Harees, *The Mirage of Dignity on the Highways of Human 'Progress'* (Authorhouse, 2012) 51.

³ Martha Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (US Independent Agencies and Commissions, 2008) 357.

⁴ Thomas Hobbes, *Leviathan* (A.P Martinich and Brian Battiste ed, Broadview, 2010) 95; Immanuel Kant, *Lectures on Ethics* (Peter Heath trs, CUP, 1997) 157.

⁵ Jürgen Habermas, 'The Concept of Human Dignity and The Realistic Utopia of Human Rights' (2010) 41 *Metaphysics* 464; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 265.

⁶ Contrast Jeremy Waldron, "Introduction" in Jeremy Waldron, *Theories of Rights* (OUP 1984) 20. Jeremy Waldron, *Dignity, Rank, and Rights* (OUP 2012).

⁷ Declaration of the Rights of Man and of the Citizen, 1789, Art. 6; Decree of 27 Apr 1848 of the French Republic.

⁸ The following states have enshrined human dignity within their constitutions or within documents that exist to protect basic rights: Germany, Sweden, Portugal, Spain, Greece, Hungary, Slovenia, Estonia, Lithuania, Slovak Republic, Czech Republic, Belgium, Poland, Finland and South Africa.

⁹ See Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Pennsylvania Press 2012) 54-71.

human dignity has raised a number of significant and challenging questions, in terms of its meaning, necessity and value.¹⁰

It is widely accepted amongst legal commentators that different legal concepts of dignity express or reflect different philosophical visions of the concept.¹¹ In order to understand the possible meanings of the legal concept of dignity at a deeper level; it appears necessary to attend to the philosophical underpinnings of the concept. Based on the assumption that legal concepts of human dignity reflect, or express different philosophical visions of human dignity, this chapter firstly considers the meaning of the concept of dignity in different theories and law.

Deploying the constructivist approach to concepts, explained in the introduction, the chapter considers the core components of the concept of human dignity as a basis for determining its existing meanings and the differences that arise when changes are made to the different core components. The chapter demonstrates that human dignity is essentially a triadic concept, made up of three components that include the concept of humanity, value and respect. It is argued that dignity is concerned with ontological issues about the nature of being and the place of humanity within the world, as well as how humans should relate to each other. At its core, dignity is about defining the state of being human that is deserving of recognition and respect.¹²

2. Different Constructions of Dignity

2.1. Introduction

This section does not attempt to replicate the wealth of existing studies that outline the historical development of human dignity. Instead, this section concentrates on some key historical and contemporary themes in the understanding of human dignity that remain relevant and prominent today. This entails an analysis of some of the core components used in three significant constructions of human dignity. It is

¹⁰ Ruth Macklin, 'Dignity is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy' (2003) *British Medical Journal* 327; Pinker, Steven. 'The Stupidity of Dignity' (2008) *The New Republic* 28–31; Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 257; Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 *The American Journal of International Law* 848.

¹¹ Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183, 186.

¹² Charles Foster, *Human Dignity in Bioethics and Law* (Hart, 2011) 6.

argued that dignity can largely be interpreted as either a teleological, deontological or status based concept. It will then be possible, in the next section, to pose problems to existing constructions of dignity to consider how well they address contemporary issues and concerns.

2.2. Teleological Dignity

The first major contemporary construction of human dignity considered is the concept of teleological dignity, according to which dignity treats humans as beings who are directed towards a particular ideal end state, or *telos*. Human beings are, on this account, treated as purposive beings that are orientated towards a substantive version of human flourishing and the good life.¹³ Teleological dignity is therefore concerned with the realisation of a particular type of existence that leads to a certain level of flourishing that is distinctly human.¹⁴

Teleological dignity would therefore appear to suggest that humans do not possess an inherent value, but are instead capable of attaining a worthwhile existence. However, it would be incorrect to suggest that all forms of teleological dignity lack a construction of intrinsic worth. In some accounts of teleological dignity the capability to realise completion may be treated as a form of inherent potential that exists within a person, which is capable of being perfected and fully realised.¹⁵ A person, in order to show sufficient respect for their own potential, may need to train their individual capacities towards the state of an ideal human existence.

2.2.1. Imago Dei

The first exemplar of teleological dignity relates to a particular interpretation of the Christian understanding of the *Imago Dei*, according to which humans are endowed with a sense of value in light of God's divine work in creating humankind.¹⁶ God is understood to have endowed the human species with a particular purpose in its creation, such as procreation, love, worship and guardianship of nature. In addition, God has created man in His image and endowed it with the practical reason necessary to realise those purposes.¹⁷ This capacity entails the ability of humanity

¹³ Foster (n 12) 9-10.

¹⁴ Ibid.

¹⁵ Martha Nussbaum, 'Human Dignity and Political Entitlements' (n 3) 357.

¹⁶ "[In the] Judeo-Christian tradition...human life is created in the image of God and is, therefore, possessed of an intrinsic dignity which entitles it to protection from an unjust attack." John Keown, 'Euthanasia, ethics, and public policy: an argument against legalisation' (CUP, 2002) 40.

¹⁷ See Jeremy Waldron, 'The Image of God: Rights, Reason, and Order' Public Law & Legal Theory Research Paper Series (Dec, 2010) 227.

to 'apprehend something of God Himself and His order and purpose in the world.,'¹⁸ As Janet Soskice puts it, God has brought every human 'into being and is working his purpose out in their life.'¹⁹

This form of reason is teleological in the sense that it is a capacity that is orientated towards discerning the particular order and purpose of humans in nature that has been created by God. It is a capacity that 'exists for excellence, and thus it serves and expresses our human dignity'.²⁰ The mind, as James Harvey argues, is only 'fully expressive of the *imago Trinitatis* when it is seeking or ordered to God, who is goodness and truth.'²¹ Harvey goes on to argue that the 'human person has teleology: the final consummation of human dignity consists in the beatific vision' and in which a person is 'becoming through the realisation of their dignity.'²² An example of this might be the institution of marriage, where a man and woman 'find their friendship and devotion to each other fulfilled in their procreation, nurture, protection, education and moral formation of their children as a basic human good'.²³

Dignity as *imago dei*, at least in the Christian sense outlined, is therefore dependent upon the idea that a divine being has invested humanity with a particular purpose. This form of dignity clearly pays a great deal of attention, as Dworkin once put it, to the investment of some purpose to humanity by a divine being.²⁴ It is a construction of dignity that places less emphasis on the human investment of individuals in creating their own lives.²⁵ The narrower the form of perfectionism required by a teleological concept of dignity, the more limited is the space for individuals to develop their own personalities in creative and unique ways.²⁶

This is, of course, far from the only interpretation of the *Imago Dei* as a basis for grounding human dignity, with different ontologies of the human person, some of which are not necessarily bound up with teleological approaches. The Christian

¹⁸ Ibid.

¹⁹ Janet Soskice, 'Human Dignity and the Image of God' in McCrudden (n1) 241.

²⁰ James Harvey, 'Dignity, Person, and Imago Trinitatis' in McCrudden (n1) 221.

²¹ Ibid.

²² Ibid.

²³ John Finnis, 'Human Rights and Common Good: Collected Essays' (OUP 2011) 346. Thomas Aquinas, *Summa Theologica, Volume XIII* (Blackfriars, 1964).

²⁴ Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins 1993) 91.

²⁵ Ibid.

²⁶ Richard Arneson, 'Perfectionism and Politics' (2000) 1 *Ethics* 37, 38.

concept of *Imago Trinitatis*, for instance, has been used by thinkers such as LaCugna and Ratzinger to ground the dignity of the human person in the ‘relational dynamics of equality, mutuality, and reciprocity...of the Trinity’.²⁷ Whilst some Jewish approaches begin with the telos of *Imago Dei*, such as Maimonides, who claimed only those who attain intellectual perfection through *vita contemplativa* are in the image of God, others have argued that it primarily acts as a limit doctrine and not prescriptive of certain ends.²⁸ In this respect, there may be restraints on certain actions that show disrespect for the *image of God*, but a person is also an autonomous being capable of freedom of will who is empowered to determine their own conception of the good.²⁹

Whilst the image of God still figures within discussion on human dignity, and may contribute to debates on what it means to be human, too great a focus on noumenal entities provides a very unstable viewpoint from which to ground human rights jurisprudence and practice. This is evident in the way that the idea of a divine creator was excluded from the final draft of the UDHR on the basis that it would not garner broad support.³⁰

2.2.2. Naturalism

Naturalism is a different account of teleological dignity that is based on an internal essentialist form of inductive methodology that requires an analysis of human experience for understanding the concrete dimensions of the dignified life.³¹ This construction of dignity is particularly prominent in the Aristotelian philosophical tradition, which is effectively an ‘essentialist teleological construction of the human person as realising their ends or destiny’.³² Humans are therefore defined by their *telos*, whereby they seek to perfect themselves in a virtuous character.³³ Human dignity is uncovered from human experience and history by determining the universal

²⁷ See Harvey (n 20) 224.

²⁸ Yair Lorberbaum, ‘Human Dignity in the Jewish Tradition’ In Roger Brownsword et al, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 135.

²⁹ Ibid.

³⁰ Jeremy Waldron, ‘The Image of God: Rights, Reason, and Order’ (2010) Public Law & Legal Theory Research Paper Series 218; Johannes Morskink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) 284-290.

³¹ See David Hollenbach, ‘Human Dignity: Experience and History, Practical Reason and Faith’ in Christopher McCrudden, *Understanding Human Dignity* (OUP 2013).

³² Mark Olssen, *Liberalism, Neoliberalism and Social Democracy* (2010 Routledge) 191-192.

³³ “Performing virtuous acts is what the best human beings do; they make evident what it truly means to be human.” George Kateb, *Human Dignity* (HUP 2011) 93.

'naturalist teleology of ends and functioning (of humanity) culminating in *eudaimonia*'.³⁴ *Eudaimonia* is therefore at the core of this concept of human dignity and is synonymous with human flourishing.

2.2.2.1. Developmental and Directed Capacities

One of the prominent features of the naturalist teleological concept of dignity is the treatment of human capacities as developmental in form. This means that human capacities should be trained and nurtured in a particular direction towards a specific end. A particularly good example of this treatment of human capacities can be seen in the political theory known as the capabilities approach to dignity developed by Nussbaum.³⁵ Using Aristotelian ideas to define the content of dignity by discerning from experience what constitutes truly human functioning, Nussbaum argues that:³⁶

The Aristotelian view sees capacities worthy of respect, but as yet unfulfilled, incomplete. They are dynamic, not static: they tend toward development and toward exercise, or at least the opportunity for exercise. They are preparations for something further; they demand space within which to unfold themselves.³⁷

The naturalist teleological view therefore emphasises the idea that human capabilities are incomplete, tending towards development and are preparations for some form of further functioning. This raises the further question as to what those capacities consist of that need to be fostered and developed. In this regard, Nussbaum proposes a number of capacities that define humanity, including emotions, practical reason, senses, thought, affiliation, health, bodily integrity, play and control over one's environment.³⁸ Importantly, in line with Aristotelian naturalism, these capacities need to be developed and fostered in a particular direction. As an example, the development of the capability for emotion entails the positive development of particular emotions, such as compassion, but it also the rejection and suppression of some emotions, such as disgust or envy.³⁹ The distinction centrally turns on capabilities that appear to be '*eudaimonistic*, that is, concerned

³⁴ Mark Olssen, *Liberalism, Neoliberalism and Social Democracy* (2010 Routledge) 193.

³⁵ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press: HUP 2011) 125-132; Martha Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' (1992) 20 *Political Theory* 202. See also, Amartya Sen, *The Idea of Justice* (HUP 2009) 235-234.

³⁶ Martha Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 297.

³⁷ Nussbaum, 'Human Dignity and Political Entitlements' (n 3) 352.

³⁸ Nussbaum, *Creating Capabilities* (n 35) 3.

³⁹ Martha Nussbaum, *Upheavals of Thought* (CUP, 2001) 300; Martha Nussbaum, *Hiding From Humanity* (Princeton University Press, 2004).

with the person's flourishing'.⁴⁰ Human capabilities are, therefore, to be developed in a way that promotes 'human flourishing, a complete human life'.⁴¹

The naturalist teleological construction of dignity would therefore appear to emphasise a certain level of perfectionism in the development of human capacities. The perfectionist nature of this concept of dignity has been criticised on the basis that it leads to elitism and paternalism in raising individuals up to a certain threshold of functioning.⁴² The perceived problem is that a teleological concept of dignity is directed towards the realisation of ideal ends will not preserve sufficient space for human freedom.⁴³ In order to avoid this consequence, capability theorists who rely upon Aristotle to define dignity, have attempted to preserve space for human freedom by focusing on the capabilities of individuals and not the actual functioning of human beings.⁴⁴

In order to achieve this, the capabilities theorists have tended to construct human dignity by counterbalancing Aristotelian theory with liberal philosophy.⁴⁵ Nussbaum, for instance, deploys both Aristotle and Rawls as grounds for justifying the capabilities approach to dignity.⁴⁶ Nussbaum therefore employs Rawls liberalism to establish an overlapping consensus on human dignity in a way that she argues does not accept any "metaphysical view of the world, any particular *comprehensive ethical or religious view, or even any particular view of the person or of human nature*."⁴⁷ It is not entirely clear, however, that these two alternatives to understanding dignity are entirely compatible.⁴⁸ The Aristotelian approach clearly focuses on objective human ends, requiring a particular view of the human person, whilst the deontological approach of Rawls prioritises the right of the individual over the realisation of a substantive version of the good life. In the liberalism of Rawls, capabilities do not tend towards development, as they lack any orientation point or ideal towards which

⁴⁰ Nussbaum, *Upheavals of Thought* (ibid) 31.

⁴¹ Ibid 32.

⁴² Arneson (n 26) 38.

⁴³ John Rawls, *A Theory of Justice* (5th Ed, HUP 2003) 282-295.

⁴⁴ Nussbaum, *Creating Capabilities* (n 35) 107.

⁴⁵ Richard Mulgan, 'Was Aristotle an "Aristotelian Social Democrat"?' (2000) 1 *Ethics* 79, 82.

⁴⁶ Mark Olssen, *Liberalism, Neoliberalism and Social Democracy* (2010, Routledge) 185.

⁴⁷ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2001) 74 (Emphasis added).

⁴⁸ Robert Goodin and David Parker, 'Symposium on Martha Nussbaum's Political Philosophy' (2000) 1 *Ethics* 5, 5.

they are directed.⁴⁹ Mark Olssen has argued that Nussbaum 'relies on fundamentally incompatible ontological and epistemological assumptions'.⁵⁰

2.2.2.2. *Virtue*

A second common element of the naturalism-based teleological concept of dignity is the view that virtue is central to a fully flourishing life.⁵¹ This aspect of teleological dignity entails the idea that an individual is directed towards the realisation and perfection of a morally excellent character.⁵² The importance of virtue to a teleological dignity is particularly prominent in the recent writing of Charles Foster. Foster proposes a concept of dignity that is defined by a 'of neo-Aristotelian virtue ethic'⁵³ that is based upon a 'scientifically informed Aristotelian naturalism'.⁵⁴ Foster alludes to a number of virtues that are essential for objective human flourishing. Foster therefore argues that courage is a virtue essential to human flourishing and a cancer victim can therefore be flourishing, even though her body is crumbling, because she possesses a particular excellence of character that includes the exercise of fortitude, courage, acceptance, consideration and appreciation of others in the face of vicissitudes.⁵⁵

Virtue may be considered only one aspect of the overall flourishing of the human being. Aristotle, for instance, is well known for arguing that the flourishing of a person did not consist solely in the attainment of moral excellence.⁵⁶ Aristotle therefore includes the possession of particular material conditions of life as central dimensions of flourishing.⁵⁷ The different constructions of flourishing reflect a division in terms of the significance that is attached to, on one hand, the finite, fragile and material nature of being, against excellence as an aspect of the 'sublime, the awe-inspiring, and the transcendent'.⁵⁸ Certain conceptions of human flourishing therefore appear to place

⁴⁹ Mark Olssen, 'Why Martha Nussbaum Should become a Foucauldian' in Hans-Uwe Otto (eds), *Education, Welfare and the Capabilities Approach: A European Perspective* (Barbara Burdich, 2010) 23.

⁵⁰ Ibid 27.

⁵¹ Martha Nussbaum, 'Non-Relative Virtues: An Aristotelian Approach' in James Sterba, *Ethics: The Big Questions* (Wiley 2009) 349.

⁵² Charles Foster, *Human Dignity in Bioethics and Law* (Hart, 2011) 1.

⁵³ Ibid 9.

⁵⁴ Ibid 22.

⁵⁵ Ibid 5.

⁵⁶ Hollenbach (n 31) 130; Nussbaum, *Upheavals of Thought* (n 39) 315; Nussbaum, *The fragility of goodness: Luck and ethics in Greek tragedy and philosophy* (CUP, 2001) 340.

⁵⁷ Hollenbach (n 31) 131.

⁵⁸ Mary Neal, "'Not Gods but Animals": Human Dignity and Vulnerable Subjecthood" (2012) 33 *Liverpool Law Review* 177, 194.

far more, or exclusive weight, on the realisation of the virtuous life over the material conditions of being. This entails an important area of disagreement concerning the way in which different accounts of dignity accommodate vulnerability.

2.2.2.3. *Fragility*

The first strategy for encompassing human vulnerability as an aspect of the *telos* of humanity is by treating it as 'a necessary background condition of certain genuine human goods'.⁵⁹ Human fragility and need is considered as pre-requisite for the existence and attainment of certain human virtues and dignity.⁶⁰ A useful example of this strategy is given by Nussbaum, who treats compassion as a human good, which fundamentally depends on the idea that we are universally fragile beings capable of suffering, which is a common trait of humanity.⁶¹ Nussbaum recognises that many of the capabilities that humans have reason to value are developmental precisely because they are fragile and dependent. In this regard, Nussbaum argues that the dignity possessed by humanity, in terms of its need for active striving, is the 'very sort of dignity [that] could not be possessed by a being who was not mortal and vulnerable'.⁶²

A second strategy that can be used to accommodate fragility as an aspect of flourishing is the more 'romantic position that vulnerability and fragility are to be prized in their own right'.⁶³ An example of this strategy can be seen in Mary Neal's discussion of human dignity..⁶⁴ Neal, drawing on Deryck Beyleveld and Roger Brownsword, argues that human dignity is concerned with an appropriate 'balance...between the "finite" and "transcendent" aspects of human existence'.⁶⁵ According to Neal, the finite entails a particularly important connection with materiality, as an aspect of existence.⁶⁶ Humans are to hold in equilibrium the "fear of personal extinction and hope of immortality."⁶⁷ The ultimate goal of humanity is to

⁵⁹ Martha Nussbaum, *The fragility of goodness: Luck and ethics in Greek tragedy and philosophy* (CUP, 2001) XXX.

⁶⁰ Ibid.

⁶¹ Nussbaum, *Upheavals of Thought* (n 39) 319.

⁶² Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press: Harvard University 2006) 132.

⁶³ Nussbaum, *The fragility of goodness* (n 599) 319.

⁶⁴ Neal (n 58).

⁶⁵ Ibid 193.

⁶⁶ "We do not magnify our dignity by fetishizing the transcendent at the expense of the material..." Ibid 194.

⁶⁷ David Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2002) 114-116.

keep in balance the 'fragile/material/finite and the transcendent/sublime/immortal.'⁶⁸ Humans can fall short of realising that aim in one of two ways, either by substantially ignoring, or having their physical needs ignored, or by being dominated by a concern for the material over transcendent pursuits.⁶⁹

The model of balance itself does not definitively explain *where* the balance is to be drawn, *how* it is to be drawn and *who* should draw it. This is related to the question of the relative weight of the finite and transcendent, as well as the precise content of each of these components. Neal shows how the concept of dignity as balancing *could* apply to intrinsic worth, praiseworthy conduct, excellence of character and as an ethical principle.⁷⁰ This ultimately means that the balancing strategy can only be fully realised in the context of a particular moral or political philosophy that establishes the content of each element of dignity, the relative importance of the individual and collective, as well as the appropriate balance as a basis for realising human flourishing.

The two different strategies that are used to accommodate vulnerability as an aspect of dignity appear to primarily focus on a kind of bodily weakness inherent in the human condition. This includes such things as 'old age, illness...physical weakness, disfigurement [and] immobility.'⁷¹ It is at least arguable that vulnerability is a more expansive concept that also includes the vulnerabilities created by particular social or institutional structures.

2.2.3. Conclusion

The teleological concept of dignity is primarily concerned with the realisation of a particular ideal end state, in which humans are objectively flourishing. Importantly, it recognises that human capacities are to be developed and trained in a particular direction. The natural capacities of persons are treated *as if* they possessed a purpose that is to be achieved, developed or perfected. That is not to say that there aren't disagreements, or variances, in terms of determining what exactly those purposes are. However, it is possible to see in this brief discussion the emergence of the sorts of significant questions that scholars using the concept of dignity are trying to address. These include questions about what it means to exist as a human being,

⁶⁸ Neal (n 58) 198.

⁶⁹ Ibid 194.

⁷⁰ Ibid 195-197.

⁷¹ Nussbaum, *Upheavals of Thought* (n 39) 307.

reflecting on the past, and the direction in which we ought to be headed, looking to the future. It is no wonder, therefore, that dignity is a challenging and complex concept, for it is a concept that addresses the big and intractable questions.

2.3. Deontological Dignity

A different model of dignity attempting to address similar questions about human beings nature and the connections between persons is the deontological concept of dignity. This approach to dignity sees or treats human beings as an end in themselves, rather than as a being invariably directed towards some further end. Humans are not therefore beings that possess a pre-determined or intrinsic purpose. This account of dignity often recognises an intrinsic value or worth in the capacity of humans to assert moral or rational agency.⁷²

2.3.1. Moral Autonomy

2.3.1.1. Self-Control

One the most important and influential forms of deontological dignity is that of moral autonomy, which entails the rational part of the self, controlling the irrational dimensions of the self. It is the capacity of individuals to reason and act morally, which is autonomous or free in the sense that the individual, through reason, gives to themselves the moral duties by which they should direct their conduct.⁷³ In contrast, the irrational part of the self can concern such things as desires, impulses, emotional states or personal tastes.⁷⁴ The truly dignified person is one who can control those desires in favour of morality.

The most prominent version of dignity as moral autonomy was established by Immanuel Kant. Kant is often attributed with being the main source of liberal deontological accounts of dignity that prioritise autonomy.⁷⁵ However, Kant had a much narrower view of autonomy than many modern liberal deontological accounts would accept.⁷⁶ Kant proposed a moral autonomy construction of dignity based on a

⁷² Rao (n 11) 200.

⁷³ Jean-Jacques Rousseau, *The Social Contract* (Cosimo 2008) 28.

⁷⁴ Michael Meyer, 'Dignity, Rights, and Self-Control' [1989] 99 *Ethics* 520.

⁷⁵ See Rao (n 11) 200. In additions, see Rt Hon Baroness Hale of Richmond Justice of the Supreme Court of the United Kingdom, 'Dignity' (Ethel Benjamin Commemorative Address, New Zealand, 2010).

⁷⁶ Foster (n 52) 38.

pre-social notion of man as an independent rational being, capable of reasoning the moral law that they apply to themselves in a way that is prior to human experience.⁷⁷

According to Kant, a person only acts out of their autonomous will when they are acting in accordance with their moral duty.⁷⁸ Therefore, a failure to act out of a universal moral duty would not be a free and rational choice, for it would entail treating the humanity in your own person as a means only, rather than an end.⁷⁹ As an example, Kant argues that prostitution is incompatible with human dignity.⁸⁰ The prostitute compromises their own humanity by treating themselves as an object for profit to satisfy the sexual impulse of another, which is not directed at universal moral principles.⁸¹ Kant, like the Stoics, appears to favour a kind of dignity as self-mastery, whereby a person acts out of calm reflection on universal moral principles, even in the face of inclination, vulnerability, misfortune and emotional upheaval.

A concept of dignity that is based on the mastery of the rational part of selfhood entails a very narrow view of the capacities of persons that are valuable and important. Such a concept of dignity often entails the exclusion of certain human capacities from being recognised as deserving of enhancement or protection. As an example, Kant excluded emotional capacities from the rational part of the self, as they consist of impulses that lack “moral worth”.⁸² This extends even to those emotions that entail altruistic elements, such as the capacity for compassion and sympathy.⁸³ Kant argues that the impulse-based nature of such emotions should be suppressed in favour of a cold and detached form of moral duty.⁸⁴ Dignity therefore becomes a matter of controlling some of even the most admirable, other-seeking dimensions of selfhood.

⁷⁷ Olssen, *Liberalism, Neoliberalism and Social Democracy* (n 32) 24.

⁷⁸ Immanuel Kant, *Immanuel Kant: Groundwork of the Metaphysics of Morals: A German-English Edition* (Cambridge University Press 2011) 109.

⁷⁹ Immanuel Kant, ‘Fundamental Principles of the Metaphysics of Morals’ in Isaac Kramnick, *The Enlightenment Reader* (Penguin 1995) 304.

⁸⁰ Immanuel Kant, *Lectures on Ethics* (Peter Heath trs, CUP 1997) 157.

⁸¹ Oliver Sensen, *Kant on Moral Autonomy* (CUP 2012) 76.

⁸² Immanuel Kant, *Groundwork of the Metaphysics of Morals* (n 78) 25.

⁸³ *Ibid* 25-27.

⁸⁴ Kant, *Groundwork of the Metaphysics of Morals* (n 78) 25.

2.3.1.2. Moral Principle

The moral autonomy based concept of dignity clearly requires the control of the irrational self, by the rational self. This ultimately entails that the content of the concept of dignity is equivalent to rationally derived moral principles. Thus, as Kant argues, respect for the humanity in your own person means acting in accordance with universal moral duties, such as the duty to be honest. This, as Charles Foster has recognised, makes Kantian dignity a limited guide to correct or appropriate action. This is because one cannot both use ethically appropriate behaviour to determine the content of dignity, and use the content of dignity to determine ethically appropriate behaviour.⁸⁵ The criticism that dignity is often used as a loose equivalent for more concrete moral principles receives no real defence from Kant.⁸⁶

2.3.2. Personal Autonomy

2.3.2.1. Individualism

The moral autonomy construction of dignity is quite distinct from the construction of dignity as personal autonomy, although the two are sometimes treated as continuous.⁸⁷ Whilst moral autonomy focuses on the self-legislation of a universal moral law, personal autonomy prioritises the rational capacity of individuals to pursue their individual conception of the good. It is this inherent rationality that is treated as the core of human worth and it is this capacity that must be treated with respect by others.⁸⁸

This account places strong emphasis on the individual, as an independent, separate and self-sufficient entity.⁸⁹ Humans are treated as beings that possess the ability to make independent and rational choices about their own plan of life, without interference from others in the community. This means that the rational independent being exists prior to the relationships upon which they depend.

2.3.2.2. Personal Responsibility

Responsibility for one's own choices is a usual corollary of dignity as autonomous agency. Each person should be held individually responsible for the consequences

⁸⁵ Foster (n 12) 38.

⁸⁶ "morality and humanity, in so far as it is capable of morality, is that which alone has dignity." Kant, *Groundwork of the Metaphysics of Morals* (n 78) 196.

⁸⁷ Rao (n 11) 200.

⁸⁸ Ibid 200-201.

⁸⁹ Martha Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (2000) 8 *American University Journal of Gender, Social Policy & the Law* 13, 14.

that flow from their rational choices.⁹⁰ Indeed, to compensate persons for losses flowing from rational choice would be to treat such persons as if they lacked the dignity that comes with an autonomous will.⁹¹

This concept of personal responsibility depends on the presumption that a clear division can be said to exist between the dependent and the independent. Independence is treated as the central case of dignity in which individuals who do benefit from fortunate social circumstances are treated as responsible for their particular state of affairs.⁹² In contrast, those who do not fully possess the capacity to take responsibility for their own life plans or well-being deviate from the model of humanity. This latter category of 'dependent' people can be further sub-divided in terms of those who are responsible for their situation on the basis of fault or on a non-fault.⁹³ This means that a person, who is disabled through a careless lapse of attention, has no claim on the basis of dignity to the provision of welfare support.⁹⁴ However, some liberals do try to avoid these harsh consequences by allowing some safety net 'to save the imprudent from the worst consequences of their choices'.⁹⁵ However, the provision of welfare support to such persons is premised on paternalism, rather than respect for human dignity. In contrast, those who are sufferers of misfortune are compensated as 'unlucky' beings on the basis that they are supposedly envious of the innate abilities of others.⁹⁶

The strong focus on individuals as a pre-social rational subject can often draw attention away from the complex social structures within which the decisions of individuals are formed. Decisions are often affected by different social, psychological and physiological factors that may make it inappropriate to treat the victim of loss as *solely* responsible for the consequences of their decisions.⁹⁷

⁹⁰ See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 210-211.

⁹¹ Ronald Dworkin, *Is Democracy Possible Here: Principles for a New Political Debate* (Princeton University Press, 2006) 109.

⁹² Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004) 58.

⁹³ See Ronald Dworkin, *Sovereign virtue: the theory and practice of equality* (Harvard University, 2000) 72-77.

⁹⁴ Elizabeth S Anderson, 'What is the Point of Equality' (1999) 109 *Ethics* 287, 298. William Talbott, *Human Rights and Human Well-Being* (OUP, 2010) 82-83.

⁹⁵ Anderson (Ibid) 301.

⁹⁶ Ibid.

⁹⁷ See Alexander Brown, *Personal Responsibility: Why it Matters* (Continuum 2009) 26.

2.3.2.3. *Human Capacities*

One of the common themes in the liberal deontological account of dignity is a shared concern with access to, and control over, certain resources in making choices about the good life. Importantly, this includes an image of human abilities and capacities as resources.⁹⁸ Human capacities or physical powers are compared to material resources as tools that a person can use to develop their own conception of what is valuable in life.⁹⁹ This appears, at its core, to be an expression of the basic mind-body dualism view of the human being, whereby the mind of the human is separate from the body and entails that the 'person as mind-should retain control of its object body'.¹⁰⁰

To some degree, the conception of human capacities as resources represents them as having a property like quality.¹⁰¹ The most radical versions of this form of deontological dignity, such as appear in the work of Nozick, treat individuals as possessive beings owning their abilities and 'owing nothing to society for them'.¹⁰² Such an image of the human being obscures the importance of community structures and social systems within which capacities are nurtured and developed.¹⁰³

2.3.3. Conclusion

The deontological concept of dignity seeks to address similar questions to the teleological concept of dignity. It proposes answers to questions about what it means to exist as a human being, including explanations of the nature and importance of human capacities. It is clear that deontological dignity places significant emphasis on rationality, which determines the central case of humanity and its value. This capacity is prioritised over the realisation of a particular conception of objective flourishing. It appears that both concepts depend on a division of the self, a separation between the rational mind and irrational body. The moral autonomy-based construction of dignity depends on the rational moral self-controlling the irrational aspects of selfhood. The personal autonomy-based construction treats

⁹⁸ Ronald Dworkin, *Sovereign virtue: the theory and practice of equality* (Harvard University 2000) 287.

⁹⁹ *Ibid* 80.

¹⁰⁰ Margerat Davies, *Are Persons Property?: legal debates about property and personality* (Ashgate 2001) 77.

¹⁰¹ John Locke, *The Second Treatise of Government and A Letter Concerning Toleration* (Courier Dover 2012) 12.

¹⁰² Crawford MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 2010) 154. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic, 1974) 333.

¹⁰³ Thomas Hobbes, *Leviathan* (A.P Martinich and Brian Battiste ed, Broadview 2010) 95.

human capacities as instruments to be used to construct a conception of the good. Dignity is not only concerned with how we relate to one another, but also how we relate to ourselves.

2.4. Status Dignity

The third key model of dignity after the teleological and deontological models is what can be called dignity as status. This construction of dignity is closely related to the ancient concept of dignitas.¹⁰⁴ Dignitas embodies the 'idea of the honour, the privileges and the deference due to rank or office'.¹⁰⁵ Originally, this construction was related to the variations in rank between different persons in society. This original construction of dignity as status is exemplified in the work of Thomas Hobbes.¹⁰⁶ Dignity was concerned with the different statuses held by individuals in society that were determined by the perceived worth of human powers and how much another person was willing to pay for them.¹⁰⁷ However, in light of the fact that persons may value themselves differently, Hobbes argued that men are always in competition for honour and dignity.¹⁰⁸ A sovereign was therefore required to determine the relative worth of particular human features or capacities as a basis for differentiating rank.¹⁰⁹

Modern day constructions of dignity as status tend to avoid the inegalitarian effects of variations in rank between humans in society, by treating humanity itself as a universal status.¹¹⁰ Dignity is not a matter of comparing different humans in terms of

¹⁰⁴ Jeremy Waldron, 'Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley' (September 1, 2009) Public Law & Legal Theory Research Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220> accessed 18 November 2013; 'Dignity, Rights and Responsibilities' (2009) Public Law & Legal Theory Research Paper Series http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1710759 accessed 18 November 2013; Jeremy Waldron, 'Dignity and Rank for the memory of Gregory Vlastos (1907-1991) (2007) 2 Archives Européennes de Sociologie 201; 'The Image of God: Rights, Reason, and Order' (2010) Public Law & Legal Theory Research Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718054> accessed 18 November 2013; How Law Protects Dignity (2012) 71(1) Cambridge Law Journal 200; Jeremy Waldron, 'Dignity and Citizenship' in McCrudden, *Understanding Human Dignity* (n 31) Ch 19.

¹⁰⁵ Jeremy Waldron, *Dignity, Rank and Rights* (Oxford, 2012) 30.

¹⁰⁶ Hobbes (n 103) 98.

¹⁰⁷ Ibid 97.

¹⁰⁸ "[M]en are continually in competition for honour and dignity, which these creatures are not; and consequently amongst men there ariseth on that ground, envy, and hatred, and finally war; but amongst these not so" ibid 157..

¹⁰⁹ Ibid 66.

¹¹⁰ See George Kateb, *Human Dignity* (HUP, 2011); Jeremy Waldron, *Dignity, Rank and Rights* (OUP, 2013). Jeremy Waldron, 'Dignity and Citizenship' in McCrudden (n 31) 327-332.

rank, but designating an equally high status for all.¹¹¹ Thus, within the rank of humanity, everything is equal.¹¹² This rank is, according to Waldron, higher than 'other creatures' because 'with reason and free will, they have God's special favour and are created in his image; this is a rank in which each of us shares, without distinction or discrimination.'¹¹³ As Katherine Franke comments, on this account, a human being possesses a higher rank to animals; they have the highest status within an existential ranking.¹¹⁴ It is clear to Franke that Waldron preserves a hierarchy between humans and animals, that treat 'humans of the highest moral order' based on having a 'certain sort of presence; uprightness of bearing; self-possession and self-control; self-presentation.'¹¹⁵ This is borne out in the way that scholars, such as Waldron, defend a conception of rank that prohibits treatment that violates the 'higher than the animals' sense of dignity as rank.¹¹⁶

Dignity as a high-ranking status, a status attached to human beings, can allow for a consideration of the dignity of both the species and the individual. George Kateb, for instance, argues for a rank attached to the human species, in light of its qualities and achievements, which every human being partakes in qua their membership of the species. Each individual as a result of this membership has an equal status, which is violated where the 'intention of inflicting suffering is to re-identify groups of people as subhuman.'¹¹⁷ Waldron also connects the idea of humanity as a high-rank with individual status -

[T]he 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.¹¹⁸

¹¹¹ Jeremy Waldron, *Dignity, Rank and Rights* (Oxford, 2012) 32.

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Katherine Franke. 'Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights, and Responsibilities' (2012) 43 Arizona State Law Journal 1177.

¹¹⁵ Ibid 1179.

¹¹⁶ Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP, 2010) 310.

¹¹⁷ Kateb (n 110) 16.

¹¹⁸ Jeremy Waldron, 'Dignity, Rights and Responsibilities' (2009) Public Law & Legal Theory Research Paper Series http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1710759 accessed 18 November 2013

Each human being has a high rank as a member of the human species, which not only encompasses rights, but also 'carries with it an obligation to maintain the elevated status to which one is called as a human being.'¹¹⁹ That is the high status of humanity itself.

2.4.1. Source of Status

The differences in the status form of dignity largely relate to ways in which a high rank can be attributed to the human species. The first way in which such a rank can be attributed to the human species is through a consideration of those capacities of particular significance that separate humanity from other species in nature. Jeremy Waldron, for instance, draws on Locke to claim that humans are of significant importance in the created world because of their rationality.¹²⁰ A more expansive account of human capacities that entitles humanity to a particular status has been proposed by George Kateb. Kateb argues that humans possess a particular status not only because the capacity for reason, but also the capacity for language, imagination and emotion.¹²¹ Although Kateb recognises that other species may possess some of these capacities, he argues that such beings do not possess a 'developed inwardness...made of images and dreams'.¹²²

The second way in which status can be attached to humanity as a species is by considering the achievements of the species in contrast to other species. George Kateb, for instance, argues that the status of the human species can in part be imputed 'on the basis of the record of its achievements.'¹²³ This requires humans to deploy their unique human capabilities towards the stewardship of nature.¹²⁴

The third way in which a high status may be attached to humanity is by the establishment of behavioural norms that separate humans from other species.¹²⁵ This construction of dignity is dependent on the existence of a conventional morality that is treated as a key way of preserving a group or species stature, which prohibits

¹¹⁹ Waldron (n 111) 140.

¹²⁰ Waldron, *Dignity, Rank and Rights* (n 111) 29. Waldron, 'The Image of God' (n 104).

¹²¹ See George Kateb, *Human Dignity* (HUP, 2011) 131-173.

¹²² Ibid 151.

¹²³ Ibid 9.

¹²⁴ Ibid 115.

¹²⁵ "The dignity of the species as a whole requires rules which differentiate between humans and other species, and which protect the special status and integrity of humans" David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 125; See Stephen Riley, 'Dignity as the Absence of the Bestial: A Genealogy' (2013) 14 *Journal for Cultural Research* 143.

acts that are associated with the status of the animal.¹²⁶ Disgust or revulsion thus becomes a metric for determining what behaviour risks a loss of humanity.¹²⁷ This approach is implicit in the work of Leon Kass on human dignity who argues that repugnance may, on some occasions, be the ‘only voice left that speaks up to defend the central core of our humanity.’¹²⁸ It thus may be the only voice that protects against degradation.¹²⁹

The use of repugnance as a basis for determining a difference in the status between humanity and other species can be criticised for the negative and false nature of the thought underlying the sentiment. In this regard Martha Nussbaum offers a convincing critique of repugnance on the basis that it is premised on an attempt of humans to shrink from ‘contamination that is associated with the human desire to be nonanimal.’¹³⁰ Repugnance ‘expresses a refusal...to be contaminated by potent reminder of one’s own mortality and decay-prone animality’.¹³¹ The emotion therefore entails an attempt to hide from the reality that humans are vulnerable and mortal beings.¹³²

Disgust becomes particularly dangerous when it is projected outwards so that certain people are perceived as themselves debasing and a site of potential contamination. Thus, male homosexual groups may be the object of repugnance on the grounds that the idea of “semen and faeces mixing together inside the body of a male is one of the most disgusting ideas imaginable – to males, for whom the idea of nonpenetrability is a sacred boundary against stickiness, ooze, and death.”¹³³ The consequence is the potential persecution and oppression of certain groups.

2.4.2. Determining Honour

The concept of dignity as status, as has just been seen, depends on the existence of some standard that can be used to distinguish the rank of humanity. This high

¹²⁶ Nussbaum, *Hiding From Humanity* (n 39) 74; Stephen Riley, ‘Dignity as the Absence of the Bestial: A Genealogy’ (2013) 14 *Journal for Cultural Research* 143.

¹²⁷ Leon Kass, *Life, Liberty and Human Dignity* (Encounter Books 2013) 150.

¹²⁸ *Ibid.*

¹²⁹ Leon Kass, ‘Defending Human Dignity’ in *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* (US Independent Agencies and Commissions, 2008) 308.

¹³⁰ Nussbaum, *Hiding From Humanity* (n 39) 74.

¹³¹ *Ibid* 97.

¹³² *Ibid* 14.

¹³³ *Ibid* 113

position is often associated with the idea of honour.¹³⁴ Each member of the species is expected to show sufficient honour for the high position of each other member of the species..¹³⁵ Waldron argues that there has been a levelling up process whereby the honours and privileges of the nobility are universalised and applied to all humans.¹³⁶

It is clear that not all rights and privileges of the nobility can be universalised. Waldron, for instance, argues that the right to be heard first in a public forum would be impossible to universalise.¹³⁷ In addition, not all rights and privileges of the nobility should be universalised where they are associated with a 'sort of mentality that was arrogant, condescending, abusive, lawless, irresponsible, wilful, and violent.'¹³⁸ To determine which privileges need be extended, and which need to be removed, it is essential to have some kind of independent metric. This will invariably entail a value-based judgment concerning those privileges that in some sense contribute to human flourishing and those which do not. It may be unnecessary to equalise the right of the nobility to exquisite food on the basis that the right of access to *basic food* is sufficient for human well-being.¹³⁹ A judgment is therefore made in reference to some criterion other than honour. Once, however, an independent criterion enters the framework, it is not entirely clear why it is necessary to appeal to the privileges of the nobility at all. The concept of dignity that is based on nobility requires an appeal to other forms of dignity, which are sufficient in themselves to determine those privileges that should be granted to individuals.

2.4.3. Acting Honourably

The concept of dignity as rank not only requires the honouring of individuals by others, but also that individuals act honourably, showing sufficient respect for their office, title or status.¹⁴⁰ In this regard, there are certain offices a person may hold in

¹³⁴ "Dignity is, to begin with, an undemocratic idea. The central notion etymologically, both in English and in its Latin root (*dignitas*) is that of worthiness, elevation, honor, nobility, height-in short, excellence or virtue. In all its meanings it is a term of distinction." Leon Kass, *Life, Liberty and Human Dignity* (Encounter Books 2013) 308; Waldron, *Dignity, Rank and Rights* (n 111) 30.

¹³⁵ Waldron (ibid) 144.

¹³⁶ Waldron, 'Dignity and Rank for the memory of Gregory Vlastos' (n 104).

¹³⁷ Ibid.

¹³⁸ Waldron, *Dignity, Rank and Rights* (n 111) 144.

¹³⁹ Waldron 'Dignity and Rank for the memory of Gregory Vlastos' (n 104) 9.

¹⁴⁰ Kass, *Life, Liberty and Human Dignity* (n 134) 15.

humanity that entail responsibilities, as well as privileges. A modern day example is that parents have responsibilities in respect of raising a child.¹⁴¹

The responsibility on individuals to act honourably may prohibit certain roles on the ground that they are dishonourable activities unworthy of the high status of humanity. In the past the nobility could lose their status because they 'engaged in occupations thought to be unfitting to a gentleman.'¹⁴² Stephanie Hennette-Vauchez has suggested that this sort of reasoning could be universalised today.¹⁴³ Thus, for instance, dwarf throwing or prostitution may be considered a dishonourable profession that undermines the status of humanity. Such constructions of honour are culturally determined.¹⁴⁴

2.4.4. Conclusion

The concept of dignity as human status compares humanity with other beings in order to determine their rank within nature. The different bases for attributing humanity with a high rank represent very different ethical outlooks. Some grounds for attributing a high status to humanity, such as those proposed by Kateb can be caring in outlook, establishing a high status on the basis of humans deploying their special capacities to cultivate nature. This status stands in stark contrast to the construction that seeks to create boundaries against objects that remind humans of their fragility. This construction of dignity as status is most problematic due to its ability to come into conflict with other models of dignity.

The purpose of the chapter so far has been to provide taxonomy of human dignity as a springboard to considering whether there are any shared or common components to the concept that cut across the different traditions. In light of the grandeur of the concept of dignity, it has simply not been possible to provide an exhaustive account of the concept. However, the aim so far has been to focus on key themes as a basis for considering the issues the concept of dignity seeks to address. It has been demonstrated that dignity is concerned with ontological questions about the very nature of existence that any serious political or legal philosophy will attempt to grapple with. These include elements that address the nature of the relationship of

¹⁴¹ Waldron, 'Dignity, Rights and Responsibilities' (n 104) 7.

¹⁴² Geoffrey Treasure, *The Making of Modern Europe, 1648-1780* (Routledge 2003) 9.

¹⁴³ Stephanie Hennette-Vauchez, 'A human dignitas? Remnants of the ancient legal concept in dignitary jurisprudence (2011) *International Journal of Constitutional Law* 32,

¹⁴⁴ Jonathan Dewald, *The European Nobility 1400-1800* (CUP 1996) 29.

humans to themselves, the interaction between humans, as well as the connection of humans to other beings.

3. Common Components: The Triadic Nature of Human Dignity

3.1. A Triadic Concept

This section suggests that the deontological, status and teleological based-concepts of human dignity, despite their differences, share some core components, namely the concepts of humanity, respect and value. In this regard, human dignity is a triadic concept, a point of coincidence between these three common components.¹⁴⁵ The concept of dignity varies in the way these shared components are interpreted differently or arranged in a particular relationship. In this light, constructivism, which treats concepts as complex multiplicities composed of different components, can explain how there is a common concept of dignity, which nonetheless differs according to how the components are arranged and interpreted.¹⁴⁶

3.1.1. Discerning the Nature of Humanity

The first major component of the dignity triad is the concept of humanity, which permeates different traditions. The teleological conception, for instance, defines humanity in terms of certain functioning essential to a 'truly human life'.¹⁴⁷ Capacities are dynamic properties, requiring development towards a particular end. The deontological concept of dignity places significant emphasis on those faculties that are unique and valuable to humanity, most notably human reason. These constructions often entail a split in dimensions of personality, which may be treated as irrational aspects of the self.

Some deontological constructions of dignity are noteworthy for their attempt to avoid a comprehensive account of the nature of the human person. The preferred approach is to account for dignity according to widespread convictions, rather than human nature. Nonetheless, such accounts of dignity inevitably *presuppose* certain things about the human person, such as a concept of humans as owning property in the person or as controllers of human resources. It may also presuppose a central case of humanity for defining other components, such as respect. John Rawls, for

¹⁴⁵ See p 21.

¹⁴⁶ Ibid.

¹⁴⁷ Nussbaum, *Frontiers of Justice* (n 62) 278.

instance, defines respect through a hypothetical contract established by parties who are 'normal and fully cooperating member over a complete life.'¹⁴⁸

Some theories begin with another component concept of dignity, such as respect, but inevitably end up attaching it to humanity. Thus, for instance, Waldron's concept of dignity as rank derives its meaning from the respect owed to others by appealing to a thought experiment whereby law makers discern what past noble privileges and duties can be universalised by claiming that humanity is itself a status and rank. An understanding of the human condition is therefore at the core of human dignity, whether it is a comprehensive account or a presupposition that is essential for grounding other claims.

3.1.2. Seeking the Value of Humanity

The second important component concept of the dignity triad is the concept of value. There is a general recognition in the different theories that in some sense humanity possesses a special value or worth.¹⁴⁹ The deontological autonomy-based constructions of dignity clearly prioritise the view that the value of human life is grounded in the rationality of humanity. In direct contrast, teleological dignity appear to prioritise the view that value is to be found in the ends that humanity is directed towards.

The concept of dignity as status does not attach quite the same level of significance to value as a dimension of dignity.¹⁵⁰ However, it is quite clear that in ranking humans above other beings, it is necessary to provide a justification of *why* humans should be accorded a status that is higher than other beings in nature. This invariably entails a comparative value judgment, even if implicit, in which certain capacities, features or behaviours are considered distinctive to humanity.

3.1.3. Defining Respect for the Value of Humanity

The third and final component of dignity that is common to the different traditions is the idea of respect. This has been recognised by David Feldman who has explicitly stated that "respect (for oneself and for others) is an important element *in* dignity."¹⁵¹ Neomi Rao similarly explains, following Kant, that humanity and personhood require

¹⁴⁸ John Rawls, *A Theory of Justice* (Universal Law Publishing, 4th Ed Indian Reprint, 2010) 111

¹⁴⁹ McCr Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 679.

¹⁵⁰ See 'Dignity and Rank for the memory of Gregory Vlastos' (n 104).

¹⁵¹ David Feldman, 'Human dignity as a legal value: Part 1' (1999) PL 682 (emphasis added).

a 'certain degree of respect.'¹⁵² The concept of respect appears to be a fundamental mediating force in terms of what treatment is permissible and in determining what actions are demanded in reference to the value of humanity. Thus, for instance, the deontological concept of dignity requires respect for the humanity of others.

The deontological concept of dignity can also encompass an obligation on individuals to respect their own rational capacity in the self. In the moral autonomy construction of dignity, this may include respecting the rationally willed universal moral law. Although the personal autonomy construction is more closely connected to liberalism, it does not deny the responsibility of individuals to respect themselves. It entails a responsibility to respect the rational capacity in oneself by making 'something valuable of...life.'¹⁵³ Developing a conception of the good is a responsibility that is essential to self-respect.¹⁵⁴

Respect is also a key component in the teleological construction of dignity, although it requires respect in the sense of developing the potential of humanity. This can include respecting humanity by developing human capacities or a particular character in a direction which may require certain social conditioning. In the very different tradition of dignity as status, respect is still a key feature that establishes a family resemblance to other accounts of dignity. Jeremy Waldron argues that dignity is understood by considering the respect that was historically owed to nobles and dignitaries.

3.2. Assembling Human Dignity in Response to Problems

The concept of dignity has been constructed by appealing to three component concepts. This follows the Deleuzian methodology outlined in the introductory chapter. Where the different components are arranged in a particular way or a particular interpretation is given to a component, then the whole meaning of the overall concept of dignity shifts. Thus, as an example, where emphasis is given to humanity as defined by reference to its ends, the whole concept of dignity transforms, with the notion of value being placed in the achievement of the flourishing life, which humans must respectfully seek to realise. Such teleological constructions contrast with deontological constructions that connect dignity by

¹⁵² Rao (11) 183.

¹⁵³ Dworkin, *Justice for Hedgehogs* (n 90) 272.

¹⁵⁴ Dworkin, *Is Democracy Possible Here* (n 91) 14.

reference to the rationality of humanity prior to its ends, which has value and must be respected.

The concept of dignity also shifts and mutates according to the manner in which sub-components are added to or abstracted from the core components of the dignity triad. It will be recalled from the introductory chapter on Deleuze that the meaning of a concept depends on connecting components in a particular relation. Concepts can be added to or subtracted from in ways that change the overall meaning of a concept.¹⁵⁵

In relation to dignity, it is arguable that each core component of dignity entails a number of important sub-components that exist in a particular relationship. Teleological dignity can be composed of a number of sub-components, including “flourishing”, “excellence”, “capabilities”, “virtue”, “fragility”, “emotion”, “purpose”, “perfection” and “development”. These sub-components can be added to or subtracted from the overall concept of teleological dignity in a way that creates new shades of meaning. For instance, as was discussed above, some teleological concepts of dignity may abstract the idea of fragility from their construction and place greater focus on excellence of character.

Deontological and status dignity similarly are made of different sub-components. Deontological dignity can include the following sub-components; “resources”, “independence”, “personal responsibility”, “autonomy”, “rationality”, “luck”, “separateness” and “property”. Status dignity, in contrast, can include the following sub-components; “nobility”, “rank”, “rationality”, “animal”, “disgust”, “stewardship”, “achievement”, “honour” and “conflict”. The concept of dignity therefore possesses different meanings to the extent that relationship between concepts mutate, as well as when sub-components are added to or abstracted from the core components of human dignity.

An important factor that affects the connections between the components of dignity concerns the particular social problems that dignity is directed towards.¹⁵⁶ As was argued in the introduction, in reference to Deleuze, all concepts are ‘connected to

¹⁵⁵ Ibid 19.

¹⁵⁶ Deleuze and Felix Guattari, *What is Philosophy?* (trs Hugh Tomlinson, Graham Burchill, Verso, 1994) 16.

problems without which they would have no meaning'.¹⁵⁷ Attentiveness to the problems to which concepts of dignity are connected can thereby enable an explanation of why the concept may vary, as opposed to just reporting of how they differ.¹⁵⁸

3.2.1. Conflict

One of the problems that dignity has been used to address is the existence of conflict between humans. This is particularly noticeable in the historic model of dignity as rank. Dignity was used to justify and denote a system of privilege and power of the nobleman over the commoner.¹⁵⁹ Thomas Hobbes explicitly connected this concept of dignity to the problem of how to resolve conflict between persons in the state of nature who are naturally inclined to overestimate their own worth.¹⁶⁰ Dignity as rank is therefore a proposed solution to this problem, for it creates a stable system by which the worth of a man is authoritatively determined by rules of honour established by the sovereign.

This construction of dignity has since been developed in a way that establishes humanity as itself a rank. The problems to which this concept of dignity may be directed can vary. It may, for instance, be directed towards the problem of how to protect humanity as a species from perceived sources of contamination or disintegration.¹⁶¹ This to some degree overlaps with the idea of conflict, in the sense that the natural is perceived as a potential threat.

3.2.2. Loss of Control

Dignity as self-control has in the past been deployed to respond to turbulent circumstances that are beyond the individual's control. As an example, the Stoic concept of dignity as self-control, which was an important precursor to Kantian dignity, was originally developed as a response to the problem of how to realise happiness when people lack power to control and influence the material world around them.¹⁶²

¹⁵⁷ Ibid.

¹⁵⁸ Tamsin Lorraine, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity and Duration* (SUNY, 2011) 3.

¹⁵⁹ Malcolm Bush, *European Nobility: Rich noble, poor noble* (Manchester University Press 1988) 206.

¹⁶⁰ Hobbes (n 103) 29.

¹⁶¹ Patrick Devlin, *The Enforcement of Morals* (OUP, 1965) [12]. Leon Kass, 'Defending Human Dignity' (n 129) 308.

¹⁶² William Irvine, *A Guide to the Good Life: The Ancient Art of Stoic Joy* (OUP 2008) 228.

In discussing the role of vulnerability in dignity, George Harris notes the similar problems that Kant appeared to be addressing in his construction of human dignity. Harris argues that, for Kant, emotions such as grief result from ‘pathological attachments to others that render us vulnerable to integral stress.’¹⁶³ Kant appeared to be addressing the Stoic problem of how to ‘regulate our emotions and attachments in a way that makes us invulnerable to integral stress.’¹⁶⁴ Dignity becomes concerned with ensuring the realisation of moral duty in a world that cannot be controlled and ‘threatens our rational capacities for being agents of pure practical reason’.¹⁶⁵

3.2.3. Resistance to Oppression

At other points in time the concept of human dignity has been deployed to address the rather distinctive problems of authorities deploying tools of subjugation and oppression in order to control parts of the population.¹⁶⁶ Dignity was a tool of resistance as opposed to acceptance that nothing could be done. At the time of the Enlightenment autonomy was a predominant value that was developed to address widespread ‘discontent with despotic rulers and church leaders.’¹⁶⁷ Thus a problem that was being addressed was how to control the excesses of political power, which may be a core reason for constructing dignity as autonomy. This pattern is perhaps repeated at a number of points in history where dignity has been used to respond to oppression. Catherine Dupré, for instance, argues that treating 1949 as a starting date for dignity has ‘led to a construction of dignity as a negative concept, this is, a “never again” response to the systematic denial and destruction of humanity, which leaves out its arguably much-needed positive and complementary dimensions.’¹⁶⁸ Despotism leads to the image of the state as a potential threat, which requires resistance to power in the shape of autonomy.

¹⁶³ George Harris, *Human Dignity and Vulnerability: Strength and Quality of Character* (University of California Press 2007) 68.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 69.

¹⁶⁶ Rebecca Scott, ‘Dignite/Dignidade: Organising against Threats to Dignity in Societies After Slavery’ in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013) Ch 2.

¹⁶⁷ Francesca Klug, ‘The Human Rights Act – a “third way” or “third wave” Bill of Rights’ (2001) EHRLR 361, 364.

¹⁶⁸ Catherine Dupré, ‘Constructing the Meaning of Human Dignity’ in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013) 118. See also Stuart Woolman, ‘Dignity’ in Stuart Woolman and T Roux (eds), *Constitutional Law of South Africa* (Kenwyn 2002) 36; Baroness Hale, ‘Dignity’ (2009) 31 *Journal of Social Welfare & Family Law* 101, 103.

3.2.4. Marginalisation and Subordination

Over time particular problems or priorities may be transplanted with new concerns. Thus, the priority of freeing people from oppression may be supplanted with new priorities, including addressing poverty, vulnerability, subordination and exclusion. These different social problems may require the different components of dignity to shift again, transforming into a new singularity. Dignity would therefore require the 'State...to do more than refrain from interfering or oppressing.'¹⁶⁹ It will be essential to have a clear idea of the sorts of social concerns that need to be addressed in the current horizon as a basis for constructing dignity.

4. A Problematic Concept

4.1. Introduction

This concluding section attempts to consolidate and expand on some of the criticisms that were raised in discussing historical and contemporary constructions of dignity. Criticism partially entails, as Deleuze argues, the process of posing problems, through which existing constructions of human dignity can be evaluated.¹⁷⁰ The first problem which some constructions face is that although they purport to define universal humanity, they exclude the experiences of many groups, leading to asymmetries of power.

The second criticism will be that some constructions of dignity obscure lived experience. This means that certain human relations are rendered hidden by particular constructions of dignity in favour of concepts that are never realised. These constructions create privileged dominant groups and disadvantaged subordinate groups.

The final criticism is based on the idea that some constructions do not attempt to 'move beyond established perspectives and suggest new perspectives in keeping with the unfolding of human life.'¹⁷¹ As Tamsin Lorraine argues, concepts need to be attuned to 'the world around us in way that unfold[s] our capacities for joyful living.'

¹⁷² Some concepts of dignity obstruct and enclose creative movements towards

¹⁶⁹ Klug (n 167) 365.

¹⁷⁰ G Deleuze and F Guattari (n 156) 28.

¹⁷¹ Lorraine (n 158) 27.

¹⁷² Ibid 28.

enhanced modes of joyful living that unlock new potentialities, relationships and capacities.

4.2. Exclusion of the 'Other'

This section critiques some of the uses of the concept of human dignity in respect of the treatment of the 'other.' This entails criticism of some accounts of human dignity that do not fall within a particular paradigm of what it means to experience life as a human.¹⁷³ The paradigm image that is adopted here, which is implicit and sometimes explicit within particular constructions of dignity is that of the independent, able bodied, rational man. This paradigm image marginalises many groups, thereby making some definitions of human dignity exclusive or incomplete by design.

4.2.1. Gender Bias

A significant line of attack that can be directed towards certain constructions of dignity is the emphasis on a male paradigm, privileging them as the locus for the demands of human dignity. This is particularly prevalent in the early conceptions of dignity that demonstrate a view of women as inferior in status and subordinate to man.¹⁷⁴ The privileging of men in the construction of the concept of dignity is far more subtle today, but still remains. Rawls, for instance, constructs dignity through a thought experiment whereby heads of households agree on political principles behind a veil of ignorance. As Susan Okin argues, it depends on the acceptance of the idea that families with heads of households, usually men, are just institutions.¹⁷⁵ Arguments also continue to be made that suggest the faculties of females have a particular *telos* that differentiate their dignity from men.¹⁷⁶ Dignity should be constructed without these assumptions and instead recognise that some of the natural constraints placed on women are in fact systems of power that enable subordination.

In order to address the problem of exclusion of groups there can be a tendency to resolve the problem by drawing persons into an existing dignity archetype by arguing that excluded groups do possess the same characteristics. It has previously been

¹⁷³ Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263, 273, 277.

¹⁷⁴ Carole Pateman, 'Self-Ownership and Property in the Person: Democratization and the Tale of Two Concepts' (2002) 10 *The Journal of Political Philosophy* 20, 52.

¹⁷⁵ Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 2008) 96.

¹⁷⁶ *McFarlane v Tayside Health Authority* (2002) 2 AC 114, See Christian Witting, 'Physical Damage in Negligence' 61(1) *The Cambridge Law Journal* 189.

argued that women possess the same dignity as that of men, as they are capable of possessing the same characteristics of the rational man, or they have finally achieved an enlightened state equivalent to that of the rational man.¹⁷⁷ Women are subject to the same dualisms as men, whose rational capacity (masculine) is the source of value and not, for instance, the emotional dimensions of personality (feminine).

The difficulty with assimilation is that it fails to assess whether the archetype in the first place is actually always supportive of the needs of the excluded groups. As an example, women may be treated as clearly capable of being rational creatures that are personally responsible for their choices. At the same time, in incorporating women into such a framework, a dependent carer, often a woman, will be treated as if they have chosen as a matter of choice to make that decision and should not therefore be afforded support.¹⁷⁸ In this way, concerns need to be expressed about the extent to which encompassing excluded groups into a framework of individualism captures their actual experiences.

Constructing dignity by the incorporation into the existing dignity paradigm also requires persons to adapt themselves to social structures designed around the existing paradigm, only laying claim to compensation for their deviations from the 'norm'.¹⁷⁹ Compensatory regimes are thus created, for instance, in order to benefit women for their differences from the paradigm, rather than considering whether the social framework can be redefined 'to accommodate biological differences and whether gender as a social construct can be redefined to make those differences less...relevant.'¹⁸⁰

4.2.2. Excluding the Physically Disabled

The notion of subordination and marginalisation extends to those persons who suffer from physical disabilities. Some writers on human dignity focus on a fully functioning human being, or, if they incorporate disabled individuals, such people are to be recognised as suffering from 'bad luck.'¹⁸¹ Envy felt by the unlucky group is given as

¹⁷⁷ Janice Richardson, *Selves, Persons and Individuals: Philosophical Perspectives On Women And Legal Obligations* (Ashgate 2004) 43.

¹⁷⁸ Anderson (n 94) 297.

¹⁷⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a discourse Theory of Law and Democracy* (trs William Rehg, Polity Press, 1996) 424.

¹⁸⁰ Ibid.

¹⁸¹ Dworkin, *Sovereign virtue* (n 98) 287.

a potential ground for compensation.¹⁸² The problem with these approaches is that they mainly start from what it means to be different from the paradigm and compensate people for their shortfalls. What disabled people arguably desire is not to be treated as inferior because they have natural impairments, but rather for individuals to recognise that society is constructed around the paradigm of the able bodied, which is to their disadvantage.¹⁸³

4.2.3. Excluding the Irrational

The exclusion of particular groups from the paradigm image of humanity also applies to those concepts of dignity that predominantly focus on rationality. This construction can lead to the exclusion of those deemed to lack rationality because of a mental disorder, such as a mental illness, disorder of consciousness, or disability of the mind. More concerning is the largely unjustified perception that, as a deviation from the norm, an incapacitous person is a particular source of danger to autonomous rational beings.¹⁸⁴ This perception has underlined recent legislation governing the detention of mentally-ill persons.¹⁸⁵ A mental illness includes a clinically significant disturbance or disorder in cognition, emotion regulation, or behaviour that indicate a dysfunction in mental functioning usually associated with significant distress. Particularly severe mental illness can undermine the ability of a person to understand, evaluate and reason as aspects of a rational decision-making.

In contrast, mental disability includes arrested or incomplete development of the mind, including significant and long-term impairment of cognitive ability, as well as day-to-day social and adaptive functioning or self-management.¹⁸⁶ A person suffering from a mental disability need not be recognised as suffering from a mental illness, nor does a person suffering from a mental illness necessarily have their day-to-day functioning impaired. A person suffering from a mental disability may, however, be deemed to lack rationality due to a limitation in their cognitive ability to process and withhold information, which may show little prospect of being developed. Disorders of consciousness differ in that they concern injuries to the

¹⁸² Philippe Van Parijs, *Real Freedom for All* (Clarendon Press 1995) 68.

¹⁸³ UPIAS *Fundamental Principles of Disability* (1975) < <http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf>> accessed Oct 30th 2013.

¹⁸⁴ See Jonathan Herring, *Medical Law and Ethics* (OUP 2012) 581.

¹⁸⁵ Joint Committee on Human Rights, *Legislative Scrutiny: Mental Health Bill: Fourth Report of Session 2006-07* (HL Paper 40, HC 288, 2007) [10].

¹⁸⁶ ICD-10 Classification of Mental and Behavioural Disorders; DSM-IV Diagnostic and Statistical Manual of Mental Disorders.

brain that significantly impair awareness, such as in the case of permanent vegetative state, which may render people incapable of rational decision-making. Undoubtedly these different disorders pose different problems and will require different responses. Nonetheless, all of these disorders pose difficulties for accounts of dignity that emphasise the rational capacities of individuals as the primary locus of moral worth.

In early accounts of human dignity, those lacking rationality were treated as beings that may be more akin to beasts in nature, than man.¹⁸⁷ The negative treatment of the irrational is far less prevalent in contemporary concepts of dignity, but it still underlies some concepts. The irrational can be excluded from the protection of dignity in a number of ways, some of which may be particularly pertinent to the different forms of mental disorder. First, concerns the treatment of the irrational person as a deviation from the paradigm in need of special treatment through the concepts of beneficence, charity or pity. They do not lay claim support on the basis of the value of the humanity in their person. Second, protection of dignity is extended to people lacking a capacity for rationality, who may have once possessed it, on the basis that the critical interests of the prior autonomous person bind the latter irrational person who only has experiential interests.¹⁸⁸ A powerful objection to this approach is that it can fail to attach weight to the views of the currently incapacitated person, which might, if ignored, lead to great distress and humiliation, treating the irrational person as if they were 'no longer fully human'.¹⁸⁹ Third, where a person may in the future regain capacity, which is most likely in respect of those suffering from mental illness, a person may be a potential citizen capable of acquiring the capacity necessary for dignity.

Focusing almost exclusively on rationality is problematic on the basis that it does value many other dimensions of humanity that can be manifested in the lives of those lacking mental capacity. Feder Kittay, for instance, has argued that a focus on rationality fails to appreciate that those with severe mental disability are still capable of a 'very good life' that is 'full of joy, of love, of laughter' and is thereby 'richly human

¹⁸⁷ John Locke, *An Essay Concerning Human Understanding* (bk 4, ch IX, para 12).

¹⁸⁸ See Ronald Dworkin, *Life's Dominion: an Argument about Abortion and Euthanasia* (Harper Collins 1993) 237.

¹⁸⁹ M. Moody-Adams, 'On the old saw that character is destiny' in O. Flanagan and A.O. Rorty (eds.), *Identity, Character and Morality: Essays in Moral Psychology* (MIT Press, 1990) 124.

and full of dignity'.¹⁹⁰ It has even been suggested that many of the most fulfilling aspects of life, including deeply meaningful experiences, may be manifested more fully in the lives of those lacking rational capacities.

It is not only constructions of dignity that focus on rational thought to the exclusion of other human dimensions that can disadvantage those deemed to lack rationality. The status-based constructions of dignity that focus on community norms of acceptable conduct is highly likely to be prejudicial to the experiences of certain persons, particularly those suffering from mental illness. In some circumstances they may engage in unconventional behaviour that might be classified as undermining the status of humanity.¹⁹¹

4.3. Obscuring Lived Experience

This section critiques some of the uses of the concept of human dignity on the grounds that they make little sense of lived experience. This includes a criticism of those accounts that obscure universal interdependence and the failure of some autonomy accounts to recognise the importance of realising a wider range of human needs. This highlights the ways in which construction of dignity that obscure lived experience tend to create asymmetries of power that benefit dominant groups over subordinate groups.

4.3.1. Recognising Human Vulnerability and Interdependency

Obscuring lived experience is a criticism that has already been noted in addressing existing accounts of human dignity. The main problem was the focus of existing constructions on an image of the autonomous man as independent and separate, as underlined many of the deontological accounts of dignity. What this does is obscure:

...[T]he sense of interdependency between people; their reliance on each other at critical times, and on structures of social support...Although we might aspire to some form of independence, such a state of being is always relative to social structure, and usually highly exaggerated by those in fortunate social circumstances.¹⁹²

¹⁹⁰ E Feder Kittay, 'Equality, Dignity and Disability' in M Lyons and F Waldron, *Perspective on Equality* (Liffey Press, 2005) 95

¹⁹¹ Bartlett and Sandland, *Mental Health Law: Policy and Practice* (OUP, 2007) 1.

¹⁹² Olssen, *Liberalism, Neoliberalism and Social Democracy* (n 34) 173.

This means that each person is reliant on others in respect of inputs produced by other people that enable them to continue and excel in life.¹⁹³ It is notable that some constructions of dignity as autonomy do recognise the importance of the social to life, but these accounts tend to begin from the premise that humans are separate entities who enter into society for particular reasons. The question being asked is therefore 'how to connect to the world around us'.¹⁹⁴ This entails the wrong sort of question and the usual answer comes in the form of the consent principle.¹⁹⁵ The question should not be how to connect to the world, but what 'kind of connections [do] we want to foster and sustain'.¹⁹⁶ This entails a vital difference, in so far as the latter recognises that individual actions, capacities and personalities are always already being developed in relation to other beings.

It is not only autonomy constructions that can obscure human experience, but also status-based constructions of dignity based on community standards of appropriate behaviour. The person who engages in unconventional behaviour may be expected to experience that behaviour as others do in terms of being shameful..¹⁹⁷ This construction can be instrumental in the creation of marginalised and vulnerable groups by treating certain persons as abnormal, existing outside of the confines of human acceptability.

4.3.2. Creating Systems of Subordination

One of the notable consequences of the formation of particular paradigms of humanity as a basis for defining dignity is the creation of systems of subordination. This is particularly the case when it comes to the concept of dignity that is premised on the idea of autonomy. Autonomy is often associated with ideas of independence, separateness and self-sufficiency.¹⁹⁸ This is a normalised image that obscures the reality of universal interdependence and interconnectedness creating inequalities of power to the benefit of particular groups. As an example, the image of the autonomous person may benefit workers over dependent carers -

[T]he dependency of carers [is treated as] a voluntary deviance from a falsely universalized androcentric norm

¹⁹³ Anderson (n 94) 321.

¹⁹⁴ Lorraine (n 158) 12.

¹⁹⁵ This is not necessarily the case for relational constructions of autonomy; see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP, 2011).

¹⁹⁶ Lorraine (n 158) 12.

¹⁹⁷ See Nussbaum, *Hiding From Humanity* (n 39) 183.

¹⁹⁸ Fineman, *The Autonomy Myth* (n 92) 72.

[that] ends up justifying the subordination of women to male wage earners and the stigmatization of dependent caretaking relative to self-sufficient wage earning.¹⁹⁹

The idea of independence and separateness benefits the wage-earner in terms of creating an asymmetry of power based on subordination, obscuring the reality that they are always dependent to a degree. At the same time it perpetuates the vulnerability of the carer as she becomes acutely dependent on a wage earner, increasing the risk of subordination and domination.²⁰⁰

4.4. Connecting to Change

This section critiques some of the uses of the concept of human dignity on the grounds that they do not link up to present day conditions and developments. These concepts therefore do not represent immanent possibilities for life, which means that they are incapable of actualisation through a 'process that is ongoing in the present.'²⁰¹ It also entails criticism of accounts that obstruct creative modes of being that are capable of enhancing life. This includes a discussion of the extent to which existing concepts of dignity are capable of opening up 'paths to the invention of new forms of individual and collective life'.²⁰²

4.4.1. Obstructing Creativity

The introduction argued that a concept can be evaluated to determine whether adequate or inadequate according to whether or not the concept enhances immanent modes of being, those that are active and excessive, leading to new creative possibilities for life. The focus is on increasing joyful experiences in the realisation and discovery of the new.²⁰³

It is the case that some constructions of dignity are obstructive of the creative process of unlocking new capacities and intensities for life. The most notable example is the conception of dignity as status that demands self-controlled, upright behaviour, which is correlated to a perceived absence of animal characteristics and

¹⁹⁹ Anderson (n 94) 311.

²⁰⁰ Okin (n 175) 134.

²⁰¹ Paul Patton, *Deleuzian Concepts: Philosophy, Colonization, Politics* (Stanford University Press, 2010) 171.

²⁰² Ibid 182.

²⁰³ It entails "creative resolution of the obstacles that prevent us from our individual and collective thriving" Lorraine (n 158) 2.

the natural.²⁰⁴ This particular conception is premised on the conservation of existing societal norms of appropriate conduct that signify self-possessed and elevated behaviour.²⁰⁵ This conservation process is hostile towards expressions of life that entail new and creative relationships. Repugnance often entails a shrinking from that which is unfamiliar. Consider, for instance, the use of repugnance in the discussion of legalisation of homosexual marriage.²⁰⁶ It establishes a protective boundary against the perceived contamination of the institution of marriage by those that are perceived to be engaging in debasing acts. This particular conception of dignity as status thereby prevents the creative reimagining of marriage as an institution. The possibility of centralising mutual support and companionship as the core aspect of marriage is obstructed. Moreover, it treats the 'other' as a possible threat, as opposed to a possible source of transformative power that can change existing paradigms in order to inform more dynamic forms of life.

The teleological construction of dignity is also obstructive of pathways to the realisation and discovery of the new. This is because teleological dignity is premised on finality which consists of human beings realising their purpose through the completion of their nature. The result is a construction of dignity that suggests that life is the perfection of the essential and defining potential proper to humanity. It might deny the possibility for experimental engagement with others that can lead to discovery of new powers and affections.²⁰⁷

5. Conclusion

Human dignity is a complex multiplicity that entails the interaction of at least three core components. The components of humanity, value and respect are therefore three parts of a triadic whole. These components are no doubt very expansive, covering issues concerned with the nature and purpose of human existence. The concept of dignity is frustratingly wide, whilst being exceptionally important. The importance of this concept is supported, rather than undermined, by the creative ways it has been constructed differently over time. Indeed, alterations in the connections and interpretations of the core components of dignity to address

²⁰⁴ Stephen Riley, 'Dignity as the Absence of the Bestial: A Genealogy' (2013) 14 *Journal for Cultural Research* 143

²⁰⁵ Ibid

²⁰⁶ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 445-46 (Conn. 2008).

²⁰⁷ Peter Lucas, *Ethics and Self-Knowledge: Respect for Self-Interpreting Agents* (Springer 2011) 185.

developing social conditions demonstrates its ability to be reconstructed in order to ensure better futures for those in need. As Dupré argues, rather than being an obstacle to understanding, the 'unfinished nature of human dignity is a crucial sign of its dynamism and usefulness'.²⁰⁸ Treating dignity as a developing concept entails a constant recognition that time is not a closed idea and humans can themselves be active in the transformation of dignity.

This does not mean criticisms cannot be directed at existing concepts of dignity. However, these criticisms do not concern the reality that dignity has been constructed differently over time, but rather that some constructions of dignity do not always capture the needs of certain persons in present day conditions. Some constructions isolate and subordinate vulnerable persons. This is not to say that all concepts of dignity exclude a consideration of the needs of the marginalised or vulnerable. The capabilities approach to the concept of dignity at least attempts to tackle these issues. However, it suffers from the problem of being underpinned by two contradictory philosophical traditions. It is therefore the aim of the next chapter to consider how the core components of dignity can be more convincingly combined to address the experiences of marginalised, subordinate and vulnerable persons.

²⁰⁸ Dupré, 'Constructing the Meaning of Human Dignity' (n 168) 121,

Chapter Two: An Investment Construction of Human Dignity

1. Introduction

Human dignity requires *respect* for the *value* of *humanity*. This chapter seeks to avoid the difficulties of the constructions of dignity analysed in the previous chapter by assembling and defining these different components in a distinct way. The concept of dignity that is constructed entails investment into the value of human life as creative potential, which is promoted to the extent that a person is capable of affecting and being affected in an increasing number of ways, enabling possibilities for different, experimental and creative modes of being.

This construction of dignity does not attempt to redefine the concept in a way that has no affinities to existing conceptions. Nor does it aim to replace all existing conceptions, which may be of particular relevance in addressing specific problems within a certain temporal context.¹ The concept that is proposed complements existing approaches by refining the capabilities construction of human dignity, which is concerned with the developmental process, including the 'affective and material engagement that grounds the person in context.'² The capabilities construction of human dignity has some important insights into the human condition that extends beyond a narrow focus on rationality and autonomy.³ However, as was argued in the previous chapter, the present capabilities construction of human dignity is underpinned by competing ethical theories.⁴

The capabilities construction of human dignity that is developed in this chapter is connected to the idea that humanity has value as creative potentiality. This is not a teleological conception of 'potential', which underpins existing capabilities-based approaches, but one that focuses on diversity and creativity, rather than an ideal or model of human nature. This construction is realised by reorienting the capabilities approach to dignity around the political philosophy of Baruch Spinoza and Gilles

¹ Alexandre Lefebvre, *The Image of Law: Deleuze, Begson, Spinoza* (Stanford University Press, 2008) 231.

² Duff Cameron, *Assemblages of Health. Deleuze's Empiricism and the Ethology of Life* (Springer, 2014) 84.

³ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press: HUP 2011) 30 – 31.

⁴ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP, 2011) 8

Deleuze. Their focus on what the body is capable of doing and being closely connects it to the capabilities approach and they share a number of important goals.⁵ At the same time, they deny the idea of an exemplary state of being human or natural end. They thus differ from teleological perfectionism, which entails becoming perfect through attaining an end, purpose or vocation inherent in being human. A view of human striving that is concerned with existence in the 'fullest and most real sense'.⁶ Their account of human life is of a dynamic, diverging, open and creative force that unfolds new capacities in interaction with other forces and persons in the world. As will be seen, they are not directly concerned with the shape a life should take, a model of what sorts of lives are worthwhile or complete, or *telos* to human becoming, but with exploring new possibilities of existence and discovering what a person is capable of doing through experimentation. There is no becoming towards a preconceived end or to a state of completion, so that we become in order to be more fully human, but rather a creative tendency to unfold new possibilities for life and that each person is free to unfold their striving in their own distinctive way.

Elements of their thinking can, it will be argued, enrich an understanding of a capabilities approach to dignity. In particular, their thinking will be used to emphasise the close relationship between different aspects of human functioning in a way that supports a strongly holistic approach to humanity. They suggest that every change in the capability of the body to affect and be affected is also a change in the mental capability of the person to affect and be affected (and vice versa). Moreover, their approach identifies the mechanisms by which capabilities are cultivated, focusing specifically on the relational context in which the capability of a person to affect and be affected develops in interaction with the surrounding flows and forces of life that sustain us. Their approach is not obstructive of creative change, but rather embraces it as an 'approach to being-human [that] entails a more active, joyous, flexible and creative subjectivity able to unfold new capacities in changing circumstances.'⁷

On this account, each person is in a state of *dynamic becoming* through continuous variation in their activity and passivity in interaction with others. Increases in the

⁵ Mark Olssen, *Liberalism, Neoliberalism and Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education* (Routledge 2009); Federico Zuolo, Sen's Capability Theory: Spinoza beyond Aristotle <http://cfs.unipv.it/sen/papers/Zuolo.pdf> <Accessed 13th February 2013>.

⁶ Nathan Jun, 'Deleuze, Values and Normativity' in Nathan Jun and Daniel Smith, *Deleuze and Ethics* (Edinburgh University Press, 2011) 91.

⁷ Tamsin Lorraine, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity and Duration* (Sunny, 2011) 126.

power of acting of the person are tracked by joyful affections, whereas decreases in that power are tracked by sad affections. Deleuze and Spinoza, it will be argued, provide an important basis for valuing emotion as an aspect of a holistic concept of humanity, treating them as cognitive and physiological phenomenon that indicate a bodily and mental transition to a lesser or greater activity, an increase or reduction in the power to bring about certain affects and to be affected. It will also be argued that Deleuze and Spinoza recognise vulnerability as a core of their conception of human subjectivity, and, more importantly, offer a way of conceiving of vulnerability as entailing both negative and positive possibilities for life. Vulnerability, it will be argued, entails openness, porosity and receptivity to what can affect us in ways that it is not possible to fully predict, control or know in advance. Such openness is the condition of human experience that 'makes possible love, affection, learning, and self-transformation just as much as it makes possible suffering and harm.'⁸

Individuals become less passive, and more active, increasing their power of acting, to the extent that they can understand and select those encounters, or relationships, with others and surrounding forces that creatively extend the capability of the person to *affect* and be *affected*.⁹ It will be argued that this entails the power or potential for multiple becomings, with a capability of both mind and body to affect and be affected in an increasing number of ways. There is no ideal or end, only a continuous endeavour to expand our power of action and perception through creativity and transformation, which enables us to vary and change in as 'many ways as possible, through a maximum of encounters.'¹⁰ It is, on this account, not possible to determine in advance a 'reliable blueprint' for development, but instead must depend on an 'experimental ethos' through ongoing 'exploration and experimentation with the bodily activity that living things are capable of undertaking'.¹¹ Therefore, what is good, in terms of what increases our power of acting, always remains to be discovered in the 'experimental relations that we have of the world.'¹² At the same time, as no one knows ahead of time the affects one is capable of, or how certain developments might unfold, respect for dignity requires a lasting prudence, patience

⁸ Ibid 38.

⁹ Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light 1988); Baruch Spinoza, *Ethics* (trs by G.H.R. Parkinson, OUP 2008). It will also be achieved by moving beyond focusing on capabilities in relation to the individual, to considering capabilities within a relational matrix.

¹⁰ Claire Colebrook, *Gilles Deleuze* (Routledge 2001) 133.

¹¹ Cameron, *Assemblages of Health* (Springer, 2014) 75.

¹² Ibid

and care, lest such experimentation become dangerously destructive. It may not be clear how something will affect us, whether it will enhance or decrease our activity, and whether it will contribute to the positive or negative aspects of human vulnerability. Becoming must not, on this account, be 'haphazard or uncontrolled' but cautious, otherwise it can itself seriously threaten the openness, creativity and diversity of human becoming.¹³

These different elements are used in this chapter as a basis for developing a refined capability approach to dignity. Human dignity is understood to be a richly holistic concept that requires a consideration of the different aspects of the person in light of the whole and to reflect on the complex relations between the dimensions of humanity (bodily, mental, social and recreational) that dynamically unfold in time and within a complex network of relationships. It will be argued that it encompasses collective and personal investment (respect) into conditions, relationships and structures that promote the creative potentiality (value) of each person by protecting and promoting the capability of the mind-body to affect and be affected in an increasing number of ways. The community has an obligation to invest in conditions that support those who face the most circumscribed and isolated conditions, and are therefore particularly limited in terms of making connections that enable them to extend and develop their capacities.

Individuals are entitled, in light of the open nature of vulnerability, and the experimental nature of development, to explore the affects of which they are capable and invest in novel forms of collective engagement, although this must be counterbalanced with a lasting prudence, patience and care. Dignity requires a person to be open to developing new affections, capabilities and forms of engagement that will increase their activity, whilst trying to avoid forms of becoming that become destructive of the subject and may limit future openness. Moreover, it will be argued that individuals are expected to recognise that their own process of development is dependent upon and invested in the development of others, and should seek to promote the striving of others as part of their own striving. The final section of the chapter assesses the investment concept against the concerns

¹³ Nathan Jun, 'Deleuze, Values and Normativity' in Nathan Jun and Daniel Smith, *Deleuze and Ethics* (Edinburgh University Press, 2011) 81.

expressed in relation to some of the existing concepts discussed in the previous chapter.

2. The Substance of an Investment Concept

2.1. Positioning Value in the Inherent Potential of Human Life

The value of human life is one of the key elements of understanding human dignity. It is clear from the previous chapter that different constructions of dignity define value in different ways. Teleological dignity, for instance, looks to valuable human ends, a predetermined direction towards an ideal state of flourishing, whilst deontological dignity posits a pre-social rational subject that has value in respect of the capacity for reason.¹⁴ As was seen in the previous chapter, there are difficulties with these approaches in the way they can marginalise and subordinate some groups.

The value of humanity exists neither as being prior to the ends of the subject, or as defining the ends of the subject, but exists rather as an unfolding of the 'creative potential within us.'¹⁵ Creative potentiality denotes, importantly, as Kateb states, the idea 'of the unrealised, of the not-yet.'¹⁶ Human life is marked by 'tendencies and potentials that could unfold in many more ways than actually occur.'¹⁷ On this account, the value of humanity is not a completed or fixed property of being. Instead, the value of humanity has a dynamic quality in which there is always the immanent possibility of discovering new capacities, intensities, relationships and modes of living that are capable of being unfolded from the potential inherent in the present forms of human existence. There are, thus, always potentials in actual bodies and situations waiting to be further developed and extended.¹⁸

It is important here to uncouple the concept of potentiality from a *teleological* ideology, which also deploys potentiality. Teleology entails a predetermined *ideal* or *purpose* as the essence of a being, which a person has the potential to realise. This conception of potentiality is concerned with the realisation of an ideal state of existence that can be extrapolated from past forms of living. The potentiality of a person is stated within the 'definition of the thing as the potential proper to that

¹⁴ Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183, 188.

¹⁵ Lorraine (n 7) 96.

¹⁶ George Kateb, *Human Dignity* (HUP, 2011) 159.

¹⁷ Lorraine (n 7) 35.

¹⁸ *Ibid* 82.

thing.¹⁹ The essence of the human being is ‘grounded in some idea of the purposes and destiny of human life.’²⁰ Thus, for instance, it is the essential and defining potential of the human to be virtuous, which is a potential already present in the person to realise. The virtuous is treated as, in some sense, more real – people are ‘striving to not only become better but to be – that is to exist in the fullest and most real sense – [through] excellence or virtue’.²¹ A person becomes more fully human through the realisation of their potential to achieve their proper end. A different conception of potentiality could negate such idealism in favour of creativity, difference and experimentation. In this regard, human life is characterised not be a single end point of perfectionism, which ‘functions as a focal point or terminus’²², but rather it is characterised by an unpredictability, which entails:

The will to break with what has gone before, to try what has not been tried before, to turn aside from what is already good enough...out of boredom or a spirit of adventure or some other passion that is not easy to identify or name – is a tribute to the unknown potentialities that people suspect, if only dimly, lie hidden in them.²³

Human potential is therefore marked by its unpredictability and dynamic nature. It is the ‘latent capacity to say or do or make or perceive or understand something new’.²⁴ On this basis, human life can never achieve completion as there are always ‘tendencies and potentials that could unfold in many more ways than actually occur’ and is valued precisely because of the creative process of differentiation and transformation in its process of becoming.²⁵ Humanity is not a completed or fixed state of being. Instead, it has a dynamic quality in which there is always the immanent possibility of discovering new capacities, intensities, relationships and modes of living that are capable of being unfolded from the potential inherent in the present forms of human existence. This entails an ethics of experimentation in order to make new connections that break with routine and open up new perceptions, new

¹⁹ Reidar Due, *Deleuze* (Polity, 2008) 44.

²⁰ Edmund Pellegrino, ‘The Lived Experience of Human Dignity’ in *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* (US Independent Agencies and Commissions, 2008) 514.

²¹ Nathan Jun, *Deleuze, Values and Normativity* in Nathan Jun and Daniel Smith, *Deleuze and Ethics* (Edinburgh University Press, 2011) 91.

²² Joe Hughes, *Philosophy After Deleuze* (Black, 2012) 101.

²³ Kateb (n 16) 171.

²⁴ *Ibid.*

²⁵ “Life is only incessantly creative, proliferating difference, trying new things, and creating new forms, in keeping with tendencies that insist without being overly manifest to human perception, but that have their effects in concert with actualised life” Lorraine (n 7) 35.

thoughts and new ways of becoming that extend the capacity to affect and be affected. Human beings are able to intuit the 'present and skilfully unfold the creative possibilities of life' and 'participate in unfolding the incipient tendencies of our present towards future we can affirm.'²⁶ This does not denote the idea of a fixed essence to being that then becomes, which simply unfolds itself through time, but rather that the human subject is a process of becoming that 'changes with each new encounter'.²⁷ The essence of humanity is the dynamic 'power that singularises each individual, conferring upon [them] a unique destiny.'²⁸

This account of potential must be assessed against the problematic aspects of exclusion that were recognised in the previous chapter. It might be thought that emphasising potentiality excludes groups who have impaired cognitive faculties, as it could be argued that they possess no potential.²⁹ This sort of prejudice can be firstly challenged on the basis that it really doesn't correlate to what is known from experience, as even education of the most psychologically disabled child can enhance the individual's experiences.³⁰ The precise problem with the historical prejudice was that it was based on an assumption that all potential is *known* and it is *nothing*. What is needed is a wide, rather than narrow view of creative experiences, treating personality in a holistic fashion, as well as recognition that a person is never fully known as a prediction.³¹ Moreover, such creative experiences should not be confused or equated with the idea of human greatness or genius.³² It is the 'ordinariness' of creative potentiality that should be valued most, as part of the dynamic and joyful aspects of human life, not necessarily great achievements.³³

Those that are temporarily incapacitated are a more difficult category as they may lack experiences, but they may have potential in the sense of any current lack of capacity being a merely temporary interruption to future creative experiences. In contrast, the permanently incapacitated may have very limited experiences or none

²⁶ Ibid 5.

²⁷ Ibid.

²⁸ Etienne Balibar, *Spinoza and Politics* (Verso 1998) 107.

²⁹ John Locke, *An Essay Concerning Human Understanding* (bk 4, ch IX, para 12)

³⁰ Warnock Report, 'The Report of the Committee of Enquiry into the Education of Handicapped Children and Young People' (1978, Cmnd 7212, para 1.7).

³¹ Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light 1988) 17-18, 60.

³² Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011) 48.

³³ Ibid.

at all. However, they can be included on the basis that the value of life as potentiality encompasses also the existing actualised potential. It is possible therefore to make judgements about how a certain type of death or treatment will fold back into the past character of the lives lived and affect the future becoming.³⁴ The treatment of incapacitated persons has the possibility of shaping the potentiality of the individual in terms of what the story of that life will become, as well as its potential effects of that story on those in relationship with the subject.³⁵

2.2. The Multifaceted Nature of Humanity

2.2.1. Powers of Acting and Capability

As a result of a focus on potentiality as unpredictable, creative and experimental, the second component concept of dignity as humanity cannot be defined solely by reference to a transcendental ideal or by reference to an ahistorical subject. Humanity is an 'evolving force of life that is always diverging from its manifest forms and whose capacities are always changing'.³⁶ There is thus no being prior to the play of forces, nor becoming towards an ideal end. There is only becoming as potential for creation, variation and production. The essence of a person is coextensive with its capability to affect and be affected, which is dynamic, shifting and evolving, rather than a rigid set of characteristics or functions. Human development does not therefore entail the specification of a set of valuable functioning's that are established *a priori*. It is not possible to determine fully beforehand the affects of what a body or mind is capable. A person can only understand the affects of which they are capable through exploring ways of being, forms of relationality, and encounters with others.

This is a very Spinozian and Deleuzian conception of the human subject.³⁷ According to both, the human subject is defined by its degree of *power to act*, which entails a capability to affect and be affected through dynamic relation with others.

³⁴ Ronald Dworkin, *Life's Dominion: an Argument about Abortion and Euthanasia* (Harper Collins 1993). Deleuze provides for the – "continual synthesis of past, present, and future that enables us to attempt to integrate the moments and events of our lives into an overarching, coherent 'story.'" Marc Roberts, 'Time, human being and mental health care: an introduction to Gilles Deleuze (2005) 6 Nursing Philosophy 161, 170; Marc Roberts, 'Gilles Deleuze: psychiatry, subjectivity, and the passive synthesis of time' (2006) 7 Nursing Philosophy 191, 99.

³⁵ Ibid

³⁶ Lorraine (n 7) 38.

³⁷ "The subject is defined by the movement through which it is developed" Gilles Deleuze, *Empiricism and Subjectivity: An Essay on Hume's Theory of Human Nature* (1991, Columbia University Press) 85; Balibar (n 28) xviii.

What is good are those relations which compound with my own to sustain the power to act, and increase the capability of a person to affect and be affected, so that a person is capable of multiple becomings. In contrast, what are bad are those modifications in our power that lead to greater passivity and thus a decreased capability to affect and be affected in varied ways.³⁸ A human being is therefore defined by 'its power or what it can do.'³⁹ The question posed by both philosophers is not -

What must I do?" (which is the question of morality) but rather "What can I do, what am I *capable of doing* (which is the proper question of an ethics without morality). Given my degree of power, what are my *capabilities* and *capacities*? How can I come into active possession of my power? How can I go to the limit of what I "can do"?⁴⁰

This treats the human person as a dynamic, affirmative and active force, a power that 'unfolds out of what it can do rather than what it can dominate – a force that extends to its limit rather than being separated from what it can do'.⁴¹ This conception of power is quite distinct from a conception that focuses on the idea of 'authority, domination of exploitation'.⁴² Liberal deontological theories of dignity often conceptualise power as something that is 'principally manifested in the regulation and control of politico-economic relations.'⁴³ In contrast, Spinoza and Deleuze promote the productive nature of power in which humans can actively develop their capacities in relationships that are mutually enhancing by composing relations with other bodies to form a more powerful collective.

This conception of power entails recognition that the capacities and abilities of a person are constantly unfolding in the interactions with the dynamic and developing forces of life. Thus, a person is always in a state of becoming because their powers of acting and their level of ability to affect and be affected are always changing in relation to 'surrounding forces of which we are an integral part.'⁴⁴ A person is

³⁸ "Objectively, then, everything that increases or enhances our power of acting is good, and that which diminishes or restrains it is bad" Deleuze, *Spinoza: Practical Philosophy* (n 31) 101.

³⁹ Claire Colebrook, 'Power' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005) 216.

⁴⁰ Daniel Smith, *Essays on Deleuze* (Edinburgh University Press, 2012) 176 [Emphasis Added].

⁴¹ Lorraine (n 7) 38.

⁴² Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporality* (Routledge 1996) 63.

⁴³ Ibid.

⁴⁴ Lorraine (n 7) 32.

therefore constantly interacting with 'other things which change and affect it.'⁴⁵ A paraplegic who combines with a wheelchair is affected in terms of changes to their capability for acting in a way that is not necessarily lesser to the 'normal' man, but 'more complex than that of an able-bodied walker.'⁴⁶ Human life in this framework exists as a dynamic force in a relation that will shift and alter, depending on encounters with other powers that increase or decrease our activity.

In light of the clear focus of Spinoza and Deleuze on what the body is actually capable of doing and becoming, it is surprising that few connections have been made by the leading thinkers on the capabilities approach.⁴⁷ This is especially the case when they offer an alternative framework to the teleological perfectionism of Aristotle or the deontological liberalism of Rawls. Their approach differs from an Aristotelian approach in that the question occupying Aristotle what shape a life should take, specifically the *telos* to which human life should conform.⁴⁸ This includes striving to fully realise the destiny of human life, which is the essence of its being, and the potential it has itself to be, reaching a state of excellence and completion.⁴⁹ The focus of Aristotle is therefore on the proper *human function*, which predetermines in advance the appropriate direction of development and the exemplary state of being human.⁵⁰

It is true that, on some readings, Spinoza is treated as supporting such a teleological approach to human nature.⁵¹ However, other readings have emphasised that for both Spinoza and Deleuze, there is no *end*, or particular model of the human that we should strive to instantiate. Development is enhanced through the expansion of our capability to affect and be affected, which opens us up to be multiple becomings, and the ability to vary and alter in as 'many ways as is possible, through a maximum of encounters.'⁵² There is no pre-given end to life to which the subject is directed, and it

⁴⁵ Beth Lord, *Spinoza's Ethics* (Edinburgh University Press 2010) 85.

⁴⁶ *Ibid* 64.

⁴⁷ Mark Olssen, *Liberalism, Neoliberalism and Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education* (Routledge, 2009); Federico Zuolo, 'Sen's Capability Theory: Spinoza beyond Aristotle' (n 5); Duff Cameron, *Assemblages of Health. Deleuze's Empiricism and the Ethology of Life* (Springer, 2014).

⁴⁸ Jun (n21) 90-92.

⁴⁹ *Ibid*

⁵⁰ Zuolo (n 3)

⁵¹ Michael Della Rocca, 'Spinoza's Metaphysical Psychology' in Don Garrett, *The Cambridge Companion to Spinoza* (CUP, 1996) 252.

⁵² Claire Colebrook, *Gilles Deleuze* (Routledge 2001) 133.

is not possible to determine beforehand what a person can do in a given encounter. The good is simply that which disposes the human body to be capable of doing many things at once, or being acted on in many ways at once, so the mind also is more capable of perceiving many things at once.⁵³ This is not a comprehensive account of the functioning proper to the individual, nor is it predetermined direction for development. Development requires, instead, an ongoing process of experimentation with the relationships, connections and interactions that a person has with the world. It is through such experimentation, and the context of a concrete encounter, that the subject discovers the affects of which it is capable, as well as that which expands those affects.

The exploration of different modes of existence, in turn, leads to the expansion of possibility, in the form of the 'creation of ever divergent ends, creating more and more series of becoming.'⁵⁴ As certain lines of becoming are unfolded differently, there is an 'expansion of possibility', with new opportunities for creation, transformation and invention becoming possible, as well as the release of new potentialities for the future.⁵⁵ With each change and modification in becoming, new possibilities for becoming are produced.⁵⁶ In this way, development becomes an open process, which entails an ongoing endeavour to explore the affects of which one is capable, without limiting potentiality in terms of what it is already determined to achieve. The ethical question therefore addressed by Deleuze and Spinoza is not how should one live (teleology), or how should one act (deontology) but how *might* one live, and how *might* one go to the limits of what one is capable of doing, which is addressed only through exploring the affects of which one is capable.⁵⁷ In this respect, they share much in common with postmodern approaches to dignity focused on ethical experimentation, localised responses to concretely experienced situations, and are addressed to the issue of what we might make of ourselves, as opposed to what is our essential nature.⁵⁸

⁵³ Spinoza, *Ethics* (n 9) V Prop XXXIX.

⁵⁴ *Ibid* 57.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

⁵⁷ Jun (n21) 92.

⁵⁸ Mark Dietrich Tschaeppe, 'Postmodern Perspectives on Human Dignity' in Stephen Dilley and Nathan Palphant, *Human Dignity in Bioethics: From Worldviews to the Public Square* (Routledge, 2013) 90.

If there is any connection to teleology, it is, as Bergson argues, situated in the 'origin and not at the end (contra traditional finalism) of life'.⁵⁹ Like Bergson, both Spinoza and Deleuze argue that there is a striving to life, a drive, creative tendency, and impulse to sustain and expand our capability to affect and be affected. Such a view of striving, however, does not depend, as traditional models of teleology do, on a conception of an ideal model against which the development of a person can be measured. Instead, it is creative of new potentialities and possibilities for life, requiring exploration and experimentation.⁶⁰ Much greater emphasis is therefore placed on the ongoing process or project of development than on the realisation of a determinate level of functioning. Striving does not 'imply that all individuals are driven by identical needs and desires.'⁶¹ Instead, it requires people to be 'free to realise their own essence in their own way' and that they should desire the same for others.⁶²

Striving is not therefore an endeavour that assumes a presupposed idea of the perfect, a movement towards the achievement or fulfilment of the essential, defining and particular ideal of human life, and what is good is not found in the maturation of our being. As Claire Colebrook puts it, there is 'no goal to which life is striving. But there is an internal or effective striving to life – to enhance its power, to maximise what it can do...[which] is achieved not by events leading up to an end, but by the creation of ever divergent ends, creating more and more series of lines of becoming.'⁶³ Striving is the drive or tendency to persevere in existence and the extension of our power of action. What is good is that which enables the extension of potentiality for affection through creative engagement and the joyous increase of our power for action, which always remain to be discovered and produced through continuous experimentation in particular encounters in time. What is important is not the attainment of an ideal, but the ongoing and persistent process of striving to increase our capacity to affect and be affected, so that a person is capable of being affected in an increased number of ways, or affecting external bodies in an increased number of ways.

⁵⁹ Valentine Moulard-Leonard, *Bergson-Deleuze Encounters: Transcendental Experience and the Thought of the Virtual* (Sunny, 2008) 59.

⁶⁰ Duff (n 47) 84.

⁶¹ Moira Gatens, *Feminist Interpretations of Benedict Spinoza* (Penn State Press, 2009) 19.

⁶² *Ibid* 113.

⁶³ Colebrook, *Gilles Deleuze* (n79) 57.

This does not mean that it is impossible to, with a degree of certainty, account for that which increases the power or capabilities of the body. However, any such account cannot be perceived as a rigid set of conditions directed towards some end state, but rather as 'knowledge gained through experimentation with different conjunctions and combinations.'⁶⁴ This knowledge 'allows for an art of organising 'good encounters', or of constructing assemblages (social, political, artistic) in which powers of acting and the affective affects that follow from them are increased.'⁶⁵ However, such knowledge is always open to 'recurrent negotiation and experimentation' taking into consideration the specific relational context.⁶⁶ It must also be open to refinement in relation to the continuous modification of life in time, and the emergence of new possibilities and potentialities.

2.2.2. Mind and Body

One of the most important implications of reorienting the capabilities approach to dignity around the political philosophy of Spinoza and Deleuze is the establishment of a parallel relationship between mind and body. Existing capabilities theorists, such as Nussbaum, appear to treat the capabilities of the mind as necessarily separate aspects of flourishing from that of the capabilities of the body and many of the autonomy-based concepts of dignity depend upon a mind-body dualism.⁶⁷ In contrast, Spinoza and Deleuze treat both the mind and body as different modes, which express the same substance.⁶⁸ The mind is treated as the idea of the body, so that it corresponds to its object, which means that the mind comprehends and develops ideas about the affections or capabilities of the body.⁶⁹ Thus, humans are 'initially informed about the world by informing images of our bodies and the ways in which other bodies impinge upon us.'⁷⁰ The mind does not necessarily control, or dominate the passive body, but moves from a relative degree of passivity to activity to the extent that it develops more adequate ideas of what enhances the body. In turn, the body moves from a relative degree of passivity to activity to the extent that the mind understands more adequately what kinds of interactions, relationships and

⁶⁴ Claire Colebrook, 'Experimentation' in Parr (n 39) 92.

⁶⁵ Ibid.

⁶⁶ Duff (n 47) 84.

⁶⁷ Nussbaum, *Creating Capabilities* (n 3) 34.

⁶⁸ Balibar (n 28) 106.

⁶⁹ Baruch Spinoza, *Ethics* (New York: Hafner 1949) 89, II, Prop XIII.

⁷⁰ Janice Richardson, *The Classic Social Contractarians: Critical Perspectives from Contemporary Feminist Philosophy and Law* (Ashgate 2009) 51.

combinations that enhance its characteristic relation. The result is the doctrine of parallelism, which establishes that -

Whatever increases or diminishes, helps or hinders, our body's power of acting, the idea of that same thing increases or diminishes, helps or hinders, our mind's power of thinking.⁷¹

This essentially means that the more the mind understands about what increases the activity of the body, the more active the mind becomes in terms of understanding. It develops more adequate ideas of those combinations and interactions that affect the body, in a way that increase the activity of thinking and perception. In turn, the more the mind truly understands about what enhances the body, the more active and less passive a person can become in having the necessary knowledge to actively seek out productive encounters, relationships or interactions.⁷²

This view of the mind entails a conception of embodied and social reason that 'instead of remaining at the mercy of chance encounters, endeavours to join us to things and beings whose relations compound directly with our own.'⁷³ Reason is therefore, in direct contrast to Kant, not an abstract process formed in isolation, but develops in encounters with other forces in the world, so that 'knowledge and the theory of sociability are closely intertwined.'⁷⁴

The importance of parallelism is that it requires an assessment of the simultaneous impact of living conditions, relationships and interactions on both mind and body. It means that whatever is 'an action in the mind is necessarily an action in the body as well, and what is a passion in the body is necessarily a passion in the mind.'⁷⁵ Thus, it is important to consider how an encounter affects 'simultaneously both the soul (mind) and the body.'⁷⁶ Consider, for example, an individual who has limited access to food with very little nutrition. The effects of malnutrition might be tiredness, delayed healing, irritability, poor concentration, anxiety and depression. Insecure access to nutrition has parallel effects on both the body and mind, as it reduces the mind's ability for perception, which in turn limits human activity. Certain channels of activity

⁷¹ Baruch Spinoza, *Ethics* (G.H.R Parkinson, OUP, 2000) III, Prop. XI.

⁷² Lord (n 45) 86.

⁷³ Deleuze, *Spinoza: Practical Philosophy* (n 31) 72.

⁷⁴ Balibar (n 28) 101.

⁷⁵ Deleuze, *Spinoza: Practical Philosophy* (n 31) 18.

⁷⁶ *Ibid* XVIII

will be cut off because the body is simply too weak to engage in it, whilst others, such as affiliation may be diminished because of depression. The person is therefore rendered less capable of being affected in diverse and creative ways.⁷⁷

2.2.3. Emotion and Reason

An important consequence of the rejection of mind-body dualism is the erosion of the emotion-reason dichotomy that characterises deontological models of dignity that treat the mind as necessarily dominant over emotions, which are irrational and resigned to the body. Spinoza rejects this traditional division in favour of an opposition between passive emotion and active emotion.⁷⁸ His account of emotions, which has gained support by some leading neuroscientists, is subtle, complex and nuanced.⁷⁹ It provides a means by which to construct a concept of dignity that maximises positive emotions, such as joy, whilst working to minimise negative emotions, such as sadness and, at the same time, connect those emotions to other dimensions of humanity.⁸⁰ This theory of emotion, it is argued, can draw dignity away from ideas of self-denial, control, dejection, towards ideas of affirmation, activity and joy.⁸¹

An emotion for Spinoza is a modification of the body, whereby the power of the person is increased or diminished, helped or hindered, together with the idea of those modifications. An emotion is at the same time cognitive and affective. It entails both a bodily transition and a mental equivalent, which pertains to those 'ideas of things that increase or diminish the body's power of acting'.⁸² Spinoza thus adopts a complex cognitive approach to emotions, encompassing an idea of the mind, which

⁷⁹Antonio Damasio, *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* (Harcourt 2003). See also Heidi Ravven, 'Spinoza's Anticipation of Contemporary Affective Neuroscience' (2003) 2 *Consciousness and Emotion* 4; 'Spinoza and the Education of Desire' (2003) 2 *Neuropsychanalysis* 218.

⁸⁰"dignity...is not only about guarding against hurt and pain, but might also contribute to the promotion of positive feelings of well-being, even joy, as well as aspirations to happiness and a sense of personal fulfilment." Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) *EHRLR* 190, 195

⁸¹"Nothing forbids our pleasure except a savage and sad superstition." Baruch Spinoza, *Ethics* (New York: Hafner 1949) 222, 4P45C28.

⁸²Aurelie Armstrong, 'Autonomy and the Relational Individual' in Moira Gatens, *Feminist Interpretations of Benedict Spinoza* (Penn State Press 2009) 56.

is a mental act entailing affirmation or denial of a bodily modification.⁸³ An emotion has:

A physical and mental aspect – The physical aspect is the physiological changes in the body that constitute an increase or decrease in our power – the mental aspect is the idea or mind of that change, which idea or mind constitutes the corresponding increase or decrease in the imaginative portion of the mind's power of action.⁸⁴

As such, something like anxiety can be understood as one and the same time a 'psychological nexus of feelings and moods' and a 'physiological state of the body that accompanies the psychological state'.⁸⁵ This is an emotion which is based on the *idea* that some aspect of bodily existence is insecure.⁸⁶ It may have negative physiological symptoms that reduce the activity of the body, such as muscle aches, palpitations and tiredness. This account of emotion therefore contributes to a holistic construction of human dignity that will require a consideration of the parallel affect of transition in the bodily state of a person on their mental state (and vice versa).

Emotions are of evaluative import in the determination of that which is useful for the individual. An idea of the mind will encompass an affirmation or denial of any external things that aid or diminish our body's power of acting, which, once formed, may aid or restrain our power of thinking. They are 'ideational indicants of bodily thriving or declining'.⁸⁷ This is not to say that some emotional states cannot be based on confused ideas. The mind, although it develops ideas of the modifications of the body, may form confused ideas of those modifications and the causes of those modifications. However, unlike some approaches to dignity, which focus on control and suppression of the emotions, Spinoza argues that a passive affect can only be displaced by a more powerful and lasting active affect. The aim is not to remove emotions from an ethical life, but to understand them, and to seek to displace passive emotions with more active emotions that depend upon true knowledge of the affects, and how external causes contribute to our striving.

⁸³ Michael Della Rocca, *Spinoza* (Routledge, 2008)

⁸⁴ Neal Grossman, *Healing the Mind: The Philosophy of Spinoza Adapted for a New Age* (2003) 127

⁸⁵ *Ibid*

⁸⁶ Jonathan Wolff and Avner De-Shalit, *Disadvantage* (OUP, 2007) 68; Spinoza, *Ethics* (n 81) 177, Def XIII.

⁸⁷ Amelie Rorty, 'Spinoza on the Pathos of Idolatrous Love' (n 82) 67

Passive emotions, for Spinoza, are those that are based on inadequate ideas, in that a person does not fully understand how other bodies affect their own or that they have confused beliefs about how other bodies affect them.⁸⁸ Not all passive emotions are in themselves negative, they can be negative or positive depending on their affect. In this regard, whilst all passive emotions are based on inadequate ideas, some experiences of passive emotions are an important and necessary precursor to the formation of active emotion. Passive emotions provide the 'material for adequate ideas, the forming of which makes us more active than before'.⁸⁹ Thus, a person can experience a passive joy because they may not fully understand or comprehend the effect or the causes behind the feeling of joy. However, these emotional encounters provide the opportunity for reflection on the reasons why the encounter was joyous - they are the 'very source of our power of activity [because] particular emotional reactions provide the occasion for thinking about ourselves in a certain way'.⁹⁰

Active emotions can, in contrast, be distinguished from passive emotions only by their cause.⁹¹ The difference between a joyful passive emotion and joyful active emotion is that 'a joyful passion arises from an external cause, whilst a joyful action arises from an internal cause'.⁹² This is because an active emotion is one that is based on adequate and clear ideas of the causes of our emotions entailing a 'deeper understanding of the whole in which our particular individuality is realised'.⁹³ The development of adequate ideas of our emotions has an internalising effect, as the 'extent that we understand something it ceases to be outside us'.⁹⁴ It is therefore possible to cause our emotions through an idea that becomes internal to us and from these ideas we can become more active in seeking out joyful encounters, whilst avoiding those that are sad. Dignity, on this account, would not require the suppression of emotions through pure reason, or give effect to negative emotions such as disgust. Instead, dignity would require the emergence from a state of passive emotion in which a person can experience joy (or sadness) through chance

⁸⁸ Deleuze, *Spinoza: Practical Philosophy* (n 31) 74-75..

⁸⁹ Olli Koistinen, *The Cambridge Companion to Spinoza's Ethics* (CUP, 2009) 21.

⁹⁰ Aurelia Armstrong, 'Autonomy and the Relational Individual' in Moira Gatens, *Feminist Interpretations of Benedict Spinoza* (Penn State Press 2009) 58.

⁹¹ Gilles Deleuze, *Expressionism in Philosophy: Spinoza* (Mit Press, 1990) 274.

⁹² Michael Hardt, *Gilles Deleuze: An Apprentice in Philosophy* (University of Minnesota Press, 1993) 98.

⁹³ Armstrong (n 90) 58.

⁹⁴ *Ibid* 57.

encounters that may be 'erratic and unreliable' to a state of active joy, where understanding provides greater security and enables us to become the source of our emotional states.⁹⁵

2.2.4. Joy and Sadness

The two most basic emotions, which entail bodily and mental transitions, are the emotions of joy and sadness. In light of the role of emotions in the evaluation of the environment, joy and sadness 'indicate or track whether our power is increasing or decreasing'.⁹⁶ Such emotions are vital to human striving as they enable a person to determine the affects of external things and provide information on whether something has a good influence on the power of the individual.⁹⁷ A joyful affect expresses a transition from a lesser to a greater power, combined with an idea of that modification.⁹⁸ In light of the rejection of mind-body dualism, a joyous affect registers an increase in the power of the body, and, as the power of the body increases, so does the mind in terms of developing adequate ideas affirming those transitions. As one develops more adequate ideas, and a better understanding of the affects, a person can become more active in terms of being the cause of their joyous states.

In contrast, sadness is a bodily and mental transition to a lesser activity, a reduction in the power to bring about certain affects and to be affected. Depression, for instance, refers to the physiological state of the person concerned with lethargy and disturbed sleep, accompanied by a 'psychological nexus of feelings and moods'. However, the ability to develop a clear idea of sad emotions is itself an active affect because the attainment of knowledge as an intellectual effort is itself emotionally rewarding. That is, true understanding of certain passive emotions can help to reveal the ideas on which they are based, reducing their power. In turn, gaining an adequate understanding of a negative emotion, including its causes, entails a greater activity of the mind and an associated joy of that increase in the power of understanding.

⁹⁵ Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporality* (Routledge 1996) 130.

⁹⁶ Matthew Kisner, 'Spinoza: Defender of the Passions?'
<https://emotionsblog.history.qmul.ac.uk/author/matthew-kisner/>

⁹⁷ Ibid

⁹⁸ Armstrong, 'Autonomy and the Relational Individual' (n 90) 56

Spinoza treats joy and sadness as the most basic, and primitive emotions, which are subject to ideation complexification. Complex emotions, such as love, shame, and self-esteem, are variants of joy or sadness accompanied with a particular idea of any modifications and any purported cause of the emotional states. Thus, for instance, Spinoza argues that love is a form of joy associated with an idea of an external cause.⁹⁹ Whilst joyful affects are generally positive, it is notable that Spinoza recognises that such emotions can be excessive. This is especially the case in relation to pleasurable excitement, love, or desire, which can, when excessive, render the body less capable of being affected in many ways. Such excessive emotions 'hold the mind down to the contemplation of one object alone that it can think of nothing else'.¹⁰⁰ Moreover, certain desires, in so far as they are related to only one aspect of the person, and become excessive, fail to have 'regard to the whole man'.¹⁰¹ Such unbalanced desires can be so powerful that they 'surpass the other activities of the body'.¹⁰² Kisner gives as the example a person whose joy at eating becomes excessive to the point that it is damaging to human health and thereby decreases the power to act.¹⁰³ On this account, excessive joy 'reliably tracks a localised increase in one's power of activity, for instance, the power of a particular region or system of the body'.¹⁰⁴ However, such excessive joy entails a disruption to 'proportion of motion-and-rest for the entire body, thereby decreasing the net power of the entire bodily system'.¹⁰⁵ Ethical deliberation requires discernment of those joys associated with the striving of the entire person and those which are not. It entails taking pleasure in things in moderation to 'meet all of the needs of his body or mind'.¹⁰⁶

The previous chapter highlighted the importance of our relationship to emotions for existing accounts of dignity. Dignity would appear to be related to how we develop, manage, and act on our emotions. The account of emotions offered here, particularly joy and sadness, offer a new perspective on how that relationship should be structured. First, joy and sadness, as they inform our understanding of the value of

⁹⁹ Spinoza, *Ethics* (n 71) IV Prop. XLIII.

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Matthew Kizner, *Spinoza on Human Freedom: Reason, Autonomy and the Good Life* (CUP 2011) 193.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Lord (n 45) 126.

external things, and register changes in our power, are not worthless, but can provide guidance as to what is most useful to us and provide insights into the cognitive and physical functioning of the person. Emotions are not to be defined in opposition to principled decision-making.

Second, rather than seeking to subdue emotions through pure reason, as is the approach of some Kantian accounts of dignity, it is necessary to set an affect against an affect. Thus, according to Spinoza, it is 'recommended that we fight a negative emotion with an even stronger positive emotion brought about by intellectual effort'.¹⁰⁷ It is thus, in part, an individual and personal task to seek to live in such a manner that a person can enhance their joy. Moreover, it entails a degree of practical discernment in taking pleasure in those external things, so that the 'whole body may be equally capable of performing all the actions, which follow from the necessity of its own nature; and, consequently, so that the mind may also be equally capable of understanding many things simultaneously'.¹⁰⁸ Although partly a personal effort, it is also clear that the prospect of developing more active emotions will depend upon a particular sort of social environment.

Law may have a role to play in terms of deterring the infliction of certain negative *social emotions*, such as shame, humiliation, disgust, or contempt. Such social emotions entail certain dangerous, and false, ideas that register certain personal affects which are then projected outwards on others. It may also be the role of law to promote certain positive emotions, such as love, self-esteem, and care. Such emotional states are undoubtedly aspirational in nature, and cannot be guaranteed or enforced by law. However, law may have a role to play in terms of protecting and structuring those relationships conducive to those affects.

Thirdly, emotions are related to our embodied existence, and so connected with our vulnerability, which, it is suggested later, entails a radical openness to our surroundings. This vulnerability is both the source of our joy and also the condition of our sadness. On this account, suffering and harm, as well as affection and creativity, are not inseparable, but are possibilities that both arise from our 'same basic

¹⁰⁷ Domasio, *Looking for Spinoza* (n 79) 12.

¹⁰⁸ Spinoza, *Ethics* (n 71)

corporeal openness'.¹⁰⁹ An openness to that which can lead to increased passivity may be inseparably bound up with an openness to that which might (sustain or) lead to activity. As an example, living at home may be important to the realisation of self-esteem, comfort and even happiness for a dementia patient, albeit potentially tinged with moments of distress and anxiety as unavoidable features of human existence that are inextricably bound up with the pursuit of the former. Law may need to avoid trying to reduce the risk of emotions related to a decrease in our power of acting (sadness), precisely because they render impossible the realisation of joyful emotions associated with an increase in our power.

Finally, as discussed further below, whilst affects of joy and sadness are related to personal striving, this personal striving is attached to the striving of others. The capability of a person to affect and be affected is related to the capability of others to affect and be affected, so a person augments their power of acting by combining with others and through the social structures of which they are a part. The more active, and the greater the capability of others to affect and be affected, the greater will be the power of the individual. On this account, seeking to harm others on the basis of sad emotions, such as contempt, disgust, or humiliation is neither conducive to the striving of the individual or the collective. It is therefore necessary to attend to both the emotional states of an individual, but also the states of all those who exist within a particular social structure or nexus, recognising that the striving of the individual to have more active emotions is enhanced when the striving of the community is also advanced.

2.2.5. Motion and Rest

The primary focus has so far been on considering the importance of increasing or enhancing the active dimension of human personality. This appears to give the impression of a predominantly *motion* based perspective of human personality, whereby people are constantly engaged in creative activities. Whilst activity is an important facet of dignity, it should not obscure the equally important place of rest, as another dimension of a holistic account of humanity. Humans are marked by a 'ratio of motion and rest'.¹¹⁰ These are not in tension, but inseparable elements of each

¹⁰⁹ Erin Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge, 2013) 153.

¹¹⁰ "Those things are good which bring about the preservation of the relation of motion and rest the human body's parts have to one another." Spinoza, *Ethics* (n 71).

other. A life in which a person is forced to barely subsist by engaging in intensive work, over long hours, every day of the week, carries a serious risk of anxiety, stress and physical exhaustion. This can diminish the unfolding of human potential into the future.

2.2.6. Becoming and Unfolding

One of the most notable consequences for a capabilities construction of dignity by focusing on potential as creative unpredictability is that identity formation is a continuing, rather than a fixed process. To respect the value of human life, one must respect the emerging quality of the self as a matter of becoming. The body and mind, including powers, affects and ideas, will adapt over time in encounters with other forces in the world. As Catherine Dupré puts it, the idea of dignity as becoming is 'time-inclusive...[that] acknowledge[s] the fact that an individual's personality is never finished and keeps evolving throughout their life.'¹¹¹ A person does not at some point in the coming of adulthood establish a fixed bodily existence, or a fixed idea of the self, in correlation to the body, out of which they act for all time.

Human personality is therefore marked by a dynamic fluidity. This process of becoming through the unfolding of potential is not characterised either as corresponding to an ideal or majoritarian norm.¹¹² The process of becoming, according to Deleuze, is a pure process of 'becoming different.'¹¹³ A person is uniquely constituted, although constantly adapting, through particular encounters. On this account there are no pre-given forms, so we could not clone Shakespeare and expect a 'Renaissance bard who would then write Hamlet.'¹¹⁴ This would not reproduce the very different affections, connections and life experiences that contributed to the formation of Shakespeare.¹¹⁵ The result is that the only repetition in life is in fact difference.¹¹⁶ Human life is valued, in part, because of the fact that all humans are uniquely forming subjects, which are irreducible to any other.

One important consequence of this focus on unfolding personality is that it points towards the future development of a person. Theories that focus on *being* are predominantly concerned with interferences with an existing state of affairs. The

¹¹¹ Dupré, 'Unlocking human dignity' (n 80) 201.

¹¹² See Gilles Deleuze, *Difference and Repetition* (Continuum International Publishing, 2004) ch 1.

¹¹³ Cliff Stagoll, 'Becoming' in Parr (n 39) 22.

¹¹⁴ Claire Colebrook, 'Univocal' in (n 39) 293.

¹¹⁵ Ibid.

¹¹⁶ Claire Colebrook, *Gilles Deleuze* (Routledge 2001) 121.

process of becoming, in contrast, additionally looks forward to the future, so as to consider the potential effects of encounters on an individual..

2.2.7. Inter-Dependency and Connectedness

The creative potential that is unfolding and which is at the core of the account of human dignity that has been proposed is not self-realising. It is also never actualised by the singular investment of the individual, but is dependent on the investment of the community. This is a necessary result of the fact that individuals do not become active in isolation or at a pre-social level, but rather through productive encounters with other bodies. People are already always in 'dynamic interaction with a world from which we cannot extract ourselves.'¹¹⁷ Even the most 'autonomous' man is dependent on interconnections, relationships and encounters with various fortuitous forces that promote or sustain their powers of acting. There is in this regard no given individual prior to the community, but a person becomes a self by affirming 'individuality against other men (and against other non-human individuals: animals, physical forces, and so on), [whilst] at the very same time [being] more or less completely dependent on them.'¹¹⁸ The process of becoming-active is therefore realised not in isolation, but in relying on and combining with other beings and forces in the world.¹¹⁹

There is no doubt that dependency does vary over the course of human life and manifests itself in different ways, but this should not be set up to denote discontinuity between the dependent and independent. Rather, there will be degrees to which a person is dependent on others over the course of their life. Human beings are best understood as existing within a spectrum of dependency, across which persons vary in their reliance on others.¹²⁰ The fact that human life is variably dependent is a truth that is based on human vulnerability. Humanity is vulnerable, in so far as creative potential is never fully actualised and not self-realising, but depends on a variety of social factors and structures.

2.2.8. Recognising Human Vulnerability

Measuring dependency by considering the factors determining human vulnerability is particularly important if a theory is going to justify the prioritisation of particular

¹¹⁷ Lorraine (n 7) 96.

¹¹⁸ Balibar (n 28) 61.

¹¹⁹ Balibar (n 28) 103.

¹²⁰ Olssen (n 47) 174 .

persons. Humans are universally vulnerable because they depend on the co-operation of others for the opportunity to channel potential to diverse ends, as well as being open to the destruction of these opportunities through various forces, such as natural and human causes.¹²¹ It is therefore the case that our 'receptivity, or openness to what can affect us, both leaves us vulnerable...and increases our power of acting.'¹²² The human body can only therefore be composed and recomposed through 'radical openness' to its surroundings but it is also through this openness that it is vulnerable to decomposition and destruction.¹²³

Humans are vulnerable in the sense that they may be obstructed from developing and enhancing their capacities to affect others or be affected by them. This closely connects vulnerability with the interrelationality of life and is not solely concerned with the idea of an inherent weakness. It is the case that the most vulnerable on this account are those whose unfolding of potential is blocked due to the inability to make connections to those things that compose and enhance the mind-body and/or are continually exposed to agents that decompose or destroy the mind-body. This idea of blocking or obstruction of development is therefore concerned with the way in which a person is cut off from 'making the connections that extends its capacities'.¹²⁴

The most disadvantaged and vulnerable on this account of dignity are those that face the most isolated and circumscribed conditions, who suffer from multiple obstructions to different channels of activity and rest. The potentiality of a person is more limited where multiple channels of human activity are cut off by certain living conditions, interactions or relationships and where a person's 'vital powers have been blocked – her productive desire has been prevented from making the connections that extend its capacities.'¹²⁵

Exclusion Vulnerability

It is not necessarily natural impairment that renders people vulnerable. Certain social structures can be designed not to take account of difference. Tailoring the system around a particular norm disadvantages those who fall outside of it in a plurality of

¹²¹ Mary Neal, "'Not Gods but Animals": Human Dignity and Vulnerable Subjecthood" (2012) 33 Liverpool Law Review 177, 187

¹²² Aurelia Armstrong, 'The Passions, Power, and Practical Philosophy: Spinoza and Nietzsche Contra the Stoics' (2013) 44 The Journal of Nietzsche Studies 6, 15.

¹²³ Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporality* (Routledge 1996) 110 .

¹²⁴ Lorraine (n 7)143.

¹²⁵ Ibid

ways. It is therefore unsurprising that many of the groups who are particularly vulnerable are those whose experiences do not fit the norm.¹²⁶ The task is to value diversity, not as an expression of weakness, but of unique difference and to eradicate disadvantage by improving the social conditions that enable them to channel their potential in an increasing number of ways.

Power Vulnerability and Unequal Relations

Closely related to exclusion vulnerability is power vulnerability, whereby certain groups are in an unequal position in respect of relations of power. This is where there is a relation of dominance and subordination, which must be contrasted with the affirmative sense of power, which entails composing relations with other bodies in a way that entails mutual enhancement of capabilities. A power relation based on domination and subordination is structured in such a way that a privileged person is in a position of political, economic or social control or influence over another person, who is thereby rendered particularly susceptible to abuse, insecurity and loss. Jennifer Nedelsky, in discussing the relational nature of humanity, gives a number of examples of how vulnerability may arise due to the way in which relations of power may be structured. These include incarceration, slavery and hierarchies of gender, alongside the welfare regimes which can 'create relations of domination and subordination.'¹²⁷ Such as, for instance, the use of caseworkers who have the 'ability to withhold information about eligibility [in a way that] puts recipients in a subordinate position.'¹²⁸ Such policies promote unequal relations of power structured by conflict, suspicion and disrespect.¹²⁹

The subordination that exists in certain relations is not always capable of being eradicated, and it is not always possible to equalise a power relationship. This is clear in the example Nedelsky gives of a hierarchy of power between student and teacher or doctor and patient.¹³⁰ There always exist in these relationships 'hierarchies of knowledge.'¹³¹ The fact that it is impossible to eradicate some hierarchies does not prevent measures being taken to mitigate its effects and put in place measures or safeguards to protect against abuse. In addition, such relationships can be structured

¹²⁶ Paul Patton, *Deleuze and the Political* (Routledge 2002) 47.

¹²⁷ Nedelsky (n 32) 66.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid 156.

¹³¹ Ibid.

in such a way that they are intended to enhance the activity of the subordinate and minimise passivity. A classroom, for instance, can be structured in such a way that class discussion encourages 'respectful disagreement among students and with the professor.'¹³² The relationships therefore, although hierarchical and entailing subordination is oriented towards promoting the capabilities and activity of the person involved.

The aim is to avoid relationships that give rise to power as negatively defined and related to control, appropriation, exploitation and domination. Positive becoming entails relations in which one 'expresses, augments and transforms the capabilities of one's body through relation to those of another body'.¹³³ Those relations are formed without 'involving the appropriation of those powers or hindering the other's ability to express itself.'¹³⁴ A responsible form of becoming thus entails composing relations of interdependence with others that enhance and augment the capabilities of both to affect and be affected, rather than diminishing their powers. Relations of power are thus not defined in reference purely to a conflict of interests. Indeed, our interests become intermingled and the interests of the one become bound up with the other. This is not to suggest that conflict cannot arise in relationships. This is inevitable where individuals can be driven by passive desires. In constructive relationships, however, driven by reason and active emotion, power is not concerned with domination or control of the one party over the other, but with mutually enhancing relations in which the good of one is the good of all.

Insecurity Vulnerability

One of the aspects that render people vulnerable is a lack of security. People in such a situation may take risks where they 'cannot be reasonably avoided because there is no reasonable alternative.'¹³⁵ A person with no steady access to nutrition might therefore take the risk of doing a job that puts them in danger.¹³⁶ The decision to do this is not a genuine opportunity in so far as it 'involve[s] undue cost or risk to other

¹³² Ibid 40.

¹³³ Erin Gilson, 'Responsive Becoming: Ethics between Deleuze and Feminism' in Jun, *Deleuze and Ethics* (n 21) 80

¹³⁴ Ibid

¹³⁵ J Wolff and A De-Shalit (n 86) 67.

¹³⁶ Ibid 65.

functions.¹³⁷ Potential is no longer capable of being channelled across diverse lines in creative ways.

A person who is in a position of insecurity may therefore take undue risks where no genuine opportunities are available. In addition, individuals who face risks may be required to invest their powers in defending themselves against those risks. As Tamsin Lorraine argues, individuals who are in a state of insecurity may not be able to develop their 'capacities to perceive, feel, create and act.'¹³⁸ This is because their capacities are 'so *invested* in defending [themselves]...against someone intent on...[their] psychic and physical destruction that...[they are] on the verge of paralysis.'¹³⁹ The result of such insecurity is that multiple channels of potential and creative becoming are blocked, as individuals invest themselves in trying to avoid encounters that give rise to trauma.

Good Intention Vulnerability

Vulnerability has thus far been considered as a reason for taking action for those in particular need. This is not, however, the limit to vulnerability, as once the community has chosen to act people remain vulnerable to the extent that it might use the wrong methods to address need. This puts the individual at further risk. For instance, it is common to institutionalise elderly people or remove them to alternative accommodation.¹⁴⁰ It has been recognised in a number of reports that relocating elderly people to new residence can have a 'dramatic effect on their mental health and life expectancy.'¹⁴¹ The decision to institutionalise the elderly may be aimed at achieving the purpose of realising the physical needs of such a person, but may have potential negative implication on other dimensions of humanity.

It is necessary to be concerned not only with dignified ends, but also with dignified means, in terms of how the exercise of power deployed to enhance the capabilities of the individual can itself end up being harmful. In light of the notion of mutual becoming, and the interconnectedness of human life, such action can negatively affect not only the interests of the individuals, but also affect, as a consequence of

¹³⁷ Ibid 80.

¹³⁸ Lorraine (n 7)133.

¹³⁹ Ibid [emphasis added]

¹⁴⁰ Luke Clements and Janet Read, *Disabled People and European Human Rights: A review of the implications of the 1998 Human Rights Act for disabled children and adults in the UK* (Policy Press 2003) 56.

¹⁴¹ Ibid.

the reflexive sense of dignity, the interests of the whole. However, and as will be discussed later in the thesis, an individual can be expected to cooperate with others in terms of reasonable compromise, taking into consideration that their interests are also connected to the interests of others. In this way, the relationship is envisaged not as conflict of interests, although it may arise, but as one that pays attention to the viewpoint of those affected by a potential decision as cooperative participants in a dialogic relationship.

2.2.9. Mutual Becoming and Reflexivity

The investment construction of dignity is premised on the universality of interdependence arising from vulnerability. Crucial to this is the idea that the community is necessary and key to the development of our own capabilities. As Balibar argues:

What is most useful to any man is other men, whose strength, when combined with his own, will provide him with greater security, prosperity and knowledge. The desire for self-preservation therefore rationally implies, for each man, that he should desire what is good for others and want to form a stable association with them.¹⁴²

On this account, according to Balibar, to desire the good of others is treated 'as a function of my own good.'¹⁴³ That is, to desire that others should develop their capabilities in creative and diverse ways enhances our own creative capabilities. This is because:

Insofar as I attend to what enhances my own joy and power, I also attend to what will foster empowerment of those most like myself – that is other human beings – around me. If those with whom I interact become less able to sustain themselves, shut down, or cut off from their capacity to affect and be affected, then I will encounter others who are unable to affect me or be affected by me, thus impeding my own power

It is therefore the case that the more cut off and blocked is the potential development of the capabilities of other individuals to affect and be affected, the more blocked will be my own capabilities to affect and be affected.¹⁴⁴ In contrast, the greater the capabilities of others to affect and be affected, the greater the possibility of future

¹⁴² Etienne Balibar, *Spinoza and Politics* (Verso, 1998) 110

¹⁴³ Ibid

¹⁴⁴ Tamsin Lorraine, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity and Duration* (Sunny, 2011) 137

productive and experimental encounters with those people. On this account, in what is reminiscent of what has been called the ‘Janus face’ of dignity, and the reflexive nature of dignity, it is not only in the interest of the dignity of the one in need to receive care and support, but it is also in the interests of the dignity of others who are capable of providing that support.¹⁴⁵

2.3. Respecting Inherent Potential through Sufficient Investment

2.3.1. Collective Investment into Conditions that Promote Inherent Potential

The final component concept of dignity is respect, the contents of which determine what action or inaction is required by people in their interactions with others. The nature of respect will reflect the structure of the value being respected. As an example, treating the value of human life as an intrinsic inviolable worth that is attached to rationality will entail the prohibition of anything that shows disrespect for that capacity, such as, for instance, dictating ethical choices. The value of creative potentiality, in contrast, has a structure which entails elements of the actualised and unrealised. The unrealised is never self-fulfilling, but is dependent on positive action. It requires investment in order to be realised. In contrast, that which has already been actualised through investment may need protection from destruction. Respect may therefore denote both promoting potential via investment and respecting existing investment through protection.

It was clear from the discussion on the concept of humanity that individual potential is never realised in isolation, but takes place in a complex framework of inter-dependence. The rationale of the community is therefore to be an enabling force –

It is not...the purpose of the state to transform men from rational beings into beasts or puppets, but rather to enable them to develop their *mental and physical faculties* in safety, to use their reason without restraint and to refrain from the strife and the vicious mutual abuse that are prompted by hatred, anger or deceit.¹⁴⁶

This entails a form of collective responsibility to invest in the conditions that promote the capabilities of all. Notably, because the potential is creative, the investment of the community is not about expecting to achieve an ideal end.

¹⁴⁵ Rt Hon Baroness Hale of Richmond Justice of the Supreme Court of the United Kingdom, ‘Dignity’ (Ethel Benjamin Commemorative Address, New Zealand, July 2010)

¹⁴⁶ Baruch Spinoza, *Theological-Political Treatise: Gebhardt Edition* (S Shirley trs, Cambridge:Hackett) 223.

As capabilities are a matter of degree, so that a person can have greater or lesser powers of acting, it is necessary to deny a threshold approach to capability. Such a model has been criticised for being both perfectionist and for not being able to provide a principled justification for the point at which the threshold level should be set.¹⁴⁷ This model also stands uncomfortably alongside a Spinozist construction of capabilities that does not depend on an ideal end point, but on experimentation, creativity and difference. The alternative approach to a perfectionist construction of dignity is to focus on prioritising investment.¹⁴⁸ In this regard, one can appeal to the concept of vulnerability as an important basis for a heightening of dependency, requiring a greater level of investment.

The heightening of dependency is particularly pertinent where, as has been seen, groups are vulnerable due to being particularly circumscribed and isolated, so multiple channels of activity and becoming are blocked. The creative potentiality of such a person is severely limited. This creates what Wolff and De-Shalit call a 'clustering of disadvantage' in the sense that 'there is a group, or several groups, that suffer from a combination of disadvantages'.¹⁴⁹ The first possible means by which to reduce clustering is by adapting relationships, living conditions, or social structures that disrupt multiple lines of human becoming or activity. The second possible means by which to de-cluster disadvantage is by prioritising basic activities, needs or functioning that may be a necessary precondition for any forms of further activity or functioning.¹⁵⁰ Certain basic necessities of life, such as nourishment, for instance, may be vital so that the whole body capable of doing a great many things, as well as the 'mind also...equally capable of understanding many things at once.'¹⁵¹

Investing in activities or functioning that may be an important precondition for enabling a person to be capable of doing many things and of being affected in many ways does not exhaust the responsibility of the community. As has been argued, vulnerable persons may live highly circumscribed and isolated lives, whereby multiple channels of human activity are cut off or blocked. In certain cases, it will not be

¹⁴⁷ J Wolff and A De-Shalit (n 86) 92; Richard Arneson, *Perfectionism and Politics* (2000) *Ethics* 37, 56.

¹⁴⁸ J Wolff and A De-Shalit (n 86) 104.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* 133.

¹⁵¹ Spinoza, *Ethics* (n 108) II Prop XIII.

possible to enable the person to vary in many ways due, for instance, to illness or frailty. In fact, deterioration in our capability to affect and be affected may only intensify and multiply over time in a manner that cannot be prevented. Whilst it may not be possible to prevent the harm from occurring, it is possible to take measures to preserve, as far as possible, the remaining access and control over those activities a person can engage in.¹⁵² Where a person must live a highly circumscribed or isolated life, anything which further impacts upon remaining activity is of equal importance.

2.3.2. Active Investment, Reason and Productive Encounters

The investment of the community into the conditions necessary for the promotion of different channels of human potential, enabling space in which individuals are capable of realising ever divergent ends and can actively realise their striving in their own distinctive way. Moreover, it provides the foundation for the protection of the whole person, so that it may be equally capable of performing all the actions which necessarily follow from its striving, and the mind equally capable of understanding many things simultaneously.¹⁵³ This, as discussed in more detail below, provides space for individuals to creatively unfold their potential, experiment with new connections and forms of engagement, and develop more life-enhancing styles of living. People become more active, and less passive, to the extent that they develop more adequate ideas that enable them to distinguish between those 'affects, relations, ways of thinking, and, ultimately, ways of living that are life - affirming, joyous, and active and those that are life-negating, sad, and reactive.'¹⁵⁴ Reason is conceived as having ideas that are as adequate as humanly possible, and which are to the greatest degree 'caused by our own essential power or conatus'.¹⁵⁵ Such ideas guide our actions by helping to determine as clearly as possible the value of various external goods, in terms of understanding that which contributes to and enhances our power, so that 'we may plan our lives accordingly.'¹⁵⁶ A person is most active, and thus free, on this account, when they act from, and are guided by, such reasons.

Notably, in a Spinozist and Deleuzian framework, reason takes on a very different form from the Kantian model of deontological dignity. Reason is not a capacity that

¹⁵² Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263, 277.

¹⁵³ Spinoza, *Ethics* (n 71) IV Prop. XLV.

¹⁵⁴ Gilson, 'Responsive Becoming' (n 133) 65.

¹⁵⁵ Kisner, 'Spinoza on Human Freedom' (n 103) 17.

¹⁵⁶ *Ibid* 87.

exists in an isolated subject, but is developed through encounters with external powers and it is developed through the process of becoming active. A person over the course of life will encounter bodies that 'agree with ours, [although] we do not yet have the adequate idea of these other bodies or of ourselves, but we experience joyful passions (an increase of our power of acting)'.¹⁵⁷ These passive encounters represent random or experimental experiences and desires, which can be gradually replaced with active encounters; once a person forms an 'adequate idea of what is common to these bodies and our own'.¹⁵⁸ A person becomes active and the adequate cause of actions, when he understands the reasons why an encounter was productive, forming common notions that explain the composition with external powers.¹⁵⁹ Individuals are able, through the comprehension of the common notions, to actively deduce from the existing composition 'other relations (reasoning) and on this basis of which one experiences new feelings, active ones this time.'¹⁶⁰

Respect for an individual therefore entails the protection and encouragement of this process of movement from passivity to activity, although it is never entirely possible or desirable to remove all passivity from life. Initial passivity is the condition of our activity, and can aid our becoming active. Reason consists in adequately understanding how our power depends on and needs the power of other things. The development of such reason exists largely in having 'certain sorts of interactions and relationships with others.'¹⁶¹ Gaining adequate reason does not consist in overcoming our dependence, but rather in enabling an individual to more skilfully, and actively, invest in establishing productive encounters, comprehending the reasons why some are positive. In this respect, becoming more reasonable, and therefore more active, provides greater stability and security to the striving of the individual, as they know with a greater degree of certainty what enhances their power.

It is important as this stage to note that, unlike some deontological accounts, a capacity for reason, which is treated as an essential property of moral agents and the ground for moral obligation, is not the sole foundation of the dignity of the human

¹⁵⁷ Deleuze, *Spinoza: Practical Philosophy* (n 31) 83.

¹⁵⁸ Ibid.

¹⁵⁹ "[The] process of becoming active...is an essentially combinatory one: common notions are acquired by composition." Aurelia Armstrong, 'Some Reflections on Deleuze's Spinoza' in Keith Ansell-Pearson (eds) *Deleuze and Philosophy: The Difference Engineer* (Routledge, 2002) 55.

¹⁶⁰ Deleuze, *Spinoza: Practical Philosophy* (n 31) 56.

¹⁶¹ Kisner, 'Spinoza on Human Freedom' (n 103) 14.

person in the investment concept. It is undoubtedly the case that the investment concept treats reason, and the capacity to exercise it, as an important component in the realisation of our striving, as it enables a person to act from their own power and to select those encounters that will increase their power. This provides a different basis for valuing reason, and therefore freedom, than one that focuses on treating it as a condition of moral agency.¹⁶² Reason is not the only aspect of dignity, for it also consists in the joyous increase in our power or activity, in our vulnerability, particularly being dependent on other things that sustain or enhance our power, and those relations that compound with our own to increase our capacity to affect and be affected. Reason is connected to these elements. It is formed through being affected by the experience of external things, and through the development of knowledge as to why certain encounters are joyful. In this respect, reason does not play a foundational role, but is rather part of a holistic assessment of the dignity of the individual, which entails different dimensions of human personality in an integrated framework.

2.3.3. Individual Responsibility and Active Agency

The capacity for reason has sometimes been connected to human agency, which, in turn, has been treated as the condition for individual responsibility, at least in some deontological accounts of human dignity. The ability of an agent to take responsibility for their actions that flow from their 'free will' has been considered a necessary aspect of respect for human dignity. However, it was noted in the previous chapter that such approaches are not without their problems, particularly in terms of abandoning negligent victims, adding to the vulnerability of dependent caretakers, and leaving unaddressed the broader social and political conditions that structure human interactions. A Spinozist framework, it is suggested, provides a means to address resolve some of these problems, whilst, at the same time, providing an alternative grounds for holding people accountable for their actions.

According to Spinoza, a person acts rationally, and thus autonomously, when their desires and passions are not at the mercy of inadequate ideas.¹⁶³ This entails a substantive account of rationality, which means that a person acts freely when they have 'reasons, which implies that freedom also requires having the knowledge that

¹⁶² Ibid 56.

¹⁶³ Deleuze, *Spinoza: Practical Philosophy* (n 31) 50.

serves as and justifies reasons'.¹⁶⁴ It thus follows the freedom of a person is 'promoted by having knowledge.'¹⁶⁵ Such reason is not 'an alien power, forcing us to act in accordance with its demands, but rather, our essential nature' which is our striving to sustain and increase our activity.¹⁶⁶ As discussed further below, such reason does not entail identical modes of living, for people are free to realise their essence in their own way, realising those desires and needs which enhance its striving, and the development of adequate ideas of those things.

A person is an inadequate cause, and irrational, when they are at the mercy of inadequate ideas, which includes acting in contravention of their power. These include, for instance, the cases of drug addicts, compulsive gamblers and kleptomaniacs. They are partially caused by forces and causes external to the striving of the individual, so the person is not the fully adequate cause of their actions.¹⁶⁷ The consequence is that no one can fully be the adequate cause of their destructive passions, but someone can be the adequate cause of their productive actions.

The substantive approach to rational decision-making consists in using reason, which means having adequate ideas. One of the potential implications of this approach is that it might promote autonomy to prevent a person from irrational preferences or to force them to behave rationally. This issue is addressed further below. It is sufficient at this stage to note that a number of aspects of Spinoza's thought limit the possibility of paternalism, which is sometimes a criticism directed at dignity. First, and as Mathew Kizner argues, for Spinoza 'force and manipulation' cannot promote our activity or striving.¹⁶⁸ Spinoza is clear that it is not possible to 'force one to be autonomous by providing her with the adequate ideas required to recognise the right course of action.'¹⁶⁹ In this respect, manipulation and coercion of the body may not entail a corresponding increase in the activity of the mind. Indeed, such coercion may render the mind, and in turn the body, more passive because it can lead a person to suffer humiliation, or mental distress.

¹⁶⁴ Kizner, 'Spinoza on Human Freedom' (n 103) 61.

¹⁶⁵ Ibid 54

¹⁶⁶ Ibid 45.

¹⁶⁷ Rosi Braidotti, 'Lines of Flight + Suicide' in Parr (n 39) 149.

¹⁶⁸ Kizner, 'Spinoza on Human Freedom' (n 103) 46.

¹⁶⁹ Ibid

Spinoza distinguishes paternalism from domination. In order to be permissible paternalism, rather than unacceptable domination, it must have the 'good of the [person] as its chief aim and, furthermore, it must succeed in this aim'.¹⁷⁰ This may well be unachievable if such action leads to loss of self-respect and greater passivity in the form of distress and humiliation. Moreover, in order to succeed in the aim, it must be possible to 'objectively know the right course of action' in relation to what enhance the striving of the other, which may not be possible as it is unclear as to how it might affect the unique striving of the person.¹⁷¹ The final way in which Spinoza limits recourse to paternalism is through the argument that rationality is equivalent to knowledge. In this respect, allowing someone to 'learn their own lessons, which mean making their own choices, even if mistaken' can enable someone to gain knowledge and see the 'error of their ways'.¹⁷²

Spinoza develops an 'asymmetrical' conception of agency, which suggests that a person can be the adequate cause of their positive affects, but not the fully adequate cause of their passive and destructive affects. Such a model may be considered antagonistic to notions of individual responsibility which, as noted above, has been treated as a central aspect of some deontological concepts of dignity. However, Spinoza does argue that people can be held responsible for their destructive actions, even though they are not the fully adequate cause of those actions, and thus not completely free. First, Spinoza argues that blame and praise can be useful by providing more powerful affects that prevent people from harming one another and as a means of promoting social harmony.¹⁷³ Punishment may also be useful as a means of self-protection against those prone to act on certain passive affects.¹⁷⁴

A number of scholars have argued that a form of moral responsibility is inherent in Spinoza's theory.¹⁷⁵ Kizner argues that Spinoza's ethics 'directs us to a better life, which presupposes that we can be responsible to ourselves' in terms of understanding our passions and seeking to cultivate more adequate ideas and knowledge, so that one can attain a higher degree of activity and freedom. Consciousness of our ideas makes possibility reflexivity, so that a person can reflect

¹⁷⁰ Ibid 46.

¹⁷¹ Ibid 47.

¹⁷² Ibid 141.

¹⁷³ Beth Lord, *Spinoza's Ethics* (Edinburgh University Press 2010) 123

¹⁷⁴ Don Garrett, 'Spinoza's Ethical Theory' in *The Cambridge Companion to Spinoza* (CUP, 1996) 301.

¹⁷⁵ Kizner, *Spinoza on Human Freedom* (n 103) 69.

on their nature and environment, and positively act to affect them both. In this respect, a person can be responsible in terms of developing and realising adequate ideas, which are related to personal character and beliefs. This personal character will determine the affect of external causes on the psychological processes of the individual. Thus, even though the decisions of a person may be causally determined, how they unfold is 'determined by us, our particular beliefs, character and thought processes.'¹⁷⁶ A failure to cultivate adequate ideas and engage in self-reflection can leave a person prone to being pushed around and easily swayed by negative emotions.

To see people as only a partial cause of their destructive activity enables us to undermine resentment and ensure a more productive encounter. This includes attending to the social and political forces that may have contributed to the formation of destructive affects upon which a person is prone to act. Such knowledge can be useful for the purposes of allowing the individual to deconstruct those forces and enable them to reconstruct a more productive future becoming. Understanding the potential factors affecting historical events, leads to 'reworking these events in the direction of positive relations.'¹⁷⁷ Such knowledge is also useful to the collective, as it enables it to address those frameworks that may contribute to the formation of destructive behaviour.

This perspective on moral responsibility can also lead to a more positive response to the suffering of those who might be considered negligent victims. Rather than abandoning them on the basis that they are responsible for their destructive acts which have led them to personal harm, a Spinozist approach can recognise that a person may not be the fully adequate cause of that harm. A person, for instance, who loses their job as a consequence of undisciplined and unreliable behaviour, may not have developed the capability to respond effectively to discipline because they were previously subjected to 'generally horrible treatment as a child and [a lack] of proper early training.'¹⁷⁸ Such a person should not simply be 'left to bear the

¹⁷⁶ Ibid 54.

¹⁷⁷Rosi Braidotti, 'Affirmation versus Vulnerability: On Contemporary Ethical Debates' in Constantin V. Boundas, *Gilles Deleuze: The Intensive Reduction* (Continuum International Publishing, 2009) 155.

¹⁷⁸John Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Ashgate 2008) 110.

consequences' without welfare assistance or social responsibility.¹⁷⁹ This does not mean that the community owes responsibility to citizens to enable lives solely dedicated leisure and personal pleasure. Such a form of functioning would not be reasonable on a Spinozist view, and would not contribute to the striving of the whole person or the striving of others.

2.4. Conclusion

It is now possible to bring together the three components of dignity, as an investment concept. Dignity has been constructed by emphasising the value of human life as inherent potential, which is realised by the interdependency of humanity seeking a diverse set of powers of action and rest. The concept of respect requires collective investment into the conditions that promote those powers of acting, whilst reason allows individuals to engage in a process of self-creation by selecting and organising good encounters, working out why such encounters are significant to the particular individual. This enables the channelling of potential in diverse and creative directions.

3. Testing the Investment Construction of Human Dignity

3.1. Test I: A Defence

The concluding section of this chapter assesses this investment conception against some of the concerns expressed about the concept of dignity, which were introduced in the introduction and further discussed in chapter one. These include concerns that dignity, and its conceptions, are vague, perfectionist, exclusionary and indistinct. This section argues that the investment construction of dignity avoids these problems, or provides alternative perspectives on the criticisms.

3.1.1. Inclusion of the 'Other'

A criticism directed at conceptions of dignity highlighted in the previous chapter was the exclusionary effect of approaches that situate the value of humanity in a singular dimension of human personality. This includes approaches that treat as the 'norm' the able bodied, rational, self-reliant and independent person. Many of the existing accounts of dignity emphasise the importance of rationality and autonomy. The implication of this is that certain groups are treated as a deviation because they are, for instance, disabled, lacking capacity, and dependent on others for care. Other

¹⁷⁹ Ibid

dimensions of humanity are lost and find no place within such a theory. The investment conception of dignity avoids the negative implications of this by adopting a holistic approach to humanity, which recognises the value of a broader range of human dimensions. This includes, as an example, treating emotions as ethically significant aspects of humanity and the relationships between persons.¹⁸⁰ Valuing dimensions of humanity beyond a limited range of rational thought thereby entails a more inclusive conception of dignity.

The investment construction draws the experiences of those at the boundaries of existing conceptions of human dignity into the centre. Thus, for instance, dependence, care and vulnerability are treated as universal (and valued) aspects of the human condition. This replaces the dualistic approach to humanity that prioritises certain dominant traits that define the paradigm over an inferior subordinate trait that defines the deviation from the paradigm. This includes the dualisms of independent (norm) - dependent (deviation), invulnerable (norm) - vulnerable (deviation), and rational (norm) – emotional (deviation). Investment dignity replaces the idea that there is a binary distinction, for instance, between the independent and dependent, in favour of recognising a continuous difference in degree across a spectrum of mutual dependence.

3.1.2. Addressing Vagueness

The charge that dignity is useless because it is vague or vacuous is not rebutted by providing an abstract account of dignity that deterministically resolves problems in advance of a particular situation. This criticism commonly approaches the concept from the expectation that it should have a clear and consistent meaning that is capable of being applied. This criticism is addressed by reframing the nature of the debate so that what might be perceived as vagueness is actually positively valued and understood as enabling openness. A concept like dignity is not amenable to a dictionary style definition. Its power lies in being dynamic, open and expansive. 'Openness' is used here in the sense deployed by Henri Bergson to denote responsiveness to the other, receptiveness to singularity, acceptance of creativity and is the opposite of a closed ethics based on preference, exclusion, and

¹⁸⁰ E Feder Kittay, 'Equality, Dignity and Disability' in M Lyons and F Waldron, *Perspective on Equality* (Liffey Press, 2005) 95

immobility.¹⁸¹ The 'openness' of a concept is potentially a key advantage to its ability to respond to the nature of human life, which is marked by its specificity, creativity and difference that emerges in time. Responsiveness to the 'other' entails addressing the concerns and needs of those whose interests are not adequately recognised or protected because of their difference, which means they fall outside the existing protection afforded by the norm. Conceptual openness enables those marginalised because of their difference to actively participate in the formation of the content of the concept in the way that can adequately further their interests.

It is not enough to observe that the overall concept of dignity is dynamic, mobile, and open, as demonstrated through the way different conceptions of dignity have been developed to address different problems. It is important, according to Deleuze, to also formulate intellectually mobile concepts that are themselves capable of being continuously renewed and adapted in relation to the creative unfolding of time.¹⁸² Such a conception is more likely to endure than others, precisely because it is dynamic and capable of continued variation as a perpetual work-in-progress.¹⁸³ In this respect, a certain conception of dignity will persist because it is constructed in a way that positively requires responsiveness to the other, receptiveness to singularity, and acceptance of creative movement. Whilst conceptual openness can enable these things, it does not ultimately require them. To say that a concept has an open texture is not the same as saying that it will necessarily be used, although it has the capacity to be used, to that end. It is therefore necessary to construct a concept that directs us to be open to singularity, otherness, creativity and difference. Such a concept will not provide a resolution to each case, as if it could be deployed in advance to determine clearly each situation in the same manner. In this way it does not resolve the 'vagueness' criticism, precisely because it does not understand the value of a concept as being exclusively defined by its ability to recognise or determine instances. Rather, it will require that the concept to be given further meaning through continued reflection on the demands of each new situation.

The investment construct positively requires openness in this sense. It does so through, for instance, recognising that an adequate idea of those connections that

¹⁸¹ Alexandre Lefebvre, *Human Rights as a Way of Life: On Bergson's Political Philosophy* (Stanford University Press, 2013) 90.

¹⁸² Paul Patton, *Deleuze and the Political* (n 197) 16.

¹⁸³ *Ibid* 17.

might enhance the capability of a person to affect and be affected may only be understood in a context-specific fashion and will only gain concrete content through reflection on the experiences of those in a particular relationship. Respecting the concept of investment dignity therefore entails being open to understanding what will enhance the capabilities of another person through responsiveness and continued dynamic engagement in each new encounter. A number of the different component concepts of investment dignity are intellectually mobile in this way. Such concepts undoubtedly help to set out some of the factors that are relevant in a consideration of a situation, and help to constitute the context to be considered, but they also direct us to be open to the changing dynamics of life, which require singular and personalised responses.¹⁸⁴ Vulnerability, for instance, has been defined, in part, as our porosity, receptivity, impressionability, affectivity and permeability, which is the condition of both our activity and passivity. It is impossible as part of this shared vulnerability 'to predict, control, and fully know that to which we are open and how it will affect us.'¹⁸⁵ On this account, knowledge of what will promote or diminish the activity of a person cannot be known or determined entirely in advance, but can only be understood through experience and being open to developing various forms of connections and combinations with our surroundings. Such a concept is not pinned down with a static meaning, but is one that moves us to experiment and reflect on our different interactions or connections.

3.1.3. Responding to Lived Experience

The separate criticism that certain conceptions of dignity, through abstraction, or distortion, do not reflect the experiences of particular groups is addressed through the openness of the investment concept. As noted above, an understanding of what will enhance the capability of a person to affect and be affected is not determined on the basis of abstraction, through a process of reasoning independent of the interactions and encounters between persons in their concrete context, and without dwelling on the singularity and specificity of that engagement.

An understanding of what a person is capable of doing and what they are undergoing in grounded is practice rather than in the adherence to abstract rules,

¹⁸⁴ Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (n 304)236.

¹⁸⁵ Erin Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge, 2013) 113.

and is evaluated from 'within the experience of affecting and being affected'.¹⁸⁶ This thereby focuses attention on 'concrete individuals in their singularity and in relations with other unique individuals'.¹⁸⁷ Investment dignity is dependent upon a Deleuzian ethology, which is 'rooted in and grows out of experience rather than being purified of experiential elements'.¹⁸⁸ It is only through experience and experimentation that it is possible to 'discern the differences between those things that can be said to be good for us and those that are bad for us, and devise for oneself such a typology of ways of living'.¹⁸⁹ The implication of this is an account of dignity that is 'more alert to the 'real experience' of bodies in their everyday encounters'.¹⁹⁰

3.1.4. Enabling Freedom

One of the key criticisms of the concept of dignity that was highlighted in the previous chapter was that dignity is used to override autonomy and freedom. A Spinozist based construction of human dignity does enable space for human freedom, although this is not an individualistic conception of negative freedom that entails merely the absence of government interference. Freedom encompasses 'acting from one's own power', which entails striving to be active as the adequate cause of one's own affects, rather than being passively controlled by external causes. Spinoza is concerned with a conception of freedom that entails the 'greatest degree of activity and self-determination achievable by us'.¹⁹¹ The good, as noted above, is understood as that which promotes that activity and power, which opens up multiple lines of becoming and ever divergent ends, and increases what a person can do or become.

Spinoza recognises that the ability to develop reason and, thereby become an active agent, depends on having 'sorts of interactions and relationships with others and, consequently, on the broader social and political conditions that structure and determine these interactions'.¹⁹² It depends on a particular relational nexus that provides a fertile environment for the growth and development of individual

¹⁸⁶ Erin Gilson, 'Responsive Becoming' (n 133) 65.

¹⁸⁷ Ibid 65.

¹⁸⁸ Ibid 64.

¹⁸⁹ Ibid 65.

¹⁹⁰ Duff, *Assemblages of Health* (n 47) 175.

¹⁹¹ Kisner, 'Spinoza on Human Freedom' (n 103) 8.

¹⁹² Ibid 14.

identity.¹⁹³ This conception of freedom entails more than a purely psychological or mind-based view of personal autonomy concerned with 'requiring that we choose our actions' or interactions.¹⁹⁴ It also encompasses the embodied nature of the self, so that a person becomes more rational, and hence autonomous, to the extent that they develop adequate ideas about that which increases the activity of the body. The conception of self is thus embodied and relational, but also affective. Acting from the emotion of joy provides an invaluable 'guide to action' and a barometer that indicates whether their power has increased.¹⁹⁵ Emotions are thus not so much opposed to freedom, but are rather necessary 'conditions for our activity...[and] help to promote our activity'.¹⁹⁶

The investment construction further avoids the criticism that it is paternalistic by adopting a Spinozist conception of human striving that supports space for creativity, experimentation and difference. Investment dignity values human life by reference to creative potentiality, which is the capacity for 'new engagement, breaking or transforming received patterns, giving rise to and acting on one's own distinctive perceptions, insights, and forms of engagement'.¹⁹⁷ These forms of new engagement, as noted earlier, lead to an expansion of possibility, creating ever more series of becoming, which, when unfolded, entail new unexplored possibilities of transformation, perception and engagement.¹⁹⁸ This is closely aligned with some relational accounts of autonomy, which emphasises the capacity for creative interaction as an important component of that concept.¹⁹⁹

Investment dignity, as noted above, does not depend on being able to determine in advance a reliable blueprint for human development, but depends on an experimental ethos. This entails ongoing exploration of the affects of which one is capable through experimental relations with the world and others. Such a conception therefore requires an 'open-ended process that explores what's new and what's

¹⁹³ Mark Olssen, 'Why Martha Nussbaum Should become a Foucauldian' in Hans-Uwe Otto (eds), *Education, Welfare and the Capabilities Approach: A European Perspective* (Barbara Budrich, 2010) 39.

¹⁹⁴ Kisner, 'Spinoza on Human Freedom' (n 103) 14.

¹⁹⁵ Ibid 192.

¹⁹⁶ Ibid 8.

¹⁹⁷ Nedelsky, *Law's Relations* (n 32) 47.

¹⁹⁸ Colebrook, *Gilles Deleuze* (n52) 133.

¹⁹⁹ Nedelsky, *Law's Relations* (n 32) 47

coming into being rather than something already experienced and known, experimentation is inseparable from innovation and discovery.’²⁰⁰ Freedom is supported on this model through the ability of each to unfold their potentiality in different ways, and with creative exploration of that which enhances our activity and development.

3.1.5. Endorsing Creativity

The final criticism directed at existing accounts of dignity in the previous chapter was the way in which they were obstructive of the realisation, creation and discovery of the new. Some conceptions obstruct the unfolding of the creative tendencies and potential in the present in ways that may lead to more active, joyous, intensive and divergent forms of human existence. Such approaches restrict understanding to a process of recognition, which is concerned with correct identification of relatively stable configurations and existing manifest forms.²⁰¹ This strips situations, forms and encounters of their dynamic and creative tendencies in favour of their stable or already given forms.²⁰²

The investment construction, in contrast, understands persons in their interactions with others not just in terms of what is overtly manifest to them or as a set of static properties or characteristics. It takes into account the idea that humanity is ‘replete with virtual tendencies as well as actual components’.²⁰³ Humanity is a creative and dynamic force that plays our and through its interactions with the surrounding processes and forces of life, as well as the environment that sustain and affect us. What are real are not only the forms of human life that have actually emerged, but the dynamic tendencies and creative potentials that could unfold in many more ways than actually do occur enabling new connections that break with routine and open up new perceptions, new affects, new thoughts and new ways of becoming.²⁰⁴ Such potentialities can only be intuitively grasped by looking beyond existing habits, categories, and models in order to experiment with tendencies that might have been overlooked.²⁰⁵

²⁰⁰ Bruce Baugh, ‘Experimentation’ in Parr (n 39) 91.

²⁰¹ Tamsin Lorraine, *Immanent Ethics* (n 25) 36.

²⁰² *Ibid* 12.

²⁰³ *Ibid* 21.

²⁰⁴ *Ibid*

²⁰⁵ *Ibid* 86.

3.2. Test II: Anchoring the Concept in Law

One of the difficulties highlighted with the other conceptions of dignity is that they do not relate to our legal practices and were not immanent possibilities.²⁰⁶ It is argued here that inherent within human rights practice is the possibility for the realisation of the investment construction of dignity. This will be established by explaining how each dimension of an investment construction of human dignity can be connected to international practice, although there is no perfect symmetry between the two. This broadly includes a consideration of how international practice can be connected to the social, bodily, mental and recreational dimensions of human personality.

Some of these rights, particularly socio-economic rights, are protected through the existence of a minimum core, a reducible obligation on the State to protect certain essential needs without which a 'right would be unrecognizable or meaningless.' A minimum core encompasses those conditions essential to the unfolding and development of personality. The Indian Supreme Court has, for instance, argued that a life in human dignity includes the 'bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.'²⁰⁷ The concept of a minimum core may be useful to denote a basic set of standards that enable individuals to realise creative potential by engaging in any form of activity at all. Other rights may require progressive realisation, whereby the State takes positive steps to fulfil certain human rights. Authorities would therefore be under an obligation to justify any measure that sort to retract and deny an ongoing investment into the conditions that promote the capabilities of all.

3.2.1. Bodily Dimension

The bodily dimension of human life is just as important to human dignity as the mental dimension. It was argued earlier that whatever increases or sustains the body's power of acting is good for a person, whereas whatever decreases or destroys that power is bad. This entails, as Deleuze claims, an effort to 'organize encounters on the basis of perceived agreements and disagreements' between bodies.²⁰⁸ If the human body is 'to be preserved [it]...requires a great many other

²⁰⁶ Article 1 of the Universal Declaration on Human Rights 1948 *S.W. v The United Kingdom* (1995) 21 EHRR 363 [44]; *Pretty v the United Kingdom* where the Court held that "the very essence of the [European] Convention is respect for human dignity and human freedom" (2002) 35 EHRR. 1 [65].

²⁰⁷ *Francis Coralie v. Union Territory of Delhi*, Air 1982 SC 746.

²⁰⁸ Gilles Deleuze, *Expressionism in Philosophy: Spinoza* (n 91) 280.

bodies, by which it is, as it were, continually regenerated.²⁰⁹ Our power of acting therefore requires access to bodies that will compose with our own to enhance or protect capability, whereas it requires protection from bodies that will harm or decompose our capability.

As Spinoza argues, our power of acting depends on those “goods as are sufficient for sustaining life and health.”²¹⁰ Related to this, is Spinoza’s claim that the ‘human body is composed of a great number of parts of diverse nature, which constantly need new and varied nourishment.’²¹¹ A number of important provisions in international law, designed to protect human dignity and human rights, explicitly recognise the need to provide basic necessities for the preservation of health.²¹² Alongside the provision of basic needs, international practice has also included the provision of health care as a “pre-requisite for the preservation of human dignity.”²¹³ A right to adequate health care is recognised in the terms of various international instruments.²¹⁴ This includes a right to enjoy the “highest attainable standard of physical *and* mental health.”²¹⁵

The provision of shelter is also included in many international instruments. The connections to human dignity have been made explicit by a number of international bodies. Thus, the ECrtHR has held that “it is clearly desirable that every human being has a place where he or she can live in dignity.”²¹⁶ In General Comment Number 4, the CESCR has stated that –

[T]he inherent dignity of the human person from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the

²⁰⁹ Baruch Spinoza, *Ethics* (n 81) 99, II, Prop XIX.

²¹⁰ *Ibid* 7.

²¹¹ *Ibid* 222, IV, Prop XLV.

²¹² Article 11, International Covenant on Economic, Social and Cultural Rights 1966,

²¹³ European Committee on Social Rights, *International Federation of Human Rights Leagues (FIDH) v France* (No 14/2003) (2004) [32].

²¹⁴ Art 12, International Covenant on Economic, Social and Cultural Rights 16 December 1966, United Nations, Treaty Series, vol. 993; Art 25 Convention on the Rights of Persons with Disabilities 24 January 2007, A/RES/61/10; Art 11 *European Social Charter (Revised)*, 3 May 1996, ETS 163

²¹⁵ Art 12, International Covenant on Economic, Social and Cultural Rights 1966.

²¹⁶ *Ibid*.

right to housing should be ensured to all persons irrespective of income.²¹⁷

Human dignity plays a foundational role, in grounding a right to access housing, and as a justification for the argument that housing should not be interpreted in narrow or restrictive sense that equates it with possession of a roof over one's head. Dignity is connected to the concepts of adequacy, security and the protection of psychological health.²¹⁸ The feeling of helplessness and utter destitution resulting from homelessness is a significant stress factor that can lead to psychological illness.²¹⁹ Shelter is therefore a necessary condition for the protection of a holistic conception of human personality.

The protection of an individual's health is closely related to the protection of individuals from pain. As Spinoza argues, pain 'diminishes or constrains a man's power of activity...in proportion as the pain is greater, so also is it necessarily opposed to a greater part of man's power of activity.'²²⁰ Clearly a person who suffers from chronic pain when moving will be deterred from engaging in a whole variety of activities, whilst pain at rest, such as arthritis, will make rest periods ineffective. Inflicted pain may be used as a technique of subordination, particularly in torture. Importantly, pain is not a singular phenomenon but affects the body and mind in a plurality of ways.²²¹

It is clear that international human rights practice recognises in principle the need to avoid the infliction of physical pain. Thus, it has long been recognised under Art 3 ECHR that severe mental and physical suffering is prohibited, so long as it meets the minimum level of severity.²²² This includes a positive obligation to protect individuals from the infliction of severe pain by a third party, although not measures to avoid naturally occurring pain, unless exacerbated by state activity.²²³ If it does

²¹⁷ CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, para 7.

²¹⁸ World Health Organisation, *Health Principles of Housing* (Geneva, Switzerland 1989).

²¹⁹ Gill B, Meltzer H, Hinds K and Petticrew M (1996) OPCS Surveys of Psychiatric Morbidity in Great Britain, Report 7: Psychiatric morbidity among homeless people, HMSO: London.

²²⁰ Baruch Spinoza, *Ethics* (n 81) 155, III, XXXVII.

²²¹ World Health Organisation, 'WHO Guidelines on the Pharmacological treatment of Persisting Pain in Children with Medical Illnesses'

<http://whqlibdoc.who.int/publications/2012/9789241548120_Guidelines.pdf> Accessed April 12th 2013.

²²² *Ireland v. United Kingdom* (5310/71) [1978] ECHR 1 [162].

²²³ *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112; *Z and Others v the United Kingdom* [2001] ECHR 333.

not meet the necessary level of severity it may still be encapsulated within the right to private life under Art 8 ECHR, which includes both positive and negative obligations to avoid suffering.²²⁴ Closely connected to the protection of bodily health and prevention of pain is the protection of bodily integrity of the individual, which has been closely associated with the concept of human dignity..²²⁵

3.2.2. Psychological Dimension

The holistic account of humanity in the investment construction of dignity includes psychological dimension of personality. This includes, importantly, the ability to develop ones power of thinking by increasing adequate ideas and developing the imaginative capacity of individuals. This will necessarily entail a right to an education. International instruments make clear the connection between education and human dignity. Thus, the ICESCR clearly states that “education shall be directed to the full development of the human personality and the sense of its dignity.”²²⁶ Similarly, the CRPD requires the establishment of an inclusive education system directed towards ‘the full development of human potential and sense of dignity and self-worth.’²²⁷ There is in this right a clear connection between human potential and human dignity, with education being perceived holistically in terms of not only the imparting of information, but the development of human personality.

Promoting of the activity of the mind entails more than just education. It may also, for example, entail the ability to produce and experience creative works. Many international instruments recognise the ability to produce such creative work through freedom of expression clauses, or freedom of conscience clauses.²²⁸ Some instruments go further in recognising the need for appropriate measures to enable persons to develop their ‘creative, artistic and intellectual potential.’²²⁹

As was demonstrated earlier in the chapter, some emotional experiences are harmful to our power of acting, both bodily and mentally. This includes those passions that Spinoza defines as sad in that they ‘diminish our power to think and to

²²⁴ *Marzari v Italy* (1999) 28 EHRR CD 175, 179.

²²⁵ *Ribitsch v. Austria* (18896/91) [1995] ECHR 55 [38].

²²⁶ Art 13 International Covenant on Economic, Social and Cultural Rights 1966.

²²⁷ Art 24 Convention on the Rights of Persons with Disabilities 2006.

²²⁸ *Muller and Others v Switzerland* [1988] [ECHR] (Application Number 10757/84) (1988) 13 EHRR 212 [27].

²²⁹ Art 30 Convention on the Rights of Persons with Disabilities 2006.

act.²³⁰ Emotions such as disgust, shame, anxiety, humiliation and distress may lead people to hide, or isolate themselves from others.²³¹ The recognition that negative emotional experiences must not be inflicted, or must be prevented, has been recognised by the ECtHR in the interpretation of Art 3. The Court has therefore held that Art 3 will be violated –

Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3.²³²

There is here reference to a number of negative emotional responses, although they will have to attain the minimum level of severity to constitute a violation of Art 3. The ECtHR has also held violations of Art 8 where a person has been subjected to gross humiliation²³³, severe embarrassment²³⁴, stress and anxiety.²³⁵

The positive or joyful emotional responses connected with the increase in our power and activity is less easily translated into a legal framework. Emotions like love, gratitude and gladness are important emotions people should be able to experience.²³⁶ Whilst all of these are important to bodily and mental well-being they do not figure as rights in law. However, the state may still be under an obligation to promote, permit and recognise relationships that are the source of positive emotions.²³⁷ In this regard, international human rights law has long recognised the right to respect for family life, as well as the right to marry and found a family.²³⁸ The promotion of positive emotions can also be realised through education, as the ICESCR recognises –

“[E]ducation shall...promote understanding, tolerance and *friendship* among all nations and all racial, ethnic or religious groups...”²³⁹

²³⁰ Balibar (n 28) XVIII.

²³¹ Nussbaum () 300

²³² *Pretty v United Kingdom* [2002] ECHR 427 [52].

²³³ *Wainwright v the United Kingdom* (2007) 44 EHRR 40.

²³⁴ *Peck v. the United Kingdom* (2003) 36 EHRR 41.

²³⁵ *Goodwin v United Kingdom* (1996) EHRR 123.

²³⁶ Nussbaum, *Creating Capabilities* (n 3) 34.

²³⁷ Nussbaum, *Upheavals of Thought* (n 39) 300.

²³⁸ See Art 8 and Art 12 European Convention on Human Rights 1953.

²³⁹ Art 26(2) of the Universal Declaration on Human Rights 1948.

In this regard the CRPD recognises a clear obligation on the state to engage in awareness-raising so that the community is capable of understanding the effects, contributions and positive capabilities of individuals with disability.²⁴⁰

3.2.3. Social Dimension

Integration into society and the ability to develop relationships are both key elements of an investment construction of dignity. It has been argued that connections and combining with other people and nonhuman others is important to the enhancement of our own activity. This social dimension to dignity has been recognised expressly in various international instruments. Thus, for instance, the EU Charter of Fundamental Rights states that -

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.²⁴¹

The CRPD has similarly recognised an obligation to include all disabled individuals within the community.²⁴² At the regional level, the ECtHR has held that Art 8 entails to a degree the right to establish and develop relationships with other human beings.²⁴³ In this respect, the personality of an individual is recognised as taking place in community and does not develop in isolation, but in relation to other human beings.²⁴⁴

3.2.4. Recreational Dimension

One of the key dimensions of an investment concept of dignity is the idea of rest and recreation. As was argued earlier, the ability of individuals to rest and enjoy recreational activities is important in order to avoid stress. In addition, it is essential to the joyful and creative expansion of bodily and mental activity. In this regard, the importance of rest and recreation has long been recognised by the international community as a right in need of protection.²⁴⁵

²⁴⁰ Art 8(1) Convention on the Rights of Persons with Disabilities 2006.

²⁴¹ Article 25, The Charter of the Fundamental Rights of the European Union (2000/C 364/01).

²⁴² Art 19 Convention on the Rights of Persons with Disabilities 2006.

²⁴³ "*Niemietz v. Germany* (1993) 16 EHRR 97 [29].

²⁴⁴ *Goodwin v United Kingdom* (1996) EHRR 123 [77].

²⁴⁵ Article 24 of the Universal Declaration on Human Rights 1948.

The obligation on the state to regulate working hours and ensure holidays for employees has been established in the ICESCR.²⁴⁶ Unsurprisingly, in light of the importance of play to childhood development, the International Convention on the Rights of the Child has a specific provision requiring State Parties to ‘recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child.’²⁴⁷ The right to participate in recreational activity also entails a particular obligation to promote accessibility to groups who may have been historically excluded. Thus, the CRPD states that persons with disabilities should have ‘access to sporting, recreational and tourism venues.’²⁴⁸

4. Conclusion

The three component concepts of dignity have been assembled in a distinct way by reference to the idea that human life has this potential is promoted by investment into conditions that promote the powers of individuals, for action and rest, simultaneously for both mind and body. The provision of these opportunities allow for individuals to take on an active role in seeking out and experimenting with productive encounters by connecting with other people and their surroundings. In so far as this potential is not self-realising, it was argued that all were interdependent and vulnerable in the process of becoming.

Once the theoretical ground work was put in place, the concluding section of this Chapter established the ways that this conception could already be connected to existing international legal practice. It was argued that existing human rights practice is already significantly committed to a number of capabilities that enable diverse channels of human activity. It is in light of these connections that the following chapters will begin to assess the actual protection afforded to dignity in the legal system in the United Kingdom.

²⁴⁶ Art 7(d) International Covenant on Economic, Social and Cultural Rights 1966.

²⁴⁷ .” Art 31, Convention on the Rights of the Child 1989.

²⁴⁸ Art 5(c) Convention on the Rights of Persons with Disabilities 2006.

Chapter Three: Potential Protection in the Common Law

1. Introduction

The previous chapter established a theoretical conception of human dignity and concluded by testing that conception by considering how it could be connected to legal practice. In the absence of a codified constitution, a possible further conduit for the potential protection of investment dignity in England and Wales is the common law. This chapter therefore continues to test the investment concept of human dignity by connecting it to the reality and practice of the common law.

The common law provides an important testing ground in light of the fact that human dignity is already being used as a legal value in the law of England and Wales with increasing frequency and breadth. David Feldman, in the first and leading commentary on the role of human dignity in English Law, noted in 2000 that human dignity was a value incidentally protected by the common law.¹ This did not really represent, for Feldman, a 'developed role [for dignity] in the constitution of the United Kingdom'.² However, a statistical analysis of official law reports show that, since 2000, human dignity discourse has undergone 'exponential growth' both quantitatively and qualitatively.³ In quantitative terms, since 2000, dignity has been referred to by judges in higher courts in 882 cases, compared to 184 cases referring to the concept in the previous fourteen years.⁴ In qualitative terms, higher courts have begun to refer to the concept across a staggeringly wide range of legal issues. This compares with the previous fourteen years in which the vast majority of cases referred to the dignity of the State and the conduct of parties during judicial proceedings.

Considering the growth in human dignity jurisprudence in the common law provides a new and useful insight in to the potential meaning and relevance of a concept, which, unlike in other jurisdictions, does not perform a 'never-again' or 'never-forget'

¹ David Feldman 'Human dignity as a legal value: Part 2' (2000) PL 61, 61.

² Ibid.

³ Gay Moon and Robin Allen, 'Dignity discourse in discrimination law: a better route to equality?' (2006) EHRLR 610, 614-615.

⁴ This data is based on a search of official law reports for the term human dignity on Westlaw. This included the judgments of the High Court, Court of Protection, Court of Appeal, House of Lords and Supreme Court. Research carried out July, 2014.

function.⁵ It can shed new light on the use of a concept that has predominantly been associated with (or studied in) a codified constitutional context. In these contexts dignity has usually served an ideological purpose, as a response to totalitarian experiences or a reaction to a constitutional crisis.⁶ The introduction of dignity as a sharp rupture from a repressive past is not an experience familiar to the English common law, which is a very different environment for the development of human dignity, built, as it is, on stability through legal continuity and incremental development.⁷ In fact, the common law appears to avoid deductions drawn from a broad code of rights based on a particular ideology or an abstract principle, such as dignity.⁸ Nevertheless, human dignity has developed in the common law to address problems that alternative concepts, familiar to the common law, may be less capable of resolving, emerging predominantly in the novel field of biotechnology.⁹

It is clear that reference to dignity can no longer be treated as a random phenomenon in the common law of England and Wales, although doubts still remain about its ability to embrace and protect such a concept. Despite its growing use, there have been few concerted attempts to systematically conceptualise its judicial use. Thus, unlike in many other jurisdictions, there has been little effort to ground the development of dignity in the law of England and Wales within a particular structure of philosophical thought or to conceive of how the British vision of dignity reflects a particular conception of humanity.¹⁰ This is perhaps due to the fact that there is no singular locus, such as a constitutional right to dignity, around which the concept has been developed, and because the common law has traditionally 'evolved through ad hoc, piecemeal, case-by-case resolution of narrowly defined issues'.¹¹ The developments surrounding dignity are more scattered and less likely to have arisen on the basis of some coherent philosophical vision of the concept. The fact that judges rarely specify the sense in which human dignity is being used in any

⁵ Stuart Woolman, 'Dignity' in Stuart Woolman and T Roux, *Constitutional Law of South Africa* (2002 Kenwyn) 36-4.

⁶ See David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 131.

⁷ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 [34]; *Hedley Byrne & Co. Ltd. v. Heller & Partners* [1964] AC 467, 482 and 525. See E. Levi, *An Introduction to Legal Reasoning* (Chicago Press 2013) 1-27.

⁸ A.V. Dicey, *An Introduction to The Law of the Constitution* (10th ed, Palgrave, 1959) 197-198.

⁹ Charles Foster, *Human Dignity in Bioethics and Law* (Hart 2011) 40.

¹⁰ In contrast to the German experience, see Donald P. Kommers and Russell A. Mille, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2012) 358

¹¹ William Twining and David Miers, *How to Do Things with Rules* (CUP, 2010) 99.

particular case, which can often be amenable to alternative interpretations, has further contributed to a less systematic understanding of dignity.¹²

Far from treating these aspects of the common law as barriers to understanding the concept of dignity, or to its suitability for the common law, this chapter argues that such qualities are associated with its unfinishable nature, as a dynamic, experimental, inductive, open, responsive, experience-based and evolving body of law. These features, it is argued in this chapter, are essential to the protection and promotion of an investment construction of human dignity, as that concept is developed in relation to the concrete context and the person-specific needs of individual in their relational network that adapts over time. In this respect, it is argued the common law is the very type of legal system that is needed in order to protect the investment concept.

Moreover, it is argued that the investment concept provides reasons for positively requiring the common law to be responsive to lived experience, open to change, and attentive to difference. Investment dignity is based on the creative potentiality of human life, which claims that an understanding of what will enhance our capability to affect and be affected always remains to be discovered within the experience of our relationship with other unique individuals, and through our engagement with our ever changing surroundings. In this respect, the investment concept is the first theoretical framework that has been developed with a particular consideration of the common law spirit in mind, relying upon and supporting its distinctive method.

In light of the common law method, it is unlikely that a complete and systematic picture will ever emerge as to the meaning of the concept of human dignity adopted by the judiciary. Indeed, expecting such a complete and systematic development may be dangerous in the way that it would codify the system and limit the potential for development. However, a theoretical approach to dignity may still be useful as a means by which to enable the judiciary to focus attention on certain developing strands in the case-law and to make connections between these strands.. Such an approach does not entail providing a definitive account of the concept of dignity adopted in all cases, but rather entails extracting particular 'tendencies' or 'potentialities' within a developing practice or set of social conditions in order to take

¹² For a discussion, see Justin Bates, 'Human Dignity – An Empty Phrase in Search of Meaning?' (2005) JR 165.

then further in the direction of maximising the powers and affections of a wider collective body.¹³

This is in line with the constructivist approach to concepts developed in the introduction, which recognises that the utility of a concept is not confined to its ability to accurately describe an existing static state of legal affairs. The common law is not a static entity, made up of codified rules, but it is also a set of dynamic tendencies, pathways and movements, a 'living thing, which evolve[s] over time and adapt[s] to new needs and circumstances.'¹⁴ More important from a constructivist perspective is the use of concepts to attune us to the potential that is part of such a dynamic legal practice and to explore how that potential might be further developed and realised. Such dynamic potentialities might be 'extracted' by the theory developed in the previous chapter and taken further in terms of enhancing and protecting the capabilities of the most vulnerable.

This chapter argues that investment dignity can be used by judges to explore the potential of the developing use of dignity in the common law to realise an inclusive conception of personality, which embraces and connects the different dimensions of a holistic conception of humanity, and recognises that central to our development is vulnerability, which gives rise to certain responsibilities, and entails both positive and negative possibilities for life. Furthermore, such a concept may be used to extract potentialities capable of counteracting the distorted view of the legal subject as detached, self-controlled, personally responsible, independent and invulnerable. Investment dignity might be used to challenge these dimensions of the common law, to creatively reimagine the role of rights and interests as a means of nurturing those forms of caring relationships that are central to the development of human capability. This chapter is thus less concerned with getting the existing account of dignity in the common law 'right', were such a correct account possible, and more concerned with how investment dignity might be used to unlock and extend certain tendencies towards a future that we wish to affirm.

Connecting investment dignity to the practice of the common law not only provides an opportunity to consider the contribution it might make to the development of the

¹³ Cameron Duff, *Assemblages of Health. Deleuze's Empiricism and the Ethology of Life* (Springer, 2014) 11.

¹⁴ B Slattery, 'The Organic Constitution' (1996) 34 *Osgoode Hall Law Journal* 101, 110.

common law. It is also valuable in terms of addressing the contribution that developments in the common law might make to the understanding of investment dignity. In light of the methodological points made in the introductory chapter, the process of testing investment dignity, by relating it to a set of factual circumstances, provides an important opportunity to deepen, enrich and even refine the concept because application is a key part of understanding.¹⁵ It was argued in the previous chapter that investment dignity is constructed as an intellectually mobile concept, one that continues to be dynamically co-formed through responsiveness to the other, receptiveness to singularity, and acceptance of creative movement. Connecting investment dignity to the common law is thus an opportunity not simply to 'apply' an already determined concept to a practice - to subsume it under an ideal - but to further develop that concept and to enrich our understanding of it.

2. Human Dignity as a Value in the Common Law

2.1. Introduction

There appears to be a general consensus that human dignity already fits with (and in) the common law as a value.¹⁶ It has even been suggested that human dignity is a 'core value', if not '*the* core value' of the common law that 'long predates the [European] Convention.'¹⁷ The precise meaning of dignity as a 'value' in the common law is, however, somewhat elusive as it can reasonably be construed to mean a variety of different things and does not necessarily prescribe any particular content for the concept.¹⁸ This section addresses the role of human dignity in the English common law and establishes the foundation for considering its meaning in the following sections. It tracks the development of at least three key senses in which human dignity can be understood to connect with the common law as a legal value, including the *incidental*, *intentional* and *integral* protection of the concept. These different roles, it is claimed, do not necessarily represent a particular commitment to a complete definition of human dignity, although, it is suggested, this is not necessarily to be treated as a negative aspect of the concept..

¹⁵ Deleuze and Felix Guattari, *What is Philosophy?* (trs Hugh Tomlinson, Graham Burchill, Verso, 1994) 79. See also p22.

¹⁶ See fn 6.

¹⁷ *R (On the Application of A, B, X and Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (East Sussex Case) [86]; *R (On the Application of Burke) v General Medical Council* [2004] EWHC 1879 [57].

¹⁸ See Mary Neal, 'Respect for human dignity as substantive basic norm' (2014) 10 *International Journal of Law in Context* 26; Also see Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Rights' in McCrudden, *Understanding Human Dignity* (n 6) 361-366.

2.2. Incidental Protection of Human Dignity

The predominant means of protecting human dignity as a value in the common law, up until 2000, was through incidental protection. Thus, according to Feldman, dignity was 'derived incidentally and indirectly' from the legal protection of other interests.¹⁹ The law of assault, for instance, which prohibits conduct that causes 'people to fear immediate and unlawful violence', protects dignity incidentally through the protection of interests such as 'bodily integrity, moral integrity, and security.'²⁰ These protect dignity understood as a subjective sense of self-respect and self-worth.²¹ In this respect, Feldman identifies a number of areas of English law where such incidental connections can be made, including medical treatment, defamation, treatment in custody, harassment and persecution.²² There are areas of law that lack a direct or systematic connection to dignity as a norm to guide their development. Dignity therefore appears to be protected more by accident than by design.

Importantly, this incidental connection does not represent a commitment to a specific construction of human dignity. Thus, Feldman demonstrates how different interests protected by the common law connect with different as well as sometimes competing conceptions of human dignity.²³ Therefore, Feldman argues that the law which makes consent ineffective in the area of sadomasochistic practices, on grounds of public morality, incidentally protects dignity in terms of an objective assessment of the dignity of the individual or humanity generally, whilst undermining a more subjective sense that is supportive of autonomy.²⁴ No clear trend or pattern therefore appears to emerge during the period in which the protection of human dignity was incidental, nor does it entail the protection of a specific construction of human dignity.

2.3. Intentional Protection of Human Dignity

Developments since 2000 demonstrate the emergence of a closer relationship between human dignity and the common law that is more than merely incidental. A key development, as part of the exponential growth in dignity discourse, is the intentional protection of human dignity through its judicial use as a heuristic device to

¹⁹ Feldman 'Human dignity as a legal value: Part 2' (n 1) 64.

²⁰ Ibid

²¹ David Feldman, 'Human dignity as a legal value: Part 1' (1999) PL 682,

²² David Feldman 'Human dignity as a legal value: Part 2' (n 1) 61.

²³ Ibid 75.

²⁴ Ibid 73, 75.

help 'shape the contours' of the common law in a way that is not dissimilar to a codified constitutional context, although it is inductively derived from an assessment of the common law.²⁵ In this way, as Aharon Barak argues, human dignity 'assists [the judiciary] in...interpretation' and 'plays a role in the limitations' of rights.²⁶ The courts necessarily rely on human dignity as a value to guide the development of the common law as an 'interpretive tool for fleshing out other rights and doctrines' and operates as a 'regulative, organisational and integrative principle'.²⁷ Therefore, in contrast to the incidental method, dignity is protected more by design than by accident.

As an interpretive tool it can also become the primary interest that a particular norm seeks to protect, as opposed to an incidentally protected interest.²⁸ Human dignity has certainly been used in this sense in a number of fields of the common law, but it has, perhaps, had the most marked role in shaping the breach of duty of confidence at common law into the 'tort of misuse of private information'.²⁹ Cases on the breach of duty of confidence were originally concerned with the 'communication of commercially valuable information to trade rivals' that was not in the public domain and was based on a relationship of confidence.³⁰ It had little to do with the protection of human dignity and would not necessarily 'protect an individual against the infliction by the press of mental pain and distress through invasion of...privacy'.³¹

However, in its current guise, the law identifies 'private information as something worth protecting as an aspect of human autonomy and dignity' and now 'focuses upon the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and

²⁵ Margit Cohn and Dieter Grimm, 'Human Dignity as a Constitutional Doctrine' in Mark Tusnet et al, *Routledge Handbook of Constitutional Law* (Routledge 2013)198; Barak (n 6) 362.

²⁶ *Ibid.*

²⁷ M Cohn and D Grimm (n 25) 197. A not uncontroversial role, see Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655; Paulo Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 EJIL 931.

²⁸ Neal (n 18) 35.

²⁹ See Tanya Aplin, 'The Development of the Action for Breach of Confidence in a post-HRA Era' (2007) *Intellectual Property Law Quarterly* 19.

³⁰ *Campbell v Mirror Group Newspapers* [2004] UKHL 22 [45].

³¹ *Kaye v Robertson and Another* [1991] F.S.R. 62, 71.

respect of other people.’³² Human dignity, as an interpretive tool, has had an important complementary role to autonomy in terms of protecting individuals from the disclosure of information that might damage self-esteem by causing severe embarrassment, distress or humiliation to the victim in ways that affect personal development and the ability to form relationships with others.³³

Dignity has also had an important inclusive role in this field in terms of bringing in to the ambit of the common law those who may have otherwise been excluded, because, for instance, they are a celebrity subject to public scrutiny or because their particular behaviour is considered unconventional. Thus, in *HRH Prince of Wales* it was recognised that, in light of human dignity, the Prince of Wales was as much entitled to privacy in his personal thoughts ‘as is any other’³⁴ and in *Max Mosley* it was held that, despite the ‘unconventional’ nature of the sadomasochistic sexual conduct of the claimant, he was as much entitled to protection of his private information as a matter of ‘personal dignity’ as those whose sexual preferences are considered ‘mainstream’.³⁵ This is particularly important in protecting minorities from intrusion based purely on ‘distaste and moral disapproval’ due to some sexual difference.³⁶ The intentional method of protection represents a closer connection to a particular construction of human dignity. Thus, for instance, in *Max Mosley*, it was held that, although certain sexual behaviour may ‘seem undignified’ to some people, this did not prevent the disclosure from affecting the ‘personal dignity’ of the claimant.³⁷ There thus appeared to be a rejection of a status-based concept of dignity that excluded the protection of acts considered disgusting by some external observers.³⁸

This is not to say that judges have formulated a singular construction or complete definition through the intentional protection of human dignity. Indeed, domestic courts have been criticised for failing to ‘embrace a full definition’ which, as a

³² *Campbell* (n 30) 50. This formulation has been restated in numerous subsequent cases, see *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 [24]; *Murray v Express Newspapers Plc* [2008] EWCA Civ 446 [31].

³³ *Mosley v News Group Newspapers* [2008] EWHC 1777 [216]; *Campbell* (n 30) 75.

³⁴ *HRH The Prince of Wales v Associated Newspapers Ltd* (No 3) [2006] EWCA Civ 1776 [70].

³⁵ *Mosley* (n 33) [215], [128].

³⁶ *Ibid* [233].

³⁷ *Ibid* [60].

³⁸ See p 49.

consequence, leaves the concept 'meaningless'.³⁹ Even the most comprehensive survey of human dignity proposed in the case law by Munby J has been criticised by Justin Bates for shying away from a 'general pronouncement as to the meaning of human dignity' by concluding that 'context is everything'.⁴⁰ However, it is questionable whether such a complete definition should be forthcoming in light of the relative infancy of the concept, in comparison to concepts with which the common law is more familiar, and the methodology of the common law, in the way it develops and evolves.

The common law tends to develop principles over time from case-to-case and as a 'localised response to present conditions.'⁴¹ Courts in the common law tradition are thus inclined to avoid laying down broad and complete generalisations that extend beyond what is necessary to resolve a specific dispute.⁴² An account of dignity at common law, if it arises, will likely emerge through inductive inference, over time, from particular cases, to a general and fuller picture of the concept.⁴³ Furthermore, rather than being a disadvantage, leaving the concept without a fully determined content can enable it be malleable in addressing changing conditions and problems as they emerge over time.⁴⁴ A malleable concept allows for the emergence of difference and ensures that victims are personally able to contribute to the shaping of the concept through the manner in which they construct their dignity argument.⁴⁵ Thus, as Dupré argues, the 'open-ended conceptual texture' of dignity ensures that it 'can always be taken in a different direction or become more inclusive of people and their needs and dreams.'⁴⁶ The intentional protection of human dignity might, therefore, have an important inclusive, perhaps even democratic element, in enabling an applicant to construct dignity as a co-participant in the legal process.⁴⁷

³⁹ Bates (n 12) 165-166.

⁴⁰ Ibid.

⁴¹ Alan Hutchinson, *The Evolution and the Common Law* (CUP 2005) 20.

⁴² *Department of the Environment Appellant v Thomas Bates and Son Ltd.* [1991] 1 A.C. 499, 509. See also A.V.Dicey, *An Introduction to The Law of the Constitution* (10th ed, Palgrave, 1959) 197-198.

⁴³ Peter Cane, *Responsibility in Law and Morality* (Hart, 2002) 25.

⁴⁴ G Moon and R Allen (n 3) 615.

⁴⁵ Dupré, 'Constructing the Meaning of Human Dignity' in McCrudden (n 18) 118.

⁴⁶ Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263, 277.

⁴⁷ Ellie Palmer, Ellie Palmer, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Oxford: Hart 2007) 33-35.

2.4. Integral Protection of Human Dignity

A number of recent academic commentaries have suggested an even closer relationship between human dignity and the common law, which entails an implicit and inherent commitment. Jeremy Waldron, Mary Neal and Trevor Allan have all made visible a hidden commitment to human dignity that is more than merely incidental, but is rather integral to the very functioning of the common law and is inherent in its procedures, normative structure and the forms of coercion it employs.⁴⁸ There is, on this account, an 'implicit commitment to dignity in the tissues and sinews' of the common law.⁴⁹ Jeremy Waldron, for example, has argued that the procedural aspects central to the common law are imbued with the value of human dignity.⁵⁰ These include, for instance, the guarantee of a hearing and an opportunity to make submissions and present evidence.⁵¹ According to Waldron, these procedural guarantees protect human dignity by recognising that a person is -

[C]apable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others.⁵²

The law protects human dignity by recognising and respecting certain capabilities that individuals are presumed to possess, treating 'humans as dignified agents, capable of self-control, with a good sense of their own interests, and an ability to respond intelligently to...[laws] demands.'⁵³ On this account, the common law recognises that individuals are not just passive beings to be acted upon, but have the power to act within the process and be heard in proceedings..⁵⁴ This connection to human dignity, inherent in ideas of procedural fairness, has been expressly endorsed by the Supreme Court in a recent decision relating to the right of recalled prisoners to an oral hearing before a parole board.⁵⁵ The Supreme Court held, in this

⁴⁸ Trevor Allan, *Constitutional Justice: a liberal theory of the rule of law* (Oxford University Press, 2001); Neal (n 18); Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) Cambridge Law Journal 200.

⁴⁹ Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) Cambridge Law Journal 200, 222.

⁵⁰ Ibid 222.

⁵¹ Ibid 208.

⁵² Ibid 202.

⁵³ Ibid 200.

⁵⁴ Ibid 218. For further exploration of the non-brutality principle, see: Neal (n 18) 41.

⁵⁵ *Osborn v the Parole Board, re Reilly* [2013] UKSC 61.

case, that judicial procedure must pay 'due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions.'⁵⁶ The Court, citing with approval the opinion of Waldron, stated that -

Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.⁵⁷

The Court therefore held that a hearing not only served a limited instrumental role, in the sense that it improved the chances of the tribunal reaching the right decision, but served a substantive role in paying due respect to human dignity by treating people as having a view or perspective of their own.⁵⁸ It is for similar reasons that the common law has 'set its face' against the use of evidence obtained by torture and, to a lesser extent, self-incrimination and entrapment.⁵⁹

Human dignity can play a further role in terms of structuring the relationship between the state and individual in the exercise of its jurisdiction, as well as encompassing a need to respect the emotional dimensions of the individual and ensure particularly vulnerable persons are able to influence significant decision-making. Munby J, as an example, has argued that dignity requires the participation of vulnerable persons in decision-making on personal welfare, including mentally incapacitated persons and those subject to the inherent jurisdiction of the High Court.⁶⁰ This is vital to establishing a relationship within which an authority makes decisions as a servant of a particularly vulnerable person and in reference to their wishes or feelings, rather than through a process that merely dictates an outcome as a master controlling its subject.⁶¹ To make a decision without the participation of those affected violates human dignity in the way that it treats the person as insignificant, without a view of their own interests, and can undoubtedly lead to damaging emotions, such as humiliation, resentment, frustration, and despair. It is with this in mind that it has

⁵⁶ Ibid 68.

⁵⁷ Ibid.

⁵⁸ See R.A.F. Duff, *Trials and Punishments* (1991 CUP) 118.

⁵⁹ *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, 11. For a discussion, see Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (OUP 2013) 129-130.

⁶⁰ Lord Justice Munby, 'Dignity, Happiness and Human Rights' (2011) *Elder Law Journal* 32, 35.

⁶¹ Lord Justice Munby (ibid) 36; See *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363 [154].

recently been held that dignity includes, for those lacking mental capacity, the 'right to be heard' and excludes 'the indignity of being forgotten'.⁶²

Anchoring human dignity in the very fabric and functioning of the common law in this way entails a commitment to dignity that is implicit, subtle, but pervasive.⁶³ It is embedded in the manner in which the common law system exercises jurisdiction over the subject, through its 'hearings and impartial proceedings, and the safeguards that go with them.'⁶⁴ It is characteristic of the common law that it, according to Trevor Allan, seeks to respect dignity by eliciting the 'co-operation of the citizen as a rational, responsible and self-determining agent' through a 'rational process of argument in which he is invited to participate.'⁶⁵ Such a connection could not be broken without doing some very real damage to the character of the common law.⁶⁶ It is, of course, true that the integral protection of human dignity in the common law is not equivalent to the complete protection of the concept. Firstly, procedural connections are not necessarily a guarantee that the substantive remedies or rights in law will fully protect human dignity.⁶⁷ Secondly, the concept of dignity, integral to the procedures of the common law, is by no means exhaustive of the dimensions of human personality worthy of protection.⁶⁸ Nevertheless, this integral form of protection provides a useful foundation upon which to develop a wider commitment to human dignity that is reflected in the substantive rights afforded at common law.⁶⁹

2.5. Conclusion

Human dignity, as a legal value, is in a fluid state in the common law. There is a clear sense of progression in terms of both its visibility and importance. As has been seen, however, a singular definition of human dignity has not been adopted, nor has the concept had the same influence on every field of the common law that it might be expected to effect. Despite the lack of a singular definition there are perhaps some signs and trends that can be inferred from the use of dignity as a legal value by

⁶² *Westminster City Council v Sykes* [2014] EWHC B9.

⁶³ Waldron, 'How Law Protects Dignity' (n 49) 200.

⁶⁴ *Ibid* 209.

⁶⁵ Allan, *Constitutional Justice* (n 48) 113.

⁶⁶ "[W]e do well not to sell this short by pretending that dignity is a take-it-or-leave-it kind of value" Waldron, 'How Law Protects Dignity' (n 49) 222.

⁶⁷ David Lubban, 'The Rule of Law and Human Dignity: Reexamining Fuller's Canons' (2010) 2 *Hague J. on Rule of Law* 29.

⁶⁸ *Ibid* 33.

⁶⁹ See Allan, *Constitutional Justice* (n 48) 65. Neal (n 48) [emphasis added].

judges, as well as victims, who may construct and propose their own dignity argument.⁷⁰

3. Human Dignity as an Investment Concept in the Common Law

3.1. Introduction

This section deploys the investment construction of human dignity to highlight and explore certain trends and developments in the common law, with a particular focus on how that concept can be used to further realise the inherent potential of the common law to protect a more holistic, developmental and interconnected vision of the legal subject, which encompasses space for experimentation and emergence of difference. It is argued that investment dignity is capable of connecting with existing judicial uses of the concept, as well as potentially extending these to realise the possibility for more active and joyous forms of life. As discussed in the methodological section of the introduction, a concept needs to connect with current processes and pathways in order to effect change by extending and promoting these movements in a manner that unlocks new intensities, capabilities and compositions.⁷¹ This will help to extract certain developments in the common law, as well as enrich or refine the former concept, by connecting it to the messy world of real-life circumstances.⁷²

The section focuses on three central and important aspects of investment dignity to explore and discuss the use of dignity in the common law, specifically the protection of multifaceted humanity, developmental personality and vulnerability. It argues that investment dignity can be used to promote the potential of the common law to recognise the importance of permitting experimentation to enable joyous and active living, as well as protecting individuals from 'good intentions vulnerability'. As a result of this encounter between investment dignity and the common law, the former is refined by drawing on certain judicial insights gained from relating human dignity to real-life circumstances, such as encompassing the importance of memory or time to the becoming of human personality and living environment to the inter-relational aspect of humanity.

⁷⁰ See Dupré, 'Constructing the Meaning of Human Dignity' in McCrudden (n 18) 116; Edwin Camerson, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in McCrudden (n 18) 468.

⁷¹ See p 25.

⁷² Hutchinson (n 41) 76.

3.2. Multifaceted Personality

A significant feature of the investment concept of dignity that was constructed in the previous chapter was its multifaceted approach to human personality encompassing physical, social, recreational and mental (including emotional) dimensions. This holistic approach to dignity entails a wide view of the interests of individuals and requires us to 'think of the human person as a whole'.⁷³ One of the key achievements of the judicial incorporation of human dignity into the common law is the way it has introduced, strengthened and made more visible a concern for certain dimensions of humanity that may have historically received limited protection. Perhaps the clearest and most consistent use of human dignity is in terms of the protection of the emotional dimension of human personality. Human dignity has, in this regard, strengthened the protection of individuals from exposure to negative or passive emotions as a recognisable form of harm.⁷⁴ In the field of misuse of private information, human dignity has, as was discussed above, been associated with protection against the disclosure of information that might damage self-esteem.⁷⁵ Thus, it has been held that a photo of person in a 'situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information.'⁷⁶ Human dignity has also added weight to the importance of taking account of an individual's wishes as a factor in assessing an individual's best interests.⁷⁷ This is primarily because, although a person may lack capacity, a failure to take account of their wishes may lead to humiliation, distress and anger at being treated as a passive object in the decision-making process.⁷⁸

Dignity has not only strengthened a concern for protecting individuals from negative emotions, it has strengthened the protection or promotion of positive emotional

⁷³ Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) EHRLR 190, 190; Stephen Riley, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6 International Journal of Law in Context 117, 125.

⁷⁴ Mary Neal, "Human Dignity and Emotion in the Healthcare Law Context" Invited paper delivered during a Two-Day Colloquium on The Emotional Dynamics of Law and Legal Discourse, Queen's University Belfast, 25th and 26th March 2013; Dupré, 'Unlocking human dignity' (n 73).

⁷⁵ *Mosley* (n 33) 216.

⁷⁶ *Campbell* (n 30) 75.

⁷⁷ *Re S and S (Protected Persons)* [2008] EWHC B16, 87.

⁷⁸ *Re MM (an adult)* [2007] EWHC 2003, 121. See also J Herring, 'Entering the Fog: On the Borderlines of Mental Capacity' (2008) 83 Indiana Law Journal 1620; Jonathan Herring, *Medical Law and Ethics* (3rd ed, Oxford University Press 2010) 182.

experiences as a key aspect of human personality and fulfilment.⁷⁹ This includes protecting or promoting feelings of happiness and well-being.⁸⁰ The most notable use of dignity in this regard is in relation to the wide formulation of the best interests test formulated by Munby J in *Re MM*.⁸¹ This was the first in a line of cases to recognise, in the application of the best interests test, that ‘treatment [of an individual] at the hands of the State which, however well intentioned, can itself end up being abusive of her dignity, her happiness and indeed of her human rights.’⁸² In this regard, human dignity is used judicially to recognise that the intention of making someone physically safer by removing certain risks can be ‘bought at too high a price in happiness and emotional welfare’.⁸³

The concept of ‘good intentions vulnerability’ set out in the previous chapter can help to make theoretical sense of this developing trend. Seeking in good faith to promote one dimension of humanity may expose a person to greater vulnerability. Indeed, as Munby J has put it, realising physical safety at all costs can appear futile if it leaves people entirely ‘miserable’ or ‘broken hearted’.⁸⁴ One of the key consequences of this approach is that intervention to protect a vulnerable adult should not be based on a mere fanciful risk of future physical injury.⁸⁵ It is neither plausible nor possible to eliminate all human vulnerability in the form of openness to harm, for all “life involves risk.”⁸⁶ Nor is it even desirable in terms of our human dignity to attempt to wholly eliminate our vulnerability. As Munby J has argued, reciting Holmes J, all ‘life is an experiment’.⁸⁷ This is, potentially, a point that could enrich the investment concept of dignity, which, as was discussed in the previous chapter, incorporates elements of vulnerability and experimentation. As discussed in the previous chapter, vulnerability

⁷⁹ Lord Justice Munby, *Dignity, Happiness and Human Rights* (2011) *Elder Law Journal* 32; Lord Justice Munby, ‘Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?’ (2012) 7 *Brunswick Mental Health Care Review* 18; Lord Justice Munby, *Safeguarding, Capacity And The Law*, A talk by Sir James Munby, President of the Family Division, at the National Spring Safeguarding Adults Conference of the Local Government Association ‘Leading Adult Safeguarding’ in London on Tuesday 12 March 2013.

⁸⁰ For a suggestion that human dignity may require personal fulfilment and the promotion of positive emotions, including joy, see Dupré (n 73) 195.

⁸¹ *Re MM (an adult)* [2007] EWHC 2003, Lord Justice Munby, *Dignity, Happiness and Human Rights* (2011) *Elder Law Journal* 32.

⁸² *Ibid* 118

⁸³ *Ibid* 120

⁸⁴ *Ibid*.

⁸⁵ *Ibid* 119. See also Justice Munby, ‘Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?’ (2012) 7 *Brunswick Mental Health Care Review* 18.

⁸⁶ *Ibid* 120.

⁸⁷ *Ibid*.

is not merely a negative concept, but is central to human dignity in the way it enables us to grow, develop and experience joy. Therefore, to attempt the impossible task of eliminating all risks by keeping people ‘metaphorically wrapped up in cotton wool’ would deny all possibility of experimentation in life and any chance at maximising our joy.⁸⁸ It would, undoubtedly, curtail, to an insufferable degree, human activity and social contact.⁸⁹

The Court of Protection has begun to use this dimension of human dignity to challenge, firstly, the premature institutionalisation of the vulnerable and, secondly, the separation of a person from a partner or family member, which is also related to the social dimension of human personality.⁹⁰ A good example of the former is the case of *Westminster City Council v Sykes*, decided in 2014, where the Court of Protection had to consider whether it was in the best interests of an elderly women with dementia to be kept in residential care or whether she should be able to return to her flat where she had lived for 60 years.⁹¹ In a carefully considered decision, the Court used dignity as part of the complex balancing exercise to refine the application of the best interest test in a way that took a holistic approach to the needs of the individual and a realistic approach to the importance of physical safety in relation to other dimensions of human personality.⁹² It relied on dignity to recognise that where there was a risk of physical injury, such as a risk of falling, in allowing Miss Sykes to return home, those risks had to be considered pragmatically in light of the ‘loss of self-esteem and dignity’ that may come with institutionalisation.⁹³ Specifically, the impact of placement in a residential setting and continued loss of her home was recognised as having, for Miss Sykes, a significant negative ‘effect on her mental health, happiness and well-being’.⁹⁴

In a closely related use of dignity, drawing on the opinion of Munby J, it argued that safety cannot always be an overriding consideration, for risk is unavoidable and any attempts to avoid it at all cost will negatively impact upon basic human functioning or

⁸⁸ *Ibid.* Recited in, *A Local Authority v TZ* [2014] EWHC 973 (COP) [50]; *CC v KK* [2012] EWHC 2136 (COP) [66]; *L (Vulnerable Adults with Capacity: Court's Jurisdiction), Re* [2010] EWHC 2675 (Fam), [21].

⁸⁹ *Ibid* 120

⁹⁰ See *CC v KK* (n 88); *Sykes* (62); *Re MM* (n 81).

⁹¹ [2014] EWHC B9, (2014) 17 C.C.L. Rep. 139.

⁹² *Ibid.*

⁹³ *Ibid* s9.

⁹⁴ *Ibid* s10.

social activity. The Court therefore pointed to the reality that there may well be risks in falling in a care home, unless 'one does not allow an older person who can do imperfectly the dignity of using the toilet alone'.⁹⁵

Finally, dignity appears to be used by the Court to recognise the importance of, what Dupré has termed, the protection of human time.⁹⁶ That is, protecting 'against an acceleration of time by bringing forward a future that could otherwise remain distant'.⁹⁷ This includes enabling people to 'live at their own pace, to sustain a tolerable status quo and crucially, to deteriorate at their own pace (if this deterioration becomes inevitable)'.⁹⁸ This aspect of dignity is evident in the way the Court notes that '*periods of liberty and time at home are important to...dignity and quality of life.*'⁹⁹ It held that whilst her dementia may reach a stage where it would make 'home care no longer viable', the ability to live at home for several last months at the end of life was something of 'value' and 'worth'.¹⁰⁰ Again, this is a point that could be used to refine and enrich the content of investment dignity by recognising the importance of time to the unfolding of our capacities. It was recognised in the previous chapter that humans are always in a state of becoming through constant changes in interaction with various forces, some of which may increase or sustain our characteristic functioning, whilst others may inevitably reduce or destroy such functioning. The addition of an element of time recognises the importance to the individual of the ability to control the speed with which they undergo such a process and that a person, at the very least, should not have their characteristic functioning diminished prematurely..¹⁰¹

This judicial use of dignity as a means by which to challenge institutionalisation of particularly vulnerable people is important in terms of widening the law's field of vision to encompass (positive) emotional and temporal dimensions.¹⁰² There is, in addition, recognition of a relational dimension in the case. It was recognised that a

⁹⁵ Ibid.

⁹⁶ Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 Liverpool Law Review 263, 277; Dupré, 'Unlocking human dignity' (n 73) 198.

⁹⁷ Ibid 277.

⁹⁸ Ibid.

⁹⁹ Sykes (n91) s10 (emphasis added).

¹⁰⁰ Ibid.

¹⁰¹ A point that seems to relate to the high frequency with which dignity is relied upon by individuals in end of life cases, see *Pretty v DPP* [2001] UKHL 61; *Purdy v DPP* [2009] UKHL 45; *R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent)*, *R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions* [2014] UKSC 38.

¹⁰² See Dupré, 'Unlocking human dignity' (n 73) 203.

home was not merely important to an elderly person because it was a physical place, but also because of the 'relational structure that is associated with a place.'¹⁰³ Removing an elderly person from their home can therefore have significant implications for their sense of connectedness to others, which are often constitutive of the self.¹⁰⁴ This is supported by the interconnected nature of humanity at the heart of investment dignity and also, potentially, can enrich that concept by introducing the intuitively convincing idea that our living environment is, in part, central to our human dignity for the manner in which it can encompass 'emotional warmth, emotional security and the commitment of human relationship.'¹⁰⁵

The investment concept not only supports the use of human dignity as a means of introducing different dimensions of human personality into the common law, but it also requires the recognition that each of the dimensions are connected to each other as equally important aspects that affect and reflect each other. As discussed in the previous chapter, a holistic approach to dignity recognises that impact on one dimension of personality, such as the activity of the body, will have a parallel affect on another dimension, such as the activity of the mind (and vice versa).¹⁰⁶ In this way, a holistic concept of dignity can 'go beyond the mainstream body-and-mind definition of human beings, i.e. the distinction between physical and psychological (or moral) integrity.'¹⁰⁷ This might be realised through the development of 'injury to dignity' as a basis for awarding damages in addition to any interference with any physical integrity.¹⁰⁸

This aspect of damage encompasses additional compensation for emotional harm in the form of humiliation, loss of self-esteem and mental distress.¹⁰⁹ The distinctive role that dignity plays in this regard is to ensure the full effects of abuse or interference are given appropriate legal recognition. As an example, in the case of *Dulghieru*, concerning the sexual exploitation and trafficking of Moldovan women as

¹⁰³ (2014) 17 C.C.L. Rep. 139 [s10]. See also, Re: GC [2008] EWHC 3402 (Fam) [24].

¹⁰⁴ See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011) 31.

¹⁰⁵ (2014) 17 C.C.L. Rep. 139 [s9].

¹⁰⁶ See p80.

¹⁰⁷ Dupré, 'Unlocking human dignity' (n 73) 198. See also, Riley (73)125; Foster (n 9) 15.

¹⁰⁸ *Breslin v McKeivitt* [2011] NICA 33; *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773; *Manley v. Commissioner of Police of the Metropolis* [2006] EWCA Civ 879; *Richardson v Howie* [2004] EWCA Civ 1137.

¹⁰⁹ Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Comm No 247, 1997) 12.

forced prostitutes, the High Court recognised through injury to dignity the feelings of humiliation, shame and degradation experienced as a consequence of the sexual abuse. More importantly, the Court was able to recognise within the legal narrative the 'continuing harmful effects of their ordeal.'¹¹⁰ This included the recurrence of 'vivid intrusive images' accompanied by continuing feelings of 'hopelessness and guilt'.¹¹¹ Notably, the Court was able to recognise the continuing effects of the emotional experience on the social dimension of personhood, including the victims 'difficulty in forming or maintaining relationships' and their fear of going outside.¹¹² Dignity appears to encapsulate and brings to the fore the full complexity of the narrative of the victim's ordeal. Investment dignity can help to make sense of the connections between these different dimensions by recognising that the interference with the body has a parallel effect on the mind in the formation of negative emotions. It also entails the mental trace of the image of degradation that remains 'present to the mind' and may, through that image, mean the body continues to experience the trauma long after it happened.¹¹³ In turn, this may affect the ability of the victim to outwardly develop relationships with others and may negatively impact on the unfolding of human personality over time. This raises the importance of memory, as an aspect of human becoming and a multifaceted concept of human dignity.

3.3. Becoming and Developmental Personality

One of the core components of the investment construction of dignity is the focus on a conception of human personality as becoming, which entails the idea that identity formation is a continuing process, rather than a fixed state. The capabilities of body and mind adapt and unfold over time in encounters with other forces in the world. This conception of human personality has a number of implications for the development of the law. Most notably, it requires the law to be attentive to the affects an encounter may have on the unfolding of the personality of an individual in to the future and in relation to others.¹¹⁴ This dimension of investment dignity is an element that can be used to explore, in a novel fashion, the development of the misuse of

¹¹⁰ *AT & Ors v Dulghieru & Anor* [2009] EWHC 225 [11].

¹¹¹ *Ibid* 29.

¹¹² *Ibid* 38.

¹¹³ Beth Lord, *Spinoza's Ethics* (Edinburgh University Press, 2010) 68.

¹¹⁴ See Edward Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33 *Liverpool Law Rev* 201, 229.

private information, which, as has been seen, is expressly connected to human dignity.¹¹⁵

Traditionally privacy has been concerned with preventing interference with a particular boundary or sphere of the self. However, recent developments suggest that it can also encompass the protection of developmental personality.¹¹⁶ As discussed in the previous chapter, the dimension of *becoming* demonstrates a greater concern with how events or encounters affect the unfolding of personality within social relations. A case that potentially is best explained through the notion of *becoming*, rather than traditional notions of privacy, is the case *Campbell*.¹¹⁷ This case concerned the publication of photographs of Miss Campbell leaving a narcotics anonymous meeting. The minority could not see anything significant about the picture and could not see how publication involved an intrusion into private space or understand how the publication was demeaning.¹¹⁸ In contrast, the majority was much more concerned with the future implications of the publication on Miss Campbell.¹¹⁹ Most importantly, the majority recognised that the publication of the photos would have had a detrimental effect on her health in terms of her progressive recuperation from a drug addiction.¹²⁰ It was therefore recognised that the publication would lead to 'distress and *potential harm*' and would affect her 'continuing health and development'.¹²¹ Human personality is prone to changes from external forces in ways that are not merely sudden - marked by a narrow temporal context that focuses on an interference with a fixed identity at a specific time - but is evolving and developing in a way that effects the becoming of holistic personality.¹²²

3.4. Human Vulnerability

Human dignity has had, as was discussed above, an important role in terms of protecting individuals, including the elderly, from a particular form of 'good intentions vulnerability'.¹²³ Vulnerability was understood in a positive sense, requiring the

¹¹⁵ *Mosley* (n 33) 216.

¹¹⁶ See H Fenwick, *Civil Liberties and Human Rights* (Routledge, 4th edn, 2007) 804-807; David Feldman, 'Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberty' (1994) 47 C.L.P 41, 51-53. Dupré, 'Unlocking human dignity' (n 73) 190, 196.

¹¹⁷ *Campbell* (n 30).

¹¹⁸ *Ibid* 51.

¹¹⁹ *Ibid* 130.

¹²⁰ *Ibid* 169.

¹²¹ *Ibid* 142, 158. See also *re S (A Child)* [2005] 1 AC 593..

¹²² See p89.

¹²³ See p94. See also Munby, 'Dignity, Happiness and Human Rights' (81) 36.

exposure to some risk on the basis that it was central to experimentation, activity and joy. To completely eradicate vulnerability is not only impossible, but would deprive us of the kind of dignity that we possess as human beings by entirely closing us off from our surroundings and reducing our activity, relationality, and creativity. Investment dignity, however, does require certain positive interventions into the lives of individuals, particularly the most vulnerable people, by requiring investment into conditions that support or protect the development of *activity* and *rest for mind and body*.¹²⁴

The common law has recognised an entitlement to basic needs used to protect and support particularly vulnerable and excluded groups. This can be discerned from the 'law of humanity' or, in its modern form, the principle of 'common humanity', which has been developed in response to the imminent destitution that may be faced by certain 'ostracised groups'.¹²⁵ Despite the fact that the common law generally shies from imposing positive obligations, it has developed a minimum obligation to provide basic needs for vulnerable persons.¹²⁶ Including, for instance, the destitution faced by asylum seekers who are prevented from working or accessing social welfare, and the eviction of gypsy travellers from their home. This concept has been held to encompass, in terms strongly reminiscent of those used in jurisdictions with a minimum core doctrine of human dignity, the provision of the 'essential basics of life'¹²⁷ and the protection of a 'minimum standard of existence'.¹²⁸ It has therefore been referred to as a 'humanitarian safety net' that includes a minimum provision of shelter and food.¹²⁹

It is in this light that the connections to human dignity appear obvious and as Feldman states it appears as something like a socio-economic right that is necessary to 'maintain life and a minimum level of dignity'.¹³⁰ The central focus on a basic level

¹²⁴ See p104.

¹²⁵ For a fuller discussion, see Luke Clements and Janet Reed, *Disabled People and European Human Rights* (2003, Policy Press) 53; Richard A. Edwards and Peter Bilings, 'Safeguarding asylum seekers' dignity: clarifying the interface between Convention rights and asylum law' (2004) *Journal of Social Security Law* 83; Murray Hunt, *Using Human Rights Law in English Courts* (Hart 1997) 226.

¹²⁶ See p146.

¹²⁷ *R.(on the application of Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 [69].

¹²⁸ *R v (Othman) v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022 [65].

¹²⁹ *Ibid* 52.

¹³⁰ Feldman notes that subsequent legislation has 'removed the law of humanity' in the field of asylum law. However, it still remains an 'undercurrent in the common law and may assume more prominence

of respect for 'common humanity' provides an important, perhaps even necessary, conceptual link to human dignity that is essentially concerned with the protection of humanity.¹³¹

Investment dignity recognises that basic existential conditions of life are necessary to enable people to engage in any kind of functioning or activity at all. They are necessary for the whole body to be capable of doing many things at once, and the mind equally capable of understanding many things at once. They enable people to 'carry on such *functions* and *activities* as constitute the bare minimum expression of the human self.'¹³² This protects two facets of vulnerability. First, it responds to exclusion vulnerability by recognising that an 'asylum seeker' or 'gypsy', who may, for instance, be excluded from the protection of the law because of their difference, are recognised as having some needs in virtue of their 'common humanity' from which they cannot be excluded. Second, it recognises that a human is a fragile being whose development is dependent on material needs and whose unfolding of capacities is contingent on being open to composing with substances necessary to maintaining and extending its power.¹³³

The provision of a minimum standard of existence differs from a more expansive power under the common law to intervene in the lives of adults who are vulnerable to exploitation through the inherent jurisdiction of the High Court.¹³⁴ This enables the High Court to make declarations that safeguard particularly vulnerable people even if they do not lack capacity or do not support the intervention, thus raising the spectre of paternalism.¹³⁵ Such declarations are usually used pre-emptively to restrict or prevent social or living conditions that could become abusive or harmful to a

at some future date' Feldman, *Civil Liberties and Human Rights* (n 116) 132. See also J Beatson *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) 14.

¹³¹ Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19 *European Public Law* 319' 325. See also Barak (n 6) 363.

¹³² *Francis Coralie v. Union Territory of Delhi*, Air 1982 SC 746.

¹³³ See p 90.

¹³⁴ For an overview, see Michael Dunn, Isabel Clare, and Anthony Holland, 'To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy' (2008) 28 *Leg Studies* 234; John Williams, 'Public Law Protection of Vulnerable Adults: The Debate Continues, So Does the Abuse' (2002) 2 *Journal of Social Work* 293; Michael C. Dunn, 'When are adult safeguarding interventions justified?'; Alison Brammar, 'Safeguarding and the elusive, inclusive vulnerable adult' in Jonathan Herring et al, *Vulnerabilities, Care and Family Law* (Routledge, 2013) Ch 13, 12; Lord Justice Munby, 'Protecting the rights of vulnerable and incapacitous adults – the role of the courts: an example of judicial law making' [2014] *Children and Family Law Quarterly* 63; Michael Dunn and J Herring, 'Safeguarding children and adults: Much of a muchness?' (2011) *Child and Family Law Quarterly* 528.

¹³⁵ See Dunn, Clare, and Holland (ibid) 236.

'vulnerable adult'. This aspect of the common law has been expressly treated by Munby J, a key judicial contributor to the development of the jurisdiction, as having the object of safeguarding human dignity.¹³⁶ In the leading case before the Court of Appeal the continued existence was argued for on the grounds that it is important to have 'remedies in place to combat [abuse]...to preserve human dignity' which was an argument ultimately accepted by the Court.¹³⁷

It has been held by Munby J that the Court will exercise its inherent jurisdiction in order to prevent the abuse of a person who is under 'undue constraint, coercion, undue influence or other vitiating factors.'¹³⁸ Thus, for instance, the jurisdiction has been exercised to protect people from forced marriage as a dehumanising practice incompatible with human dignity and, for instance, to create an injunction to restrain the behaviour of a son who was alleged to have physically assaulted and verbally threatened his elderly parents, as well as controlled and unduly influenced aspects of their lives.¹³⁹

Investment dignity supports the general thrust, if not every detail of this common law remedy, in that it seeks to address, at least in part, a certain form of power vulnerability that characterises particular relationships in which a subordinate is subject to the domination of another through emotional, social, or economic control in a way that renders them highly susceptible to abuse, coercion or oppression.¹⁴⁰ The current law recognises the importance of intervening to re-structure and re-orient relationships of power that are damaging to the dignity of the subordinate in the way they leave people predominantly passive to the manipulation of another. This is not necessarily an autonomy denying practice.¹⁴¹ Rather, it recognises a less abstract and more grounded or relational model of decision-making in which autonomy, if it is to thrive, is 'continually dependent on constructive relationships' based on care and respect for human dignity.¹⁴² The focus is, significantly, on

¹³⁶ Lord Justice Munby, 'Dignity, Happiness and Human Rights' (2011) *Elder Law Journal* 32, Lord Justice Munby, 'Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?' (2012) 7 *Brunswick Mental Health Care Review* 18.

¹³⁷ *DL v A Local Authority* [2013] Fam. 1.

¹³⁸ *Re: SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam) [79].

¹³⁹ *DL* (n 137); *Re SK (proposed plaintiff) (an adult)* [2004] EWHC 3202.

¹⁴⁰ See p 92.

¹⁴¹ *DL v A Local Authority* [2013] Fam. 1 [54].

¹⁴² *Nedelsky* (n 104) 300.

providing relief that is 'facilitative' and 'empowering' to the victim of abuse, directed at constraining the abuser in a dominant position of power, rather than 'controlling' the victim of abuse.¹⁴³ Investment dignity may be used to develop this justification, on the basis that intervention must always be carefully considered in relation to 'good intentions vulnerability' whereby a person susceptible to one kind of abuse can be exposed to treatment that is abusive of another dimension of human dignity and must, as discussed above, be focused on a sensible and robust approach to risk that allows space for experiments in daily living.

3.5. Conclusion

It appears that aspects of common law practice provide a conceptual link to investment dignity, as well as enrich and deepen that concept. They potentially provide a much needed practical anchor and afford immanent pathways that can be extended to promote core dimensions of investment dignity. Realistically, however, common law practice is unlikely to conform perfectly to every element of a philosophically rich concept of dignity, such as investment dignity, especially when the common law is more familiar with other values and has a 'messy' quality possessing different strands or pathways that branch off in directions that may not always be consistent.¹⁴⁴ However, it is less significant than the existence of possible strands or branches that might be extended or developed to protect investment dignity. Moreover, it is characteristic of the working of the common law that it is amenable to adaptation and development. It is to these qualities of the common law that the chapter now turns, representing, it is argued, a potential further conceptual connection with investment dignity, which extends beyond content, to include the spirit of the common law.

4. Investment Dignity and the Spirit of the Common Law

4.1. Introduction

The 'spirit of the common law' has been a topic of interest for many years.¹⁴⁵ It has both excited and perplexed commentators in equal measure, with variable viewpoints emerging in regards to the core (perhaps somewhat elusive) characteristics, qualities, methodologies or features of the common law. This section selectively focuses on the evolutionary, inductive, unfinishable and grounded

¹⁴³ *DL v A Local Authority* (n 137) 67.

¹⁴⁴ Hutchinson (n 41)192.

¹⁴⁵ Roscoe Pound, *The Spirit of the Common Law* (Transaction Publishers 1925).

features of the common law, emphasised by commentators who support its capacity or need to change, as opposed to theories that focus predominantly on integrity or tradition.¹⁴⁶ These qualities provide a particularly fruitful environment for the development of investment dignity, by creating space for the law to be attentive to singularity, responsive to human experience and engaged in creative movement. Moreover, it is suggested that, in light of these features, the common law is effectively in sustained dialogue with those it affects, creating an important bridge between the spirit of the common law and the rule of law or democracy, which are discussed in more detail in later chapters. In light of these dynamic features of the common law, it is argued that there are potential pathways and means by which to transform the common law which, in some respects, does not provide sufficient protection of particularly vulnerable groups.

4.2. Work-In-Progress: Encountering Difference and Openness to Change

Alan Hutchinson, drawing on the insights of commentators such as Roscoe Pound, Oliver W Holmes and Hans-Georg Gadamer, has aptly described the common law as a 'perpetual work-in-progress' that is being adapted and worked out in relation to the particularity of each case.¹⁴⁷ It largely adopts an inductive or 'bottom-up' approach to reasoning that moves from the particular case to the tentative development of a general principle, which may always be refined or corrected in relation to the emergence of new situations, or social conditions. This entails a necessary responsiveness of the common law to emerging social problems. It is potentially, through its inductive approach, attentive to the singularity and specificity of each case.¹⁴⁸ Rather than merely subsuming a case under an abstract or general principle, recognising it to be merely an instance or repetition of that principle, the common law develops principles through concrete engagement with the particular problem raised in each case and treats understanding as something that can only be achieved in a specific encounter between individuals in each horizon.¹⁴⁹ As Bingham MR put it, the common law 'should respond to social needs as they are manifested,

¹⁴⁶ Hutchinson (n 41) 116; Hans Georg-Gadamer, *Truth and Method* (Garrett Barden and John Cumming trs, Sheed and Ward, 1975).

¹⁴⁷ "[The]... common law is a perpetual work-in-progress – evanescent, dynamic, messy, productive, tantalizing, and bottom up." Hutchinson (n 41) 291; Alexandre Lefebvre, 'The Time of Law' in Claire Colebrook (eds), *Deleuze and Law: Forensic Futures* (Palgrave, 2009) 43.

¹⁴⁸ Lefebvre (Ibid).

¹⁴⁹ Ibid 172.

case by case.’¹⁵⁰ This feature of the common law provides a potentially fruitful environment for the promotion of investment dignity as it can allow for attentiveness to the singularity or individuality of the ‘other’, as well as the differences that characterise the becoming of humanity. Dignity is developed in relation to the specific needs and desires of individuals in particular cases as they emerge over time.

The attentiveness of the common law is closely related to its responsiveness to the lived experiences of those it affects. Rather than focusing on logic or technical niceties, the common law is based on experience.¹⁵¹ As Lon Fuller put it, the common law has the virtue that it necessarily ‘mirrors the variety of human experience; it offers an honest reflection of the complexities and perplexities of life itself, instead of concealing them in the specious geometry of a code.’¹⁵² Alan Hutchinson has, similarly, argued that the common law is ‘only brought and rebought to life in the active and persisting conversations between real people within, over, and across time.’¹⁵³ The responsiveness of the common law, in this regard, suggests a kind of sustained conversation or dialogue with those it affects, so that the law, in each application, listens for the changing needs, problems or experiences of life.¹⁵⁴ This is a potentially beneficial characteristic of the common law, in terms of facilitating investment dignity, as it opens up space for individuals to articulate for themselves their experiences or needs.¹⁵⁵

Finally, the common law is, in light of its evolutionary qualities, a process of creative movement that is never settled or complete. The common law possesses an ‘unfinishable’ quality, which is central to its adaptability and flexibility.¹⁵⁶ As Alan Hutchinson has argued, it is characteristic of the common law that it is –

¹⁵⁰ *Re S [Hospital Order: Court’s Jurisdiction]* [1996] Fam 1, per Sir Thomas Bingham MR.

¹⁵¹ “The life of the law has not been logic: it has been experience.” Oliver Holmes, *The Common Law* (Lawbook Exchange 1881) 1.

¹⁵² Lon L. Fuller, *Anatomy of the Law* (Penguin 1968) 106.

¹⁵³ Hutchinson (n 41)165. See also Lefebvre (n 147) 38.

¹⁵⁴ “[E]ach judgment that evokes this rule...must reinvent it along the lines of the needs and desires appropriate to contemporary society. The rule is differentiated and made actual in each case it is called on to adjudicate...” Lefebvre (n 147) 43.

¹⁵⁵ “[The Common Law can]...open a space in which people can engage directly about what is more and less useful in specific contexts at specific times.” Hutchinson (n 41) 116.

¹⁵⁶ *Ibid* 277.

Perpetually...in flux, always in a process of further *becoming, developing, and transforming*...with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the *lived experiences* which formed the basis of the litigation that led to the prior relevant court adjudications.¹⁵⁷

This 'unfinishable' nature of the common law has long been recognised by judges who have applauded its 'capacity...to adapt itself to the needs of contemporary life'¹⁵⁸ and for the way in which it 'continues to evolve, as it has done for centuries.'¹⁵⁹ Even today new legal concepts are being developed, as 'new problems will generate new demands and produce new remedies' on the basis that the common law has a 'remarkable ability to adapt in dramatic way over a very short period of time.'¹⁶⁰ A particularly good example of such a dramatic development is the inherent jurisdiction in relation to vulnerable adults. This remedy is, in effect, and according to Munby J, the 'invention by the judges' of a 'novel jurisdiction' which is an example of 'judicial law-making on...a fairly heroic scale.'¹⁶¹ On this account, the common law can never really reach completion, for it must be capable of adapting to its surroundings and social environment, which is always evolving and changing. It must be able to refine, modify and even create concepts to respond to new problems, compositions, or relationships in each horizon.

The common law also endorses continuity, consistency and stability through judicial precedent, qualities which are conventionally emphasised over the more dynamic and changeable characteristics of the common law. Such dimensions of the common law are undeniably significant in ensuring the law is carefully applied to changing conditions and shifting circumstances, which are also features that are vital to the protection of dignity (explored further in chapter five). However, continuity and stability are not equivalent to the idea of completion of the common law.¹⁶² An exclusive focus on these aspects ignores the 'peculiar forte' of the common law that

¹⁵⁷ Ibid 288.

¹⁵⁸ *Campbell* (n 30) 46.

¹⁵⁹ *Venables v News Group Newspapers Ltd* [2001] EWHC 32 [6].

¹⁶⁰ Lord Justice Munby, 'Protecting the rights of vulnerable and incapacitous adults – the role of the courts: an example of judicial law making' [2014] CFLQ 63, 77.

¹⁶¹ Ibid 65.

¹⁶² See Lord Justice Munby, 'Protecting the rights of vulnerable and incapacitous adults – the role of the courts: an example of judicial law making' [2014] CFLQ 63.

‘allows for change in an overall process that emphasises the importance of continuity and stability.’¹⁶³ The common law is a steady or stable process of growth or development, rather than being an entirely static or wholly revolutionary process.¹⁶⁴

The developmental and open nature of the common law makes it a particularly suitable environment for the protection of investment dignity. Investment dignity, like the common law, also has an ‘unfinishable’ quality. It is not possible to expect the completion of a mobile concept of dignity based on creativity, difference and experimentation. Unlike teleological dignity, which is premised on the idea of human beings realising an ideal end through the perfection of their nature, investment dignity, as was discussed in the previous chapter, is based on a dynamic conception of human personality in which an understanding of our capacity to affect and be affected is not fully determined in advance of our experimental encounters with others.¹⁶⁵ In this way, there is no completion of human dignity, as there is no final idealised mode of being. Investment dignity necessarily requires an environment in which the concept can be developed, supplemented, co-determined, corrected and enriched through the experience of relating it to ‘otherness’ and difference. The open and developmental nature of the common law means that the law can always become more inclusive and receptive to the creativity of life in ways that respond to the continuous production of difference in time, as well as the emergence of new problems or challenges.¹⁶⁶

Providing a suitable environment for the protection of investment dignity, does not, of course, guarantee the protection or development of that concept. Indeed, the adaptability of the common law may mean that it is taken by judges in a direction that, for instance, incidentally advances a rank-based dignity approach by prohibiting acts that are perceived as incompatible with the high status of humanity.¹⁶⁷ In this regard, there are always dangers inherent in the creative and developmental aspects

¹⁶³ Hutchinson (n 41) 1; “Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change.” Roscoe Pound, *Interpretations of Legal History* (CUP, 2013) 1.

¹⁶⁴ Ibid.

¹⁶⁵ Claire Colebrook, ‘Experimentation’ in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2010) 94.

¹⁶⁶ See Alexandre Lefebvre, *Human Rights as a Way of Life: On Bergson’s Political Philosophy* (Stanford University Press, 2013) Ch 6.

¹⁶⁷ See p49.

of the common law and any developments must be undertaken with care, patience and prudence.¹⁶⁸

Indeed, from the perspective of investment dignity, some directions, which might be invented, must be off-limits precisely because they destroy or restrict the possibility for creativity, difference and responsiveness to otherness.¹⁶⁹ Nevertheless, the common law provides an environment that is necessary for the concept of investment dignity to flourish. Moreover, the common law is, perhaps, better suited to a concept like investment dignity compared to, for instance, teleological dignity, which, as noted above, suggests that the concept is being taken to ultimate completion and perfection, which the common law can and should never reach. Deontological dignity depends on a decision being deduced from a general principle and applied to a case, where, in fact, the common law allows for concepts to be moulded and shaped in the event of application. In contrast, investment dignity, as an intellectually mobile concept, provides direction for the development of the common law, but does not obstruct, in fact explains, the need for further adaptation, openness and responsiveness. Investment dignity is a conception of dignity that is ideally suited to the creativity, responsiveness and attentiveness of the common law.

4.3. Change: Implications for the Common Law

The adaptability of the common law means that there is scope for change that would, potentially, advance some aspects of investment dignity that may not be sufficiently protected by the common law or may sit uneasily alongside competing values or ideologies. In this regard, investment dignity may well have important transformative implications for longstanding and established values.¹⁷⁰ Investment dignity, for instance, may be used to nurture developing strands in the common law that challenge its focus on independence and personal responsibility to the detriment of interdependence and collective responsibility.

Investment dignity strongly emphasises an interdependent and interconnected perspective on humanity through the idea of *mutual becoming*. This is especially

¹⁶⁸ See p223.

¹⁶⁹ Fuller (n 152).

¹⁷⁰ Matthias Mahlmann, 'The good sense of dignity - six antidotes to dignity fatigue in ethics and law' in McCrudden (n 18) 600..

important in terms of entailing a heightened responsibility, on the spectrum dependency, for the needs of the particularly vulnerable persons and in ensuring that creative potentiality is realised through the investment of the community. This contrasts with a strong and historical undercurrent of the common law that prioritises personal responsibility and independence in terms of the obligations that we owe to one another.¹⁷¹ Thus, for instance, in the field of negligence, which is the area of law primarily concerned with notions of care and responsibility towards others, the courts have tended to avoid the imposition of positive obligations on public authorities to protect individuals from harm or to confer a benefit.¹⁷² This is partly based on the principles of corrective justice and individual responsibility.¹⁷³ These principles require that loss be borne by an 'autonomous independent self' unless it can be shifted to someone who has actively caused that loss.¹⁷⁴ This conceptualises the subject of law in an atomistic way.¹⁷⁵

It is helpful to turn to an example of extreme abuse to demonstrate the manner in which the common law may be underpinned by values that potentially differ from interdependence and holism.¹⁷⁶ The case that has been chosen is the Court of Appeal decision in *X and Y v Hounslow London Borough Council*,¹⁷⁷ due to the fact that it is demonstrative of a number of key themes in the case law on duty of care, especially a narrow conception of responsibility, but also because it concerns two highly vulnerable individuals who were subject to treatment that was undoubtedly incompatible with human dignity. The case concerned a married couple (X and Y) who had significant learning difficulties and lived with their children in a council owned flat. During their residency they befriended some youths who began to use their flat for illicit activities. On one occasion, X was seriously assaulted by one of the youths. The social services department was aware of the exploitation of the couple, as well as the residency.

¹⁷¹ See Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (Pluto 1999); Joanne Conaghan, 'Tort Law and Feminist Critique', in M. D. A. Freeman, *Current Legal Problems* (OUP 2003) 175.

¹⁷² *Stovin v Wise* [1996] AC 923, *Smith v Chief Constable of Sussex* [2008] UKHL 50.

¹⁷³ Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th Edn, CUP 2013) 417.

¹⁷⁴ Carl Stychin, 'The vulnerable subject of negligence law' (2012) 8 *International Journal of Law in Context* 337, 343; Jenny Steele, 'Duty of Care and Ethic of Care: Irreconcilable Difference' in Janice Richardson and Erika Rackley, *Feminist Perspectives on Tort Law* (2012 Routledge) 23.

¹⁷⁵ Jane Stapleton, 'Duty of Care Factors' (Ibid).

¹⁷⁶ See p 90.

¹⁷⁷ [2009] EWCA Civ 286.

Following the receipt of complaints from other residents concerning the activities at the flat, a meeting to discuss the situation was arranged for a future date. In the interim, the claimants were imprisoned by the youths and became victims of extreme sexual, psychological and physical abuse.¹⁷⁸ The claimants argued that the local authority had owed a duty of care to re-house them before the incident in light of the foreseeable and imminent physical danger. The Court of Appeal dismissed the claim on the basis that no duty of care was owed to the claimants. The crux of the reasoning was that, although the local authority was exercising statutory functions, there had been no assumption of responsibility for the particular claimants' welfare and that was no general duty to prevent third parties from causing damage.¹⁷⁹

An investment dignity-based approach would entail a different approach to determining whether a duty was owed in such a case. Most notably, it could provide a means by which to establish legal responsibility beyond the narrow confines of an assumption of responsibility. It was argued in the previous chapter that human personality and its power of acting develop dynamically through interactions with others.¹⁸⁰ On this account, there is no individual who is prior to, or can be extracted from, the complex network of relationships within which they develop.¹⁸¹ In contrast, the existing law is effectively concerned with a 'boundary-setting role'¹⁸² that treats the autonomous subject as 'prior to the relationships on which it is dependent.'¹⁸³ A stronger emphasis on interrelationality would shift the focus of the common law away from questions about whether a relationship has been created, to a consideration of how to structure relationships, from which person can never be extracted, in a manner that produce, nurture, and protect.

Directly related to this interconnectedness in the concept of investment dignity is that

¹⁷⁸ Ibid 5.

¹⁷⁹ For a discussion of this case, see R Mullender, 'Negligence Law, the Welfare State, and "Our Moral Life"' (2009) 25 *Journal of Professional Negligence* 187; R Mullender, 'Negligence, neighbourliness, and the welfare state' (2009) 68 *Cambridge Law Journal* 507; Justin Bates, 'A landlord's liability for the acts of its tenants: back to where we started - X v Hounslow LBC revisited' (2009) 12 *Journal of Housing Law* 86.

¹⁸⁰ See p 89.

¹⁸¹ Steele (n 174) 29.

¹⁸² Conaghan (n 174) 203.

¹⁸³ Stychin (n 174) 343.

of vulnerability.¹⁸⁴ Investment dignity would lead to less emphasis on ideas of self-reliance and personal responsibility and greater emphasis on issues of power, exclusion and insecurity in relations of interdependency.¹⁸⁵ Thus, in the case of *X and Y*, investment dignity, would require an evaluation of the relative power and control of the parties over the situation to determine responsibility. Within a relationship of power, a claimant may, in part, be marked by passivity and subordination because they may entirely lack the ability to take steps to protect themselves from harm. They may be dependent on a defendant who possesses significant control over the situation. Thus, in *X and Y*, it was evident that the claimants had distinctive needs and lacked the ability to take steps to safeguard themselves.¹⁸⁶ In contrast, the local authority could have taken effective measures to respect and protect human dignity, as it was aware of the exploitation, as well as the escalating threats, and it was exclusively within its power to safeguard the family.

This aspect of vulnerability may, it is suggested, also be used to set limits on the positive obligations of the state. Vulnerability can 'provide justifiable limitation on the duty of care' and the obligations of public authorities.¹⁸⁷ In order for a duty to arise, there must be a 'distinct capacity to control [that] particularizes the defendant, while a distinct vulnerability to harm particularizes the plaintiff...[as] each position constitutes and individualizes the other.'¹⁸⁸ Where a public authority, for instance, lacks an ability to control the situation, or the claimant is not any more vulnerable than the general population to harm, there may not be an individualised duty that is owed to the particular other.¹⁸⁹

This is not to say that the common law is fixed in its opposition to aspects of interdependence and positive obligations to protect particularly vulnerable people. It is characteristic of the common law, returning to its spirit, that it possesses dormant strands, cultivates new branches and extends alternative pathways.¹⁹⁰ Thus, for

¹⁸⁴ See p 90.

¹⁸⁵ Ibid.

¹⁸⁶ *X v Hounslow* (n 177) 79.

¹⁸⁷ *Stychin* (n 174) 345.

¹⁸⁸ Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (McGill-Queen's Press 2006) 141.

¹⁸⁹ *Hill v Chief Constable of South Yorkshire Police* [1987] UKHL 12.

¹⁹⁰ "[T]he growth and development of the common law –[is]...the budding of new ideas, the branching out from old ideas, the decay of some rules, the varied ramifications of different rules, and so on."

instance, cases have begun to emerge in negligence where some judges have reinterpreted past decisions and tentatively relied upon 'vulnerability' as a concept in establishing a duty of care.¹⁹¹ Investment dignity might therefore be used to take these aspects of the common law further in protecting a more interdependent and interconnected view of humanity.

4.4. Conclusion

In conclusion, the common law not only provides a possible conduit for the protection of a concept of dignity, but provides a fertile environment in which to develop the protection of a concept of human dignity based on creative potentiality, unfolding differences and shifting problems in time. It is suggested that dignity need not be treated as a concept that is mainly or predominantly suited to a codified constitutional context. Indeed, an emphasis on the somewhat understated qualities of the common law (dynamic, inductive, unfinishable and adaptive) reveals that in certain respects it offers the possibility of being more in tune with the richness and complexity of human experience, even if it sometimes falls short of that potential.

5. Overall Conclusion

This chapter has sought to rely on the concept of investment dignity to explore the developing jurisprudence on human dignity in the common law. In light of the lack of systematic conceptualisation of dignity in the case law, and the fact that few cases provide an explanation as to the sense in which dignity is being used, investment dignity has been deployed to highlight, identify and extract some of the key developments in the common law, as well as to further the potential of human dignity, as a common law concept. It has been argued that investment dignity can make clearer the connections between the concepts of dignity, experimentation, vulnerability and emotion that are at the early stages of development in the common law, and provide insights into the theoretical justification for the connection between these concepts.

The common law has provided a basis in which to anchor the theoretical concept of investment dignity within the practical confines of law, connecting to existing legal pathways or processes that might be extended, fostered or developed by the use of

Hutchinson (n 41) 287. See also Alexandre Lefebvre, *The Image of Law: Deleuze, Begson, Spinoza* (Stanford University Press, 2008) 101; Alexandre Lefebvre, 'The Time of Law' in Claire Colebrook (eds), *Deleuze and Law: Forensic Futures* (Palgrave, 2009) 42.

¹⁹¹ *Phelps v Hillingdon* [2001] 2 AC 619, 665.

investment dignity to provide even greater protection of particularly vulnerable people. The multifaceted nature of the concept of investment dignity broadens our legal imagination in terms of our understanding of human beings, extending beyond a limited conception of autonomy, to encompass and connect the emotional, interdependent, social aspects of a person, which, it was argued, is a trend that can be extracted from the case law. In this respect, investment dignity has been used to challenge the conception of the legal subject as bounded, independent, and isolated, which underpins some of the law, exploring instead the possibility of opening new paths and extending others towards a more inclusive, holistic, creative, interconnected and dynamic conception of the human subject.

Connecting these aspects of investment dignity to the common law has not only shown the relevance of investment dignity, but has allowed for a fuller picture to emerge concerning its content. The concepts of vulnerability and experimentation have, for instance, been given fuller content by drawing on the experience of elderly people faced with institutionalisation, which has been captured in the case law. The process of refining investment dignity has further led to the introduction of new concepts, such as time, memory and environment, which have been constructively connected to some of the existing components of investment dignity. The refined definition of human dignity might therefore recognise that in order to promote the power of acting and rest for mind and body, in which the personality of a person is always in a state of becoming, it is necessary to invest in conditions that enable people to control the time of their deterioration. This process of refinement helps to highlight the intellectually mobile nature of the concept of investment dignity. It is a concept that is most likely to endure in the common law, as it is capable of variation in relation to the singularity of each new case and the open nature of time, and can only thrive through reliance on the supple, inductive and dynamic features of that system of law.

The concept of investment dignity does not, of course, connect with all cases that make use of the concept of dignity. Further exploration would very likely reveal alternative conceptions. But investment dignity provides a basis by which to challenge those aspects of the law that might advantage the autonomous, independent, rational, able-bodied self as the ideal subject, which, as a consequence, disadvantages the 'other' and obscures the lived experience of real

people's lives.¹⁹² In this regard, there are many areas of the common law that might be taken in new directions. The great strength of the common law is that it can allow space for such change to occur through a process that is creative, responsive and attentive, at the same time as being stable, prudent and careful. Far from being unsuited to human dignity, which is concept often addressed in a codified constitutional context, this chapter has argued that the common law tradition is particularly suited to the protection of an unfinishable concept of human dignity based on creative potentiality, difference and experimentation, which is at the core of the investment concept.

¹⁹² See p63.

Chapter Four: Potential Protection under the Human Rights Act 1998

1. Introduction

This chapter considers how investment dignity can be deployed to highlight and explore central developments in the use of human dignity under the Human Rights Act, which has been a key driving force in the exponential growth of dignity discourse in the United Kingdom. This is despite the fact that the HRA, like the ECHR upon which it is based, provides no direct textual anchor for human dignity and, in this way, differs considerably from many modern human rights instruments.¹ However, the concept of human dignity has emerged in case law as an important value that informs the entire system of rights protection under the HRA. It has, therefore, been recognised as the ‘essence’ of the rights and the ‘core’² value that is ‘immanent’³ within the rights and ‘permeates’ the Act.⁴

In much the same way as the previous chapter, this chapter starts by considering the current role of human dignity within the system of fundamental rights protection established under the HRA. It focuses specifically on the foundational and bridging function of the concept of human dignity, which, it is argued, supports the indivisibility of human rights and creates a link between the predominantly civil and political character of rights found in the HRA and economic and social rights that inform other human rights instruments. In addition, it creates and governs the relations between rights, such as Art 3 and Art 8.

The second section discusses the potential of investment dignity to highlight and explore the developments in the judicial use of human dignity under the HRA. It focuses on Articles 3 Sch 1, Part 2, HRA (prohibition of torture, inhuman or degrading treatment) and Article 8 Sch 1, Part 2 HRA (right to private and family life). Although many of (if not all) the rights can be conceptually connected to human dignity, these are rights that are often considered to be most closely related to

¹ Art 1, The Charter of the Fundamental Rights of the European Union (2000/C 364/01).

² *R (On the Application of A, B, X and Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (East Sussex case) [86]; *R (On the Application of Burke) v General Medical Council* [2004] EWHC 1879 [57].

³ *Ibid* 86; *R. (on the application of SC) v Salford City Council* [2007] EWHC 3276 [33].

⁴ *R (on the application of Razgar) v Secretary of State for the Home Department (No.2)* [2004] 2 AC 368, 373.

human dignity.⁵ It is notable that the most concerted effort to explore the potential meaning of human dignity as a legal value under the HRA has been made in relation to these Articles. This effort has not led to a 'general pronouncement as to the meaning of human dignity' but it has resulted in the development of certain connections between the concepts of dignity, vulnerability, emotion, dependence, development of personality, social and recreational activity, and interpersonal relationships. The chapter highlights how investment dignity can be used to develop clearly the theoretical connections and links between those concepts, providing, in particular, a valuable insight into how such dimensions of humanity may be interconnected as part of a holistic concept of the person, rather than simply treating such dimensions as separable aspects of humanity. This section further explores how the investment concept may be used to help realise the potential of human dignity under the HRA to establish positive obligations that promote and protect the interconnected functioning (social, emotional, physical) of persons who may otherwise be subject to particularly circumscribed and isolated conditions. This is an important aspect of the investment concept, and a potential limitation of the common law.⁶ Investment is also close conceptually to positive obligations which have been recognised as requiring the fulfilment and promotion of rights through 'investment, monetary and otherwise'.⁷

Testing investment dignity in the context of positive obligations will help to refine the concept in relation to the extent of the obligation of the community to promote human potentiality via investment, as well as delineate clearer conceptual boundaries by addressing the practical problems of resource allocation and collective action. In respect of Article 3, the discussion concentrates on the extent to which investment dignity connects with the judicial use of human dignity to protect basic needs, which provide existential conditions of life necessary to the realisation of any human potentiality and such functioning as constitutes the bare minimum expression of the human self.⁸

⁵ *R (Haidar Ali Hussein) v The Secretary of State for Defence* [2014] EWCA Civ 1087 [44]-[45]. *R. (on the application of Hall) v University College London Hospitals NHS Foundation Trust* [2013] EWHC 198 [33]; *R. (on the application of SC) v Salford City Council* [2007] EWHC 3276 [33]; *Hegarty v Enforcement of Judgments Office* [2013] NICA 56 [8].

⁶ See p146.

⁷ Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, *International Human Rights Law* (OUP, 2013) 272.

⁸ See p 132.

The discussion of Art 8 is in two parts. The first part addresses the potential of Art 8, considering specifically cases where the human dignity argument is deployed successfully to protect the disabled and is of material benefit to the victim, which is mainly in the context of the decisions of the High Court.⁹ Investment dignity is deployed in order to help explain the connections that are made between dignity and cognate concepts, including a multifaceted concept of humanity and development of the personality of vulnerable people who are subject to the most circumscribed and isolated conditions. These connections have been made by judges, but not always explained, or fully explored in terms of the potential implications.

The second part addresses the current protection of human dignity for the vulnerable, following, particularly, the rejection of the dignity argument by the majority of the Supreme Court in the case of *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*.¹⁰ The final section of the chapter summarizes certain trends in the judicial use of human dignity under the HRA 1998. Supported by the work of Dupré, Carozza, Riley, Hale and Gearty, it argues that human dignity is an important value that performs a distinctive role in the determination of rights. It has, it is argued, an open dimension that promotes inclusivity of the 'other'.

2. Protection of Human Dignity under the Human Rights Act 1998

The concept of dignity under the HRA despite its textual absence, predominantly operates as a 'foundational value' that underpins the system of rights protection and acts as a guiding principle that is used by Courts to inform the content of human rights, as well as the relationship between those rights. Lord Dyson, for instance, has held that 'dignity is the foundation of all the freedoms protected by the [European] Convention'¹¹ and Lady Hale has argued that all human rights are 'founded on the inherent dignity of all human beings.'¹² This foundational aspect performs an important role in terms of providing reasons for the protection of human rights, as well as, potentially, grounding and ordering other values that may be relevant to

⁹ East Sussex Case (n 2); Burke (n 2); *R (on the application of Bernard) v Enfield LBC* [2002] EWHC 2282.

¹⁰ [2011] UKSC 33. See also *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406.

¹¹ *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 [39].

¹² *Cheshire West and Chester Council v P* [2014] UKSC 19 [45].

human rights adjudication.¹³ There is clear evidence emerging to suggest that dignity can and does perform this role under the HRA. Thus, for instance, in the case of *Ghaidan*, Baroness Hale held that the value of democracy was ‘founded’ on the principle that ‘each individual has equal value’ and that treating individuals as having less value ‘violated his or her dignity as a human being’.¹⁴ According to Hale, democracy ‘values everyone equally even if the majority does not’ or even if the group is ‘unpopular’.¹⁵ This treats human dignity as a foundational feature of democracy, providing the conditions of its legitimacy, as well as challenges a purely procedural model, re-structuring the relationship between the majority and minority.¹⁶ This foundational role has been repeated in cases concerning the rule of law and equality.¹⁷

As a result of being the foundational value of human rights, dignity can also act as a bridging device that ‘connects different rights, particularly minimal prohibitive claims (to life, contra torture) to more substantial rights concerning personality (to family life, to health).’¹⁸ This entails, as Stephen Riley argues, a potentially important function for dignity in terms of justifying the indivisibility of human rights, as well as creating connections between civil and political rights on the one hand and economic and social rights on the other. It is far from surprising, therefore, that in the cases discussed below, where the dignity argument is accepted in the majority reasoning of the domestic courts, it has had social and economic implications.

The natural corollary of treating human dignity as the foundation of human rights, which justifies and provides reasons for their existence, is its role as a guiding

¹³ Mary Neal, ‘Respect for human dignity as substantive basic norm’ (2014) 10 *International Journal of Law in Context* 26, 37-39.

¹⁴ *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [132].

¹⁵ *Ibid*

¹⁶ See Catherine Dupré, ‘Dignity, Democracy and Civilisation’ (2012) 33 *Liverpool Law Review* 263, 273; Erin Daly, *Dignity Rights* (Pennsylvania Press, 2013) 132.

¹⁷ *Ghaidan* (n 14) 9; *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 [268], [270]; *R. (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 [49]; *R (On the Application of Gurung) v Ministry of Defence* [2002] EWHC 2463 [36]; *Secretary of State for Work and Pensions (Appellant) v. M* [2006] UKHL 11 [101]. See also Jeffrey Jowell, ‘Equality as a Constitutional Principle’ (1994) 7 *CLP* 1, 7; Gay Moon and Robin Allen, ‘Dignity discourse in discrimination law: a better route to equality?’ (2006) *EHRLR* 610, 622.

¹⁸ Stephen Riley, ‘Human Dignity: Comparative and Conceptual Debates’ (2010) 6 *International Journal of Law in Context* 117, 125.

concept that helps to shape the content of human rights.¹⁹ Human dignity in this regard is a 'heuristic notion' and 'problem-solving tool' that affects, amongst other things, the scope of rights.²⁰ Human dignity has, for instance, been used as a heuristic device to find an obligation on the state to move pre-operative transgender women from a male prison to a female prison²¹ and to effectively protect people from the practice of human trafficking.²² In respect of some rights, dignity has more than a background role and is more akin to a determinative legal test used to decide a case in a substantive way. Dignity has, for instance, become a central concept used to define the limits of the manifestation of beliefs that are protected by Art 9 Sch 1, Part 1.²³ Human dignity, in this regard, has a potentially important role to play setting the boundaries and limitations of rights.

Although dignity is a value that is generally relevant to the whole of the HRA and Convention, it seems to be treated as particularly relevant to informing the content of certain rights, most notably Art 3 (prohibition of torture, inhuman and degrading treatment) and Art 8 (right to private and family life).²⁴ Domestic courts appear to have established a special connection between these Articles and human dignity. Dignity has, for instance, been recognised as an integral component concept used to shape the scope of Article 3.²⁵ It has similarly been treated as 'immanent' and 'included' in Art 8.²⁶ The recognition that dignity is inherent in both rights has resulted in the UK Courts stating that the 'structure of the ECHR means that affronts to human dignity are addressed not only by Article 3 but also by Article 8.'²⁷ Dignity can possibly act as 'a bridge between Arts 3 and 8' through the way that it connects these rights and affects their relationship. Indeed, it has even been suggested that there is little that 'dignity as a right-in-itself [could] add to the combined jurisprudence

¹⁹ Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 694.

²⁰ Riley (n 18) 124.

²¹ *R (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220 [39]-[43].

²² *Hounga v Allen & Anor* [2014] UKSC 47.

²³ *Grainger plc v Nicholson* [2010] IRLR 4 [24]. Drawing on the decision in *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.

²⁴ See *Pretty v United Kingdom* [2002] ECHR 427 [65]. See Elizabeth Wicks, 'The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties' (2012) 14 Human Rights Law Review 199, Catherine Dupré, 'Human dignity and the withdrawal of medical treatment: missed opportunity?' (2006) EHRLR 678.

²⁵ *Pretty* (ibid) 52; David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002) 130; Ellie Palmer, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Oxford: Hart 2007) 69.

²⁶ See fn 4.

²⁷ *Haidar Ali Hussein* (n 5) [44]-[45].

of Articles 3 and 8' in which dignity is deployed as a legal value.²⁸ This is perhaps going too far, but it does capture something of the expansive and expanding scope of these Articles. This undoubtedly raises important questions about the distinctive scope of each Article and the degree of 'overlap' that exists in terms of their dignity content.

3. Investment Dignity and Positive Obligations

The extent to which human dignity has jointly shaped the content and limits of Art 3 and Art 8 is the main focus of this section. Specifically, it focuses on the extent to which human dignity has been used to guide the development of positive obligations to access care and welfare services for particularly vulnerable individuals. Positive obligations are defined broadly as the duty on the state to take action to secure rights and to not merely refrain from taking action.²⁹ As will be seen, Art 3 and Art 8, although primarily phrased in negative terms, have both been recognised as capable of 'imposing positive protective measures requiring financial expenditure in welfare needs contexts'.³⁰ It is primarily through the dynamic interpretation of these Articles that the Courts have been able to indirectly adjudicate on the legal implications of the health and social care needs of particularly vulnerable people, supporting, potentially, the indivisibility of human rights.³¹

The purpose of addressing this specific category of positive obligations is threefold. First, it potentially covers the needs of acutely vulnerable individuals, a major priority for investment dignity, such as the disabled or elderly, who may be unable to benefit effectively from first generation rights without access to certain social or economic conditions and who do not necessarily correspond to the ideal sometimes at the centre of law.³² Second, the doctrine of positive obligations to provide social facilities and welfare benefits is at the very 'outer boundaries' of Art 3 and Art 8.³³ Considering, therefore, the role that human dignity plays in testing these boundaries might provide some useful insight in to the substantive difference it can make to transforming traditional human rights paradigms. Finally, and crucially, positive

²⁸ Neal (n 13) 33.

²⁹ Alistair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 2.

³⁰ Palmer (n 24) 22.

³¹ Eva Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights' in Dephne Barak Erez et al (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2011) 138.

³² See p 59.

³³ Mowbray (n 29) 187.

obligations are, it is argued, closely related to the idea of 'investment' as a central aspect of the concept of human dignity that has been proposed.³⁴ Positive obligations entail a collective duty on the state to 'take protective action to safeguard' the rights and values encompassed within the Convention.³⁵ According to Erin Daly, such a system of positive obligations recognises that 'while dignity is inherent in each member of the human family, it must be nurtured and protected by the others, including the state.'³⁶

Positive obligations, in this regard, embrace the idea that human capabilities are vulnerable. They need to be protected, developed and unfolded.³⁷ Positive obligations correspond to the way investment dignity captures the meaning of 'respect' as a core component concept of human dignity and reflects the structure of the intrinsic 'value' of human life as potentiality. In this regard, creative potentiality, as a value, requires 'protection' for what has been actualised, and 'promotion' of what may be unrealised.³⁸ This includes positive action through collective investment in to conditions that enable individuals to unfold creatively their human personality and develop their capacities, with priority going to the most vulnerable that need support to develop their personality.

3.1. Article 3: Investment into a Minimum Core

3.1.1. Scope for Protecting and Promoting Dignity

Human dignity is the 'first principle' of Art 3 and 'most commonly arises' in case law on that provision.³⁹ This is hardly surprising in light of the way the Article prohibits conditions that 'dehumanise' and 'degrade' the victim.⁴⁰ In this regard, the Article appears to have been 'specifically designed' to protect human dignity, although it does not directly deploy the language of that concept.⁴¹ The scope for protection depends, fundamentally, on the construction of the key terms used in Art 3 and the extent to which human dignity can be used to shape these terms. In this respect, Art

³⁴ See p 96.

³⁵ K Starmer, 'Positive Obligations under the Convention' in Jeffrey Jowell et al (eds), *Understanding Human Rights Principles* (Hart 2001) 203.

³⁶ Daly (n 16) 114.

³⁷ Martha Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (US Independent Agencies and Commissions 2008) 359; Martha Nussbaum, *Upheavals of Thought* (CUP 2001) 272.

³⁸ p96.

³⁹ *R (on the application of Razgar) v Secretary of State for the Home Department* (No.2) [2004] 2 A.C. 368, 373.

⁴⁰ Charles Foster, *Human Dignity in Bioethics and Law* (Hart, 2011) 6-7.

⁴¹ *Hall* (n 5) 25.

3 has a number of separate component concepts, each of which has distinct features.⁴²

Some of these components of Art 3 are more relevant to a consideration of the role human dignity plays in shaping the content of positive obligations to protect the welfare and care needs of particularly vulnerable people than others. The concept of torture, for instance, would seemingly have less relevance to a failure to provide services in light of the need for the severe suffering to be done for a purpose and, similarly, 'punishment' requires the infliction of some kind of consequential suffering, to be distinguished from a failure to ameliorate suffering.⁴³ In contrast, inhuman and degrading treatment could, potentially, cover a wide body of measures that include a failure to provide welfare provision that leaves a person in dire need and in a state of destitution.

Undoubtedly the most detailed judicial summary of the potential scope of the protection of human dignity under the requirements of 'inhuman and degrading treatment' and the most comprehensive survey of the case law in relation to positive obligations to provide for the care needs of particularly vulnerable people, has been elaborated by Munby J in *East Sussex*⁴⁴ and *Burke*.⁴⁵ In relation to 'inhuman and degrading treatment', Munby J begins, in each case, by outlining the basic threshold requirement of a minimum level of severity in order for treatment to fall within the scope of the Article and that such a minimum is relative.⁴⁶ Suggesting, therefore, that 'not every type of indignity amounts to degrading or inhuman treatment' but only those types which are particularly serious.⁴⁷ The existence of a high threshold of indignity will often depend on a combination of factors, including personal factors, such as the existence of a health condition and contextual factors, such as improving social standards.⁴⁸ In regards to context, although an intention to cause degrading treatment will often be an important aggravating factor relevant to a finding of a violation, it is not, as Munby J recognizes, a prerequisite for such a finding.

⁴² Each concept is a complex multiplicity of components, see p 21.

⁴³ *Greek case* [ECommHR, 1969] 186; *Ireland v UK* [1978] ECHR 1 [167].

⁴⁴ *Sussex Case* (n 2).

⁴⁵ *Burke* (n 2).

⁴⁶ *Sussex Case* (n 2) 87. The minimum level of severity was first established in *Ireland* (n 2) 167.

⁴⁷ *Palmer* (n 24) 69. See also *Feldman* -

⁴⁸ *Selmouni v France* [1999] ECHR 66, para 101.

Importantly, then, human dignity can be violated by 'thoughtless, uncaring and uncharitable actions' which can be just as 'damaging and distressing to the victim as the vicious, wilful or malicious.'⁴⁹ This puts significant emphasis on the subjective experiences of the victim.⁵⁰

A lack of seeming awareness of the indignity of a certain form of treatment, or the inability to complain about the effects of such treatment, is not however a barrier to a finding the treatment 'degrading', as this would exclude the protection of a significant group of particularly vulnerable people.⁵¹ This potentially brings in an objective element to the protection of human dignity, in which a violation may be found on the basis of, for instance, the perspective of a 'right-thinking bystander' who views the treatment as 'humiliating or debasing to the victim, showing a lack of respect for or diminishing human dignity.'⁵² In addition to negative obligations, Art 3 has been recognised as imposing a positive obligation to ensure that individuals are not subjected to ill-treatment administered by private individuals.⁵³ Significantly, however, there is a heightened degree of protection for particularly vulnerable people who are likely to be subject to abuse.⁵⁴ A state is also under an obligation to take positive measures to provide suitable physical conditions or medical care where 'indignities are likely to be exacerbated by the deprivation of liberty.'⁵⁵ This includes a positive obligation on the state to create differential conditions of detention to ameliorate differences in people's abilities or physical and mental needs.⁵⁶

Outside of the context of detention, there is a lack of clarity about the extent of the positive obligations of the state to provide for the health or welfare of vulnerable people.⁵⁷ *Pretty* suggests that liability would arise only where the state assumes a responsibility and then takes a course of conduct that results in inhuman or

⁴⁹ *Burke* (n 2) 134; *East Sussex case* (n 2) 89.

⁵⁰ *Ellie Palmer* (n 24) 70.

⁵¹ *M.S. v United Kingdom* (2012) 55 EHRR 23,

⁵² *Burke* (n 2) 149.

⁵³ *Z v United Kingdom* (2002) 34 EHRR 97

⁵⁴ *Ibid* para 73.

⁵⁵ *Ellie Palmer* (n 24) 70.

⁵⁷ *Ellie Palmer*, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 4 *Erasmus Law Review* 397, 412; *Mowbray* (n 29) 48.

⁵⁷ *Ellie Palmer*, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 4 *Erasmus Law Review* 397, 412; *Mowbray* (n 29) 48.

degrading treatment, such as, for instance, deporting an Aids sufferer who is receiving treatment in the UK to a jurisdiction with totally inadequate health care.⁵⁸ However, as Munby J notes, some cases have suggested a wider obligation.⁵⁹ It has thus been held, for instance, that the lack of appropriate medical treatment⁶⁰ or 'wholly insufficient amount of pension and social assistance may, in principle, may raise an issue under Art 3.'⁶¹ A wide reading of Art 3 might therefore suggest that there is an obligation to positively invest in to the protection of the human dignity of the most vulnerable. In contrast, a narrow reading may suggest that an obligation arises only when the state has already made some kind of investment to maintain dignity and then acts to retract that investment, or where the state has subjected a person to conditions, such as detention, in which a failure to invest in dignity is likely to make suffering reach a minimum level of severity.

3.1.2. Existential Conditions of Investment Dignity

The concept of dignity, as was argued in chapter two, requires the positive investment of the community to provide some basic entitlements that are necessary to the realisation of any human potentiality and to basic human functioning.⁶² These are the existential conditions of investment dignity and are connected to the 'minimum core' or an 'irreducible obligation' to respect human dignity.⁶³ The absolute nature of Art 3, and the increasing recognition by the ECtHR that certain living conditions may cause suffering that meets the minimum threshold of severity, indicates that Art 3 could be developed to encompass a minimum core of respect for human dignity.⁶⁴ Courts in England and Wales have been more explicit and expressly recognised that destitution may, in certain circumstances, constitute inhuman or degrading treatment by diminishing human dignity. The leading case in this regard is the House of Lords decision in *ex parte Limbuela*.⁶⁵ This concerned a ban on the provision of social assistance to asylum seekers who were deemed not to have applied for refugee status as soon as reasonably practicable.⁶⁶ In short, a violation of Art.3 ECHR was found on the basis that the entire package of restriction

⁵⁸ *Pretty* (n 25) 52.

⁵⁹ *East Sussex case* (n 2) 100; *Burke* (n 2) 80.

⁶⁰ *Keenan v United Kingdom* (2001) 33 EHRR 913 [110].

⁶¹ *Larioshina v Russia* [2002] ECHR 56869/00 [3].

⁶² See p 111.

⁶³ See p137.

⁶⁴ *Palmer* (n 24) 69; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008) 68, 236-237.

⁶⁵ *R (On the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66.

⁶⁶ *Ibid* para 5.

and deprivations surrounding the victim was sufficiently severe to violate human dignity and, as such, could be qualified as inhuman and degrading treatment.⁶⁷

The decision in *Limbuela* appears to provide some degree of protection of a minimum guarantee of social security in ensuring that the state does not impose conditions on individuals that deny access to basic means of subsistence. Human dignity is deployed in the case to address the needs of a group who were subject to exclusion from the realisation of basic needs on the possible grounds that they were considered 'unworthy or unpopular.'⁶⁸ Dignity was used to prevent exclusion vulnerability by ensuring that a certain group of people, who may have already fled abuse, are not then subject to conditions that might further perpetuate their suffering and, in addition, treats them as less worthy of respect. These are a group of people who may be unable to fully comprehend the processes or procedures of making an asylum application, and are very likely to lack other means of social support.⁶⁹ In addition, in much the same way as the common law doctrine of 'common humanity', it recognises that humans are vulnerable beings who can only for a very 'short and foreseeably finite period' endure destitution.⁷⁰

Moreover, and crucially, dignity was used to unlock an assessment of destitution that progressed beyond the limited assessment of its physical impact, as an exclusive factor in determining the minimum level of severity. For instance, Lord Hope after reiterating the importance of human dignity to the second part of the *Pretty* test, which encompasses dignity, emphasised that 'humiliation and sense of despair' was a factor to be assessed in meeting the threshold of severity.⁷¹ Similarly, Lord Scott argued that a sense of 'growing despair and loss of self-respect' were part of the overall assessment.⁷² Richard Edwards has suggested that these references reinforce the potential for degrading treatment to be applicable to the 'bare fact of

⁶⁷ Ibid para 92-95.

⁶⁸ Ibid para 76.

⁶⁹ R Edwards and P Billings, 'R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department - a case of "mountainish inhumanity"?' [2006] *Journal of Social Security Law* 169, 177.

⁷⁰ Ibid para 9.

⁷¹ Ibid para 59.

⁷² Ibid para 71

sleeping rough' as it difficult to detach such a fact from the invariable (and severe) humiliation and despair that results from destitution.⁷³

The importance of dignity to a holistic assessment of destitution is potentially supported by the strong role granted to human dignity in the earlier High Court decisions of *Q* and *T*, which addressed similar issues. These cases emphasised that human dignity required a consideration of the impact of destitution on the emotional dimension of personality. In *T*, for instance, Kay J recognised that the decision in *Pretty* could be used to 'illustrate that the consequences of the treatment [destitution] are not limited to physical injury or illness' and could be used to 'emphasise the importance, in the context of Article 3, of respect for human dignity.'⁷⁴ In these cases, as Richard Edwards argues, 'separate weight' was attached, as a consequence of focus on human dignity, to the 'humiliation and sense of despair that results from exposure to the elements, associated risks to health and safety and lack of access to sanitary facilities.'⁷⁵ The distinctive contribution of dignity in *Q* and *T*, and to an extent *Limbuela*, is to emphasise the importance of material stability to the well-being of the victim as an aspect of Art 3. The consequence of such a dignity focus is that an obligation on the state to prevent destitution may occur earlier, rather than later. Rather than waiting to see whether a person would slip in to extreme hardship, it requires support at earlier stage before physical suffering becomes too extreme.⁷⁶ Moreover, it recognises the importance of the future to the unfolding of human personality, ensuring that the lives of people are not entirely absorbed with seeking subsistence in the short-term. Human dignity, as Catherine Dupré argues, ensures that 'people can keep looking forward to their life...in this sense dignity has a compelling aspirational dimension and is closely related to hope.'⁷⁷

Although these cases do recognise the importance of the minimal necessities of life to the protection and promotion of human dignity, it is possible to conceive them as adopting the narrow reading of degrading treatment, whereby a state is only liable for

⁷³ R Edwards and P Billings, 'R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department - a case of "mountainish inhumanity"?' [2006] *Journal of Social Security Law* 169, 177. See also Peter Billings and Richard Edwards, "Safeguarding Asylum Seekers Dignity: Clarifying the Interface Between Convention Rights and Asylum Law" (2004) 11 *JSSL* 83.

⁷⁴ *R (On the application of S, D and T v the Secretary of State for the Home Department)* [2003] EWHC 1941 [22].

⁷⁵ Richard Edwards and Peter Billings, 'Mountainish Inhumanity' (n 73).

⁷⁶ Richard Edwards and Peter Billings, 'Mountainish Inhumanity' (n 73) 180.

⁷⁷ Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263, 278.

a breach when it decides to expressly exclude persons from work and social security.⁷⁸ This potentially limits the usefulness of Art 3 for certain groups who may not be officially excluded from work or social provision, but are nevertheless dependent on social care.⁷⁹ It is not surprising that some of their Lordships refrained from setting down a more general principle, which would have gone beyond that which was necessary to resolve the particular dispute, and further intensified the strained relationship with the other branches of government in relation to a sensitive issue.⁸⁰ However, some of the *dicta* in *Limbuela* suggest that a wider obligation can be derived from Art 3. Lord Brown, for instance, suggested that the outcome of the case would not be different if a ban on work was lifted but someone who was unemployable was left destitute and that any analysis of the obligations under Art 3 should elide the unhelpful negative-positive dichotomy in favour of an assessment of state responsibility.⁸¹

Later cases support this wider reading of Art 3. It has thus been held in a case concerning a complaint about inadequate pensions provision that it 'cannot exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.'⁸² This entails an expansive understanding of 'treatment' which requires only the 'official indifference' of the state towards those who exist within a relationship of dependence who cannot take measures to provide for themselves and are thus wholly reliant on the support of others to avoid destitution. This obligation depends on the particular degree of vulnerability of the victim in a relational matrix of interdependence, and the attitude expressed by the state in response to that particular vulnerability.⁸³

3.1.3. Human Vulnerability and the Spectrum of Dependency

The high threshold of severity established under Article 3 and the generally prohibitive nature of that Article might suggest that it provides a limited basis for securing dignity for particularly vulnerable people that extends beyond a deprivation

⁷⁸ *Limbuela* (n 65) 67. See also [7] (Lord Bingham); [87] (Lord Hope).

⁷⁹ See Anna Lawson, 'Disability, degradation and dignity: the role of Article 3 of the European Convention on Human Rights' [2005] 56(4) NILQ 462, 482-483.

⁸⁰ See R Edwards and P Billings, 'Mountainish Inhumanity' (n 73) 171.

⁸¹ *Limbuela* (n 65) 92.

⁸² *Budina v. Russia* [2009] ECHR 45603/05 [3].

⁸³ See p 90.

of basic existential needs. However, in the field of detention, the ECtHR has been willing to find violations of Art 3 on the basis of inadequate conditions of care and environment.⁸⁴ Interestingly, in this field, the concepts of dignity and vulnerability have had a key role to play.⁸⁵ A noticeable trend in detention cases is the recognition that the removal of liberty renders prisoners subject to the control and authority of the state, which gives rise to vulnerability leading to clear concerns for human dignity.⁸⁶ The combination of these principles has led to recognition that a deliberate violation is not a necessary component of Art 3 and can, instead, be based on a failure in the coordination between public bodies, as well as a lack of respect and concern for the needs of a detainee expressed by the detention system as a whole.⁸⁷ Moreover, the concepts have been deployed to recognize that, whilst in detention, certain groups may be in a particular state of dependency and that inadequate conditions of detention can still damage the personality of a person suffering from a pre-existing illness, even if the State is not the cause of that illness, by affecting the way it evolves and manifests itself over time.⁸⁸

A good example of the domestic courts taking such an approach is the decision reached in *Napier v Scottish Ministers*, where a remand prisoner was successful in arguing that the conditions of detention was a violation of Art 3.⁸⁹ In this case, the cell of the detainee lacked ventilation, lighting and living space, being recognised by the court as 'disgustingly smelly, stuffy, gloomy and cramped.'⁹⁰ The sanitation facilities were also recognised as 'poor', which included the victim being exposed to 'slopping out'.⁹¹ The effects of these aspects of detention led to a severe outbreak of his eczema from which he had 'suffered throughout his life'.⁹² In what has been described as a 'thoughtful, carefully constructed judgment, interspersed with external

⁸⁴ *Peers v Greece* (2001) 33 EHRR 51; *Dybeku v. Albania* (2007) E.C.H.R 1109.

⁸⁵ Daniel Bedford, "'MS v United Kingdom" : Article 3 of the ECHR, Detention and Mental Health' (2013) 1 EHRLR 72.

⁸⁶ *M.S. v United Kingdom* (2012) 55 EHRR 23 [44].

⁸⁷ Bedford (n 85) 77.

⁸⁸ *Ibid* 80.

⁸⁹ [2005] 1 SC 229.

⁹⁰ *Ibid* 262.

⁹¹ "[H]ere are two principal components to slopping out: (1) the use of a bottle to urinate and a chamber pot to defecate in the cell, and (2) the practice of groups of prisoners emptying both within the arches up to four times a day." *Ibid* 239

⁹² *Ibid* 231.

benchmarks',⁹³ Lord Bonamy held that the combined effect of the features of detention were enough to 'diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation' in contravention of Art 3.⁹⁴ In particular, Lord Bonamy addressed the mental effect of the 'oppressive' living environment on the applicant, noting that the applicant suffered, as a reasonable consequence of the conditions, feelings of 'shame, disgust, loss of self-esteem, low mood, anxiety, tension and anger...[resulting in a stressful environment]'.⁹⁵

Although the consequences of these emotions were not necessarily the deliberate intention of the State to humiliate, Lord Bonamy was willing to recognize that 'many features of the regime seemed designed to stamp a mark of inferiority on the petitioner'⁹⁶ and, as such, was harmful to mental health because 'it impressed on the inmate that he was treated as someone who was not esteemed by the institution or by society at large - it denigrated the person as an individual'.⁹⁷ It was therefore sufficient that the conditions of detention as a whole failed to express sufficient respect for the victim in order for a violation to be found. Importantly, from the perspective of investment dignity, Lord Bonamy recognised the interaction between the psychological effects of detention and the episode of severe eczema. It was thus held that the resurgence of eczema was a consequence of the 'stress' experienced by the living conditions.⁹⁸ This adopts a strongly holistic approach to the mind-body by referring to expert evidence of psychologists to recognize the affect that mental distress can have on the manifestations of a physical illness. It also reflects the *becoming* of human personality, by recognizing that the detention worsened the eczema, thereby affecting the personality of the victim as it evolved and manifested over time.⁹⁹ The fact that a pre-existing mental condition is not the fault of the state does not mean that the state may not cause a further deterioration, or restrict prompt access to treatment that might alleviate the degree of suffering.¹⁰⁰

⁹³ Luke Clements, 'Disability, *dignity* and the *Cri de Coeur*' (n 1) 677. See also, Mary Rogan, 'Prisoners' rights and the separation of powers: comparing approaches in Ireland, Scotland and England and Wales' (2012) Public Law 415, 420.

⁹⁴ *Napier* (n 89) 273.

⁹⁵ *Ibid* 250.

⁹⁶ *Ibid* 272. See Rogan (n 93) 420.

⁹⁷ *Ibid* 249.

⁹⁹ See n87.

⁹⁹ See n87.

¹⁰⁰ *Napier* (n 89) 251.

A further contributing factor in the recognition of a violation of Art 3 was the limited opportunity to engage in structured physical and recreational activity.¹⁰¹ Inevitably, the activity of a person in detention will always be restrained for the purposes of reforming the character of the detainee and there will always be an element of hardship experienced in detention that is a consequence of the victims own actions.¹⁰² However, in light of the need to restrain such activity, the applicant becomes more acutely vulnerable, as multiple channels of human activity become cut-off and the person is severely restricted from making connections that develop their capacities.¹⁰³ There is a strong relationship of dependency between the prison authorities and the detainee who is reliant on the former to provide stimulation, including some social, physical and recreational activities, in which they are capable of developing and exercising their creative capacities.

The pressing nature of the obligation to respect the dignity of vulnerable detainees, as an aspect of the case law on Art 3, has been recognised by both Luke Clements and Ellie Palmer. Luke Clements, for instance, has argued that Art 3 –

[P]rovides a spectrum of safeguards that become more intense the greater the individual's vulnerability"; the greater the gravity of the potential consequences; and the greater the constraints he or she experiences. The protection is graduated...¹⁰⁴

This gradation is particularly clear, according to Clements, in the context of detention and the duty to take measures to provide effective protection for particularly vulnerable persons from the actions of other private individuals, such as victims of domestic or parental abuse.¹⁰⁵ Ellie Palmer has similarly argued that -

[Courts appear willing] to draw a direct correlation between the extent of an individual's disability and the positive obligations of states parties to provide services tailored to her health and welfare needs.¹⁰⁶

¹⁰¹ Ibid 271.

¹⁰² *Kudla v Poland* (2000) 35 EHRR 198 [94].

¹⁰³ Luke Clements (n 1) 677.

¹⁰⁴ Ibid 679. See also Baroness Hale, 'What Can the Human Rights Act Do for my Mental Health?' (2005) 17 *Child and Family Law Quarterly* 295, 305; *East Sussex case* (n 2) 67, 93.

¹⁰⁵ Luke Clements (n 1) 679.

¹⁰⁶ Palmer, 'Protecting Socio-Economic Rights through the European Convention' (n 57) 411.

The greater the vulnerability of the individual, the stronger the positive obligations become. This aspect of the case law, which is recognised by Palmer and Clements, is closely related to the idea of a 'spectrum of dependency' which is a central feature of investment dignity.¹⁰⁷ The spectrum of dependency, as an aspect of investment dignity, is an important concept that entails a heightened degree of responsibility in relation to those who are most vulnerable and who, as a consequence, are the most dependent on the state to protect and promote their dignity.¹⁰⁸

However, Palmer and Clements both note that outside of the context of detention that Art 3 has been less prominent as a means by which to establish positive obligations to respect the dignity of particularly vulnerable people.¹⁰⁹ Clements terms this the 'prisoner's dialectic' in which deprivation of liberty is used as a 'cliff edge' so that if an applicant is 'fractionally the wrong side of detained, then they fall and the court is powerless to intervene'.¹¹⁰ There is no reason in principle why other types of severe vulnerability, in which people have their liberty constrained, but not deprived, should not attract the protection of Art 3.¹¹¹ Indeed, some marginalised people are often subjected to conditions that border on imprisonment.¹¹² The distinction between Art 3 and Art 8, in this framework, would potentially be on a continuum in which there is a 'seamless spectrum of protections' for human dignity, with Art 3 covering the more extreme end of the spectrum in terms of the level of constraint, dependency and indignity, which the state must take 'reasonable steps' to address.¹¹³ In contrast, Art 8 covers the less extreme end, in which the state must consider a 'fair balance' between the interests of the individual and community as a whole.¹¹⁴

¹⁰⁷ J Sweeney, 'The human rights of failed asylum seekers in the United Kingdom' (2008) PL 277, 298.

¹⁰⁸ See p 90.

¹⁰⁹ See also, Lawson (n 79) 482-483.

¹¹⁰ Luke Clements (n 1) 679.

¹¹¹ Ibid 680-681.

¹¹² Ibid 684. See also Lawson (n 79) 483.

¹¹³ Luke Clements (n 1) 680.

¹¹⁴ *Botta v Italy* (1998) 26 EHRR 241 [33].

3.2. Article 8: Holistic Humanity and Dignity as a Prism

3.2.1. Scope for Protecting and Promoting Dignity

The scope of protection for human dignity under Article 8 is wider than Article 3 and is the broadest of any of the rights protected by the HRA.¹¹⁵ It has been interpreted dynamically, as David Feldman argues, to provide protection for a range of interests, including self-fulfilment, identity, moral integrity, organisation of relationships and business activities, which clearly extend beyond the original concern of protecting people from ‘threats to private space’.¹¹⁶ Human dignity has been recognised as inherent in that Art, with some *dicta* even suggesting that Art 8 includes a ‘right to human dignity’.¹¹⁷ Art 8 is, much like Art 3, a multiplicity of component concepts. It includes ‘respect’ for ‘private life’, ‘family life’, ‘home’ and ‘correspondence’. Each, in turn, has distinctive, but sometimes overlapping features. The most directly relevant components in terms of protecting a positive obligation to care and social support is respect for private and family life. There is, in this regard, according to Feldman, the ‘potential’ for ‘generating some social or economic rights imposing positive obligations on states’.¹¹⁸ This potential has been expressly recognised by the ECtHR who have held that state parties, in principle, may need to take positive measures to provide sufficient funding for health care¹¹⁹, facilities for disabled individuals¹²⁰, housing for those suffering from severe illness¹²¹ and protection from pollution.¹²² Importantly, there must be a sufficient link between the measures sought and the applicants’ private and family life.¹²³

Again, Munby J has offered the most comprehensive judicial survey of how private and family life relates to human dignity. Munby J has argued that Art 8, in relation to human dignity, includes primarily the protection of the ‘inner’ and ‘outer’ dimensions of human personality.¹²⁴ The inner dimensions include space within which people

¹¹⁵ See David Feldman, ‘Secrecy, dignity, or autonomy? Views of privacy as a civil liberty’ [1994] 47 CLP 41; ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ [1997] (3) EHRLR 265.

¹¹⁶ Feldman, ‘The Developing Scope of Article 8’ (Ibid) 266.

¹¹⁷ *R (on the application of Rostami) v Secretary of State for the Home Department* [2013] EWHC 1494 [90],

¹¹⁸ Feldman, ‘The Developing Scope of Article 8’ (116) 270.

¹¹⁹ *Pentiacova v Moldova* (2005) 40 EHRR SE 23, 218; *Van Kück v Germany* (App no 35968/97) 2003.

¹²⁰ *Botta* (n 114) 32-34; *Sentges v The Netherlands*, no.27677/02, 8 July 2003.

¹²¹ *Marzari* (1999) 28 EHRR CD 175, 145.

¹²² *Lopez Ostra v Spain* 16798/90 [1994] ECHR 46; *Guerra v Italy* (1998) 26 EHRR 357.

¹²³ *East Sussex case* (n 2) 148. See also *Mowbray* (n 29) 165-166.

¹²⁴ Para 77.

can 'freely pursue the development and fulfilment of his personality',¹²⁵ as well as the protection of physical and mental integrity, which Munby J argues 'embrace' human dignity.¹²⁶ These interests include the impact of measures on physical and mental stability or well-being, such as environmental hazards, medical care, sexual identity, personal information and housing assistance.¹²⁷ This makes Art 8 a potentially rich source for the protection of a holistic concept of human dignity that recognises and encompasses a broad set of human needs or desires. The outer dimensions of human personality, in contrast, include the right to develop personality by establishing and forming relationships with other human beings. This inter-personal dimension is, perhaps, a distinct element of Art 8 that differentiates it from the scope of Art 3. More broadly, the outer dimension also encompasses, according to Munby J, a right to 'participate in the life of the community' and to have 'access to essential economic and social activities and to an appropriate range of recreational and cultural activities'.¹²⁸ However, this does not mean that the scope of Art 8 is open-ended.¹²⁹ It has thus been recognised that Art 8 potentially does not cover interpersonal relations of a broad and indeterminate scope and does not necessarily extend to 'relationships of the individual with his entire immediate surroundings, in so far as they do not involve human relationships'.¹³⁰ Even in relation to a measure that adversely affects physical or mental integrity there can be no automatic recognition that Art 8 is engaged.¹³¹ This either suggests that some potential indignities will fall outside the scope of Art 8 or that some discomfort is a necessary aspect of everyday life.

It has been recognised that inherent in effective respect is an obligation on the state to positively adopt measures 'designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.¹³² The strength of the positive obligation, according to Munby J, is more stringent where certain people are shut off from what is available to the vast majority and, in such circumstances, matters of dignity weigh particularly heavily.¹³³ However, the positive obligation on

¹²⁵ Para 108.

¹²⁶ Para 85.

¹²⁷ *Burke* (n 2) 63.

¹²⁸ *East Sussex case* (n 2) 99, 114.

¹²⁹ *Burke* (n 2) 121.

¹³⁰ *East Sussex case* (n 2) 106.

¹³¹ *Ibid* 105-106.

¹³² *Ibid* 80.

¹³³ *Ibid* 148.

the state is not absolute and only requires the state to take 'reasonable and appropriate' measures to secure the applicant's rights under article 8 in which 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole'¹³⁴ This recognises the reality that the dignity claims of an individual can, especially where they concern the allocation of resources, never be considered in isolation from the wider network of relationships within which an individual is always a part and must be considered in light of the dignity claims of others.¹³⁵

3.2.2. Potential for Positive Investment under Article 8: *Deploying Dignity in the High Court*

There is thus significant potential for Art 8 to ensure a positive obligation on the state to protect and promote the human dignity of particularly vulnerable people.¹³⁶ This potential has been best realised by the High Court in the cases of *Bernard* and *East Sussex County Council*, which were decided shortly after the HRA came in to force. *Bernard*¹³⁷ concerned a severely disabled woman with right-side paralysis. Her housing was completely inadequate to her needs, causing her to be confined to the living room. Due to her double incontinence, this meant she was left to defecate and urinate on the living-room floor. She also struggled to participate in the upbringing of her children and was particularly concerned for their safety when being left alone with them. Additionally, she could not lead an independent life, being incapable of leaving the property due to the fact there were steps to the front door.

The High Court held that there had been a violation of Article 8, as the State had failed to provide suitably adapted accommodation.¹³⁸ Sullivan J recognised that suitably adapted accommodation would have:

[F]acilitated the normal incidents of family life, for example the second claimant would have been able to *move around her home* to some extent *and* would have been able to play some part...in looking after their

¹³⁴ Ibid 81.

¹³⁵ J Herring and C Foster, 'Welfare means relationality, virtue and altruism' (2012) 32 Legal Studies 480, 491.

¹³⁶ Ellie Palmer, Written Evidence in Joint Committee on Human Rights, A Bill of Rights for the UK?: Twenty-ninth Report of Session 2007-08, Vol. 2, Ev 157.

¹³⁷ *R (on the application of Bernard) v Enfield LBC* [2002] EWHC 2282 [24].

¹³⁸ Ibid 34.

children. It would also have secured her '*physical and psychological integrity*'. She would *no longer have been housebound, confined to a shower chair for most of the day, lacking privacy in the most undignified of circumstances, but would have been to operate again as part of her family and as a person in her own right, rather than being a burden, wholly dependent upon the rest of her family. In short, it would have restored her dignity as a human being.*¹³⁹

Dignity is used here an overarching concept to encompass and connect a number of different dimensions of human personality, which, importantly, includes the promotion of activity and rest for mind and body. One of those dimensions includes the power of her body to move and interact with the home environment, as well as the ability to control the conditions under which she was able to use the toilet. Similarly, dignity was used to recognise the importance of enabling Mrs Bernard to develop her personality by forming relationships with other people and bodies in a way that would promote the capability to affect and be affected, which was also central to a sense of mental well-being in terms of avoiding feelings of isolation, humiliation and insecurity.¹⁴⁰ The unsuitable accommodation not only restricted the mobility of the claimant, but also caused her health to deteriorate.¹⁴¹ In order to respect dignity, it was important to provide accommodation that enabled the claimant to affect the pace of deterioration by ensuring that she was subject to conditions that would not diminish her characteristic functioning prematurely.

The vulnerability of the applicant played a particularly important role in the case in determining the existence of a positive obligation to promote the above dignity interests of the applicant. Thus, according to Sullivan J, whilst there was no general right to a home under Art 8, the applicant was part of a 'particularly vulnerable group' and, as a consequence, 'positive measures...[had] to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a *normal* private and family life'.¹⁴² In this regard, Sullivan J noted the applicants particular living conditions were so bad that it was 'virtually impossible' to have 'any meaningful

¹³⁹ Ibid 33.

¹⁴⁰ Ibid 7.

¹⁴¹ Ibid 26.

¹⁴² Ibid 32.

private or family life for the purposes of Art 8.¹⁴³ This, it is suggested, adopts similar reasoning to Munby J in *East Sussex County Council* and, potentially, as discussed in reference to that case, protects investment dignity by prioritising the acutely vulnerable who are subject to multiple disadvantages in which many different channels of human activity and rest are blocked.

This leads to the second High Court case to consider the argument that human dignity entails a positive obligation to respect the care needs of particularly vulnerable people.¹⁴⁴ *East Sussex County Council (No 2)* concerned the lifting of two severely disabled individuals with learning difficulties. East Sussex County Council had developed a policy implementing manual handling regulations, which generally prevented care staff from personal lifting.¹⁴⁵ The applicants complained that the policy restricted the possibility of manual lifting that was needed in order for them to engage in activities outside the home, including shopping, swimming and horse-riding, as well as access to basic facilities, such as toilets.¹⁴⁶ Inside the home, the applicants complained that mechanical handling had caused them, on a number of occasions, significant distress and concern.¹⁴⁷ Munby J therefore had to consider whether there was a positive obligation under Art 8 to provide for manual lifts.

Munby J recognised that human dignity was contextually sensitive and would not always be best respected by personal handling.¹⁴⁸ As, in some cases, the 'independently minded but physically disabled person might prefer to hoist himself up'.¹⁴⁹ However, in the particular context, Munby J was willing to recognise that the applicant's human dignity could require personal handling. In this regard, a blanket policy restricting personal handling, which applied indiscriminately, was incapable of responding to the particular dignity interests of the specific claimants.¹⁵⁰ This contextually sensitive approach to human dignity, therefore, led to a focus on the individuality and difference of the particular disabled individuals in the specific

¹⁴³ Ibid 34.

¹⁴⁴ East Sussex case (n 2).

¹⁴⁵ The regulations themselves required employers to avoid 'as far as reasonable practicable' the need for employees to perform manual lifting where a risk of injury is present. Regulation 4, of the The Manual Handling Operations Regulations 1992, SI 1992 No 2793.

¹⁴⁶ Ibid 25.

¹⁴⁷ Ibid.

¹⁴⁸ Catherine Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263, 269.

¹⁴⁹ East Sussex case (n 2) 122.

¹⁵⁰ Luke Clements and Pauline Thompson, *Community Care and the Law* (Legal Action Group 2011) 240

encounter, responding to their person-specific needs and concerns.¹⁵¹ Dignity, as in this case, takes account of the 'relative' needs of disabled people.¹⁵²

In order to address the particular needs of the applicants, Munby J articulated a number of relevant dignity interests, such as the ability to develop personality, participate in the life of the community and to have access to an appropriate range of recreational and cultural activities.¹⁵³ This is, according to Munby J, 'matched' by the positive obligation of the state to take appropriate measures designed to ensure that a disabled person to the 'greatest extent feasible' is not left 'so circumscribed and so isolated as to be deprived of the possibility of developing his personality'.¹⁵⁴ Where that life is already circumscribed, then anything which 'impacts upon what remains to...a [severely disabled] person of the pleasure of life is commensurately important'.¹⁵⁵ Therefore, for those who are severely disabled, 'enhanced weight' is attached to their dignity interests, as they are 'already deprived of so much of what makes life enjoyable and enriching for the majority'.¹⁵⁶ Applying these principles to the particular facts, Munby J held that the remaining activities of the applicant was able to engage in, such as bathing, shopping, swimming and horse-riding, were of 'great importance' to the applicant, for which there could be a positive obligation to enable through personal lifting.¹⁵⁷ This is consistent with the reasoning in *Bernard* and can be connected to investment dignity, which imposes a responsibility to prioritise investment into the most vulnerable who live in the most circumscribed conditions and the most isolated conditions..¹⁵⁸

This definition of vulnerability is important for delimiting the possible boundaries of the obligation of the state to invest in human potentiality. It provides a basis for determining when 'enhanced weight' should be attached to the dignity claims of the applicant in comparison to the claims of others. It is, for instance, possible to distinguish a case like *East Sussex*, from a case like *Botta*, decided at the regional

¹⁵² Ibid

¹⁵³ Ibid 102.

¹⁵⁴ Ibid 99.

¹⁵⁵ Ibid 138, 148.

¹⁵⁶ Ibid 148.

¹⁵⁷ Ibid 25. See text at fn 130.

¹⁵⁸ See p 90.

level, on the basis of the degree of vulnerability.¹⁵⁹ *Botta* concerned a physically disabled applicant who was unable to access or make use of a private beach at a particular holiday destination.¹⁶⁰ The crux of the reasoning was that the effect of not allowing access to a single private beach was not sufficiently serious to violate the positive obligation under Art 8, as the applicant had access to an appropriate range of alternative social, recreational and cultural activities.¹⁶¹ The applicant in *Botta*, unlike those in *Bernard* and *East Sussex*, was not so isolated or circumscribed that they could not make connections with others that would extend or develop their capacities. Vulnerability, in this regard, acts as a restraining factor, setting the outer boundary and limits of the positive obligation under Art 8.¹⁶²

The judge also held that there was a positive obligation to provide personal lifts in the home for the applicants. Munby J placed particular emphasis on the personal experiences and emotional welfare of the applicants. The applicants had, on previous occasions, been put at risk from the hoisting system, resulting in the applicants becoming noticeably distressed by the prospect of mechanical lifting.¹⁶³ Munby J held that there could be a positive obligation to provide personal lifting to respect the dignity interests of the individual, particularly by avoiding a situation in which the applicants might be forced to sit in the bath for too long, left sedentary with the risk of bedsores, or left sitting in bodily waste.¹⁶⁴ This takes a holistic approach to the interests of the individual, specifically in terms of simultaneously promoting emotional fulfilment, relaxation, personal hygiene and physical mobility. More importantly, the reasoning of Munby J protects the applicants from a form of good intentions vulnerability by ensuring that a measure based on the 'good intention' of protecting an already vulnerable person, in this case mechanical lifting, does not

¹⁵⁹ See Luke Clements and Janet Read, *Disabled People and European Human Rights: A review of the implications of the 1998 Human Rights Act for disabled children and adults in the UK* (Policy Press, 2003).

¹⁶⁰ *Botta v Italy* (1998) 26 EHRR 241.

¹⁶¹ *East Sussex case* (n 2) 102.

¹⁶² Lisa Waddington, 'Unravelling the Knot: Article 8, private life, positive duties and disability: rewriting *Sentges v. Netherlands*' in Eva Brems, *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP, 2003) 339.

¹⁶³ *East Sussex case* (n 2) 20.

¹⁶⁴ *Ibid* 114, 154.

expose that person to conditions that make them miserable and entirely passive.¹⁶⁵

Whilst significant weight should be placed on promoting the interests of those who exist within the most circumscribed and isolated conditions, it is vital not to exclude a consideration of the interests of others that might be affected by a decision. A full assessment of the dignity interests of the individual must take into consideration all those affected by a decision within their network of interdependence.¹⁶⁶ Within this model we cannot readily separate the interests of those within the network of relationships and we must, as such, treat the good of the one as an aspect of the good of the 'other'.¹⁶⁷ As stated in chapter two, attending to what enhances personal joy and empowerment, will also entail fostering the joy and empowerment of others who may be involved in the care of the individual on the basis that their interests are closely tied together.

A concern for the dignity interests of others was readily evident in the *East Sussex* case where Munby J held that the carers of the disabled applicants also had dignity interests and, in the circumstances, such dignity interests had to be weighed against the dignity interests of the two severely disabled children. This included the risk of physical injury to the professional carers involved in manual handling, which, according to Munby J, was an interest in competition with the interests of the disabled children. In balancing these interests, it was held that hoisting could not be precluded in every situation where there was a measurable impairment to the rights of the disabled children, nor could manual lifting be permissible only if the particular lift is physically incapable of being achieved by a hoist or in exceptional circumstance. As noted, Munby J held that the interests of the disabled children weighed heavily in the balance, and were of such importance, that a significant amount of manual handling was required, although the interests of the disabled person can't be an overriding consideration in all circumstances. In this context, as in others previously addressed, Munby J took a pragmatic, sensible and robust approach to the management of perceived risk.

¹⁶⁵ Discussed in Lord Justice Munby, 'Dignity, Happiness and Human Rights' (2011) *Elder Law Journal* 32, 36.

¹⁶⁶ J Herring and C Foster, 'Welfare means relationality, virtue and altruism' (2012) 32 *Legal Studies* 480, 491.

¹⁶⁷ *Ibid* 490. See Foster (n 40) 16.

A greater focus on the reflexive dimension of dignity might go further than this and treat the dignity interests of the carers as part of the interests of the two disabled individuals, as well as the interests of the children as part of the carers, and not as entirely separable interests to be understood as in competition.¹⁶⁸ Harm to one person in a caring relationship is harm to another. Charles Foster, writing on human dignity, alongside Jonathan Herring in relation to an ethics of care, have jointly argued in this respect that attempts to pit the rights of the carer and the cared for against one another is out of place. This unjustifiably separates the interests of the parties in relationships of care and dependency. They propose that assessment of the intermingled nature of the interests should emphasise the responsibilities owed to one another in the context of mutually supporting relationships based on reciprocity, accommodation and compromise.¹⁶⁹

Although there is primarily a discussion of balancing competing interests in *East Sussex*, perhaps because of the existence of risk of physical harm to the carers, the idea that interests can become intermingled is implicitly recognised by Munby J in his claim that the compassion of the carer is an aspect of the dignity of the carer.¹⁷⁰ The dignity of the carer therefore pertains to a wider range of interests than physical safety of the individual, encompassing altruistic acts as an essential part of being human, although, importantly, such care does not extend so far as to demand abnegation or self-sacrifice.¹⁷¹

In conclusion, the early case law of the High Court under the HRA began to realise the potential of Article 8 to create positive obligation to protect the dignity of the particularly vulnerable. The cases of *Bernard* and *East Sussex* adopt similar approaches and a number of trends can be extracted from the reasoning. Most notably, they both suggest that human dignity is a holistic concept that encompasses different dimensions of humanity and, in addition, respect for such dimensions is context dependent, relative to the particular experiences of certain vulnerable groups. The most vulnerable being those who are forced to live in particularly circumscribed and isolated conditions.

¹⁶⁸ Jonathan Herring, *Caring and the Law* (Hart, 2013)

¹⁶⁹ Herring and Foster (n 166).

¹⁷⁰ *East Sussex* case (n 2) 119.

¹⁷¹ *Ibid.*

3.2.3. Limiting Positive Investment under Article 8: *Dignity in the Supreme Court*

It was some eleven years after the HRA 1998 came into force that the UKSC was faced with addressing the issue of how far Art 8 can be used to establish a positive obligation to provide a particularly vulnerable group, such as the disabled, with welfare support. In the case of *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, the UKSC was required to consider whether the Local Authority was entitled to withdraw an overnight carer in favour of meeting the needs of Ms McDonald through incontinence pads as a more economic option.¹⁷² The applicant had required a night-time carer to gain access safely to a commode, without a risk of falling or injuring herself. Her neurogenetic bladder had meant that she needed to urinate much more frequently than normal. In July 2008 the local authority had assessed the needs of Ms McDonald to be that of access to a commode at night under the National Health Service and Community Care Act 1990 and Chronically Sick and Disabled Persons Act 1970. However, in October 2008 the authority informed Ms McDonald that it intended to reduce the available funding and that a night-time carer could no longer be provided. The Court of Appeal had previously found that during this period there had been a breach of statutory duty as there had been no reassessment of her needs, which was a requirement under the Act. Care plan reviews in November 2009 and July 2010 had concluded that Ms McDonald needs were night-time toileting and that those needs could be met more appropriately by the provision of incontinence pads.

Rationality: Incontinence and Disability

The first ground of appeal was narrowly framed by the parties and limited to the issue of whether the CA had been correct to hold that the 2009 and 2010 care plan reviews were to be understood as including a reassessment of her needs though there had been no separate needs assessment. The majority held that the reviews were indeed to be read as including a reassessment of the needs of the appellant and that it was irrelevant that there was no additional documentation.

In the minority, Lady Hale chose to address a much broader point of general public importance not raised by the parties, which was specifically whether it was lawful, in accordance with *Wednesbury reasonableness*, to provide incontinence pads for a

¹⁷² [2011] UKSC 33.

person who is not in fact incontinent but requires help to get to the lavatory or commode.

The decision to focus on a point not raised by counsel, and her reasoning in finding irrationality in the decision-making process of the local authority, were subject to strong criticism by three of the majority judges. The central question for Lady Hale was how the needs of Ms McDonald were to be defined under legislation. Hale distinguished between two separate questions. First, what are the needs of the disabled person; and second, what is necessary to meet those needs. Disagreeing with the previous authority of *Barry*, she argued that resources should figure in the second question of determining the most appropriate means of achieving a need, but not in the question of defining that need. In relation to addressing the second question, Lady Hale argued that Ms McDonald could be expected to cooperate with the local authority by choosing the most cost effective means of achieving the need, properly defined, such as Sheltered Housing Schemes or Homeshare Schemes.

Lady Hale nonetheless did not feel it was necessary to find *Barry* wrongly decided to establish that the decision-making of the authority irrational. Noting that there were two questions, including identification of need, and appropriate means to realise those needs, Lady Hale argued that the need to get the lavatory or commode were so different from the need for protection from uncontrollable bodily functions it was irrational to confuse the two, and meet one need in the way that is appropriate for the other. The issue was whether the local authority had identified the correct question and responded in a rational way. Thus, as a consequence of mischaracterising the needs of Ms McDonald, the local authority had never asked itself how to meet those needs. She concluded by expressing her concern with wider consequences of the way in which the needs of Ms McDonald had been mischaracterised. She noted in particular the concern that it might logically enable the removal of a night-time carer from someone who needed to defecate at night and that help could be removed during the day subject to changing the pads to avoid infection.

Her judgment, as noted above, was subject to a number of strong critical comments from the other judges. Robert H George has suggested that many of the criticisms directed at the judgment of Lady Hale by the majority were misplaced and

misconstrue the points raised in her dissenting judgment.¹⁷³ This includes, firstly, the claim by Lady Hale that it might well have been open to the local authority to provide her with Extra Care Sheltered Housing or a House Share Scheme. This was an option that Ms McDonald had expressly rejected, and consequently Lord Brown argued that Lady Hale had failed to grasp the fact that the very solution that is mentioned had previously been rejected. However, this, according to George, is a misreading of Lady Hale, whose point was limited to the claim that the local authority had ‘mischaracterised Ms McDonalds needs and so had never asked itself how to meet those needs.’¹⁷⁴ In this respect, had the authority asked the right questions it was ‘possible that they might have reached this answer’ and the options proffered ‘might be acceptable, regardless of Ms McDonald’s views on it.’¹⁷⁵

Lord Walker further addressed the dignity issues in response to the suggestion by Lady Hale that the reasoning of the majority might logically imply that someone could be left lying in her own faeces. Lord Walker stated that it was unfortunate that Lady Hale should refer to defecation in her judgment, despite the fact that there was evidence that it was a concern of the applicant, and that Lord Walker recognised that it was necessary to ‘think about’ faeces.¹⁷⁶ Lord Walker appears to treat urination as different, suggesting that ‘most people’ would agree that use of incontinence pads for urination may be ‘unpleasant and undignified’ but a great deal ‘less so’ than for faeces. The difference, then, appears to be one of degree in terms of the impact on the dignity of the applicant and not a distinction in kind. In which case, as George notes, it was legitimate to raise defecation as a concern.¹⁷⁷

In response to the specific claim that the measure was irrational in the *Wednesbury* sense, Lord Walker offered a strong critique of the arguments offered by Lady Hale. Lord Walker stated *obiter* that the position reached by the local authority could not be considered irrational (in the *Wednesbury* sense). The council was entitled to take account of costs in assessing the ‘needs’ of the applicant and had, in addition, come to the reasonable conclusion that the use of incontinence pads would maximise

¹⁷³ Robert George, ‘In Defence of Dissent: R (McDonald) v Royal Borough of Kensington and Chelsea’ [2011] ELJ 409

¹⁷⁴ Ibid 411

¹⁷⁵ Ibid

¹⁷⁶ Ibid 32

¹⁷⁷ George (n 210) 412

privacy, independence and security.¹⁷⁸ He further pointed to a range of expert evidence that suggested that use of incontinence pads, even for people who were not in fact incontinent, was widespread and accepted practice. It is clear that such evidence did inform the judgment of Lady Hale, although she argued there was no accepted practice in effect to oblige the client to accept incontinence.¹⁷⁹

Nevertheless, Lady Hale did not appear to say that the outcome was necessarily irrational, only that the 'decision-making process was irrational because it treated mobility problems and incontinence as being the same need'.¹⁸⁰ In summary, then, Lady Hale can reasonably be understood to have argued that the decision-making process was irrational in the way it had mischaracterised the needs of Ms McDonald. This resulted in a situation where it had not addressed the question of how to best meet those needs, which had important consequences for the dignity of the individual. Had the authorities asked the right questions, it might have been open to them to then have offered sheltered care, which Ms McDonald could not unreasonably reject.

Applicability of Article 8 ECHR

The second ground of appeal concerned whether the measure had been a violation of Art 8 ECHR. There were at least two ways in which this matter might have been addressed by the Court. First, was in terms of whether there was a positive obligation to provide 'night-time care' in order to enable a disabled person to access the toilet, which is how the applicant characterised her claim before the ECtHR. In order to establish a positive obligation, and for Article 8 to be applicable, there must be a direct and immediate link between the requested measure and the private life of the applicant. In order to discharge the obligation the State must adopt reasonable and suitable measures to respect the private life of the individual. In determining whether an obligation exists, and what steps should be taken, regard must be had to fair balance that has to be struck between the competing interests of the individual and of the community as a whole. At the ECHR level, this entails the provision a wide margin of appreciation by states in terms of determining whether the steps to be

¹⁷⁸ Ibid 31.

¹⁷⁹ *McDonald v RBKC* (n 209) 75.

¹⁸⁰ *George* (n 210) 412

taken. Strictly speaking, such a doctrine is irrelevant at the domestic level, as it is premised on the principle of subsidiarity.¹⁸¹

Munby J, as noted earlier, has added to these principles, recognising that, where a severely disabled person is already forced to live a highly circumscribed and isolated life, anything that further impacts on their quality of life is of commensurate importance, and their interests must be given enhanced weight in the balancing exercise. Moreover, the positive obligation under Art 8 to secure human dignity 'calls for human empathy and humane concern as society...seeks to try to ameliorate and compensate for...disabilities.'¹⁸²

The second option available to the Court was to address whether the withdrawal of night-time care, and requiring her to use incontinence pads, even though she was not incontinent, constituted an unjustifiable interference. Assuming such measures interfere with Article 8, they must be necessary to achieve a legitimate aim under Art 8.2. The choice of approach is not insignificant. It is clear that the Courts (at least the ECtHR) are much more likely to find a direct interference, then to 'find the state is under a positive obligation where the interferences are linked to the consequences of impairment or disability.'¹⁸³

It appears that Lord Brown, who addressed the Art 8 issue, primarily considered the applicants claim in terms of whether there was positive obligation to provide night care. He noted that, '*even assuming*' a direct and immediate link existed between the measure sought (night care) and private life, one only had to consider the facts of many of the ECHR cases on disability to 'recognise the hopelessness of the article 8 argument in the present case'.¹⁸⁴ This follows the line of ECHR cases relating to disability, which have been resolved on the basis of an assumption of applicability. Such cases have been criticised on the basis that merely supposing applicability cannot take the place of paying proper attention at the definitional stage.¹⁸⁵ This leaves the case unclear as to whether the criteria for establishing a positive obligation have been met, and why those criteria may have been met in relation to the particular circumstances.

¹⁸¹ See M Hunt, R Singh, and M Demetriou, 'Is there a role for the 'margin of appreciation' in national law after the Human Rights Act?' (1999) 1 EHRLR 15, 17.

¹⁸² East Sussex case (n 2) 119.

¹⁸³ Waddington (n 198) 329.

¹⁸⁴ *McDonald v RBKC* (n 209) 16.

¹⁸⁵ Waddington (n 198) 343.

In order to clarify the threshold for establishing a positive obligation to reduce the disadvantages faced by disabled persons, it is important that Courts, when faced with such cases, specify clearly how inaction might affect the interests protected by Article 8 and whether the criteria for positive obligations have been satisfied. Such clarity is vital in terms of distinguishing between the issue of whether the complaint falls within the scope of the right and the review of its justification.¹⁸⁶ Moreover, establishing whether the Article 8 is applicable is essential to enabling a parallel consideration of Art 14, which may be used to 'effectively accommodate the needs of disabled people and to ensure that they are not subject to discrimination because of the environment which they inhabit.'¹⁸⁷

Lord Brown went on to claim that the case law of the ECHR was consistent with the decisions of domestic courts. Citing with approval the CA decision in *Anunfrijeva*, he went on to argue that there will be very few situations where the:

[P]redicament of an individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved.¹⁸⁸

Although recognising that a positive obligation under article 8 might arise in very exceptional circumstances, where a family unit was not involved, Lord Brown held that it could not be plausibly argued that respect, privacy and autonomy were not afforded to the applicant. The authority had gone to great lengths to consult the appellant about their needs and possible means of meeting those needs. He then proceeded to argue that interference could not be established and that, 'even if' interference 'were' established, it would be easily justified under Art 8(2). There is a degree of uncertainty around whether this point is still concerned with a positive obligation, such as whether a failure to address the consequences of impairment constitutes an interference, or whether Lord Brown was in fact addressing at this stage the separate point that the reduction in the care constituted an interference. It is notable that a consideration of Art 8(2) is unusual in relation to positive obligations.

¹⁸⁶ Ibid.

¹⁸⁷ Olivier De Shutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights' in Anna Lawson and Caroline Gooding, *Disability Rights in Europe: From Theory to Practice* (OUP, 2005) 35.

¹⁸⁸ *McDonald v RBKC* (n 209) 18.

Ambit of Article 8: Holistic and Contextual Dignity

It is important to be clear at the definitional stage as to whether appropriate access to a toilet at night for a disabled person, who is able to control their bodily functions, might fall within the scope of the concept of “private life”. This will be central to establishing what measures can be deemed ‘appropriate and reasonable’ for the purposes of determining the content of any positive obligations and whether an interference has occurred. If, for instance, provision of support at night to enable a person to urinate safely is understood to ensure that a person can live with dignity and autonomy, then the right to respect for private life may well be appropriately realised through the use of incontinence pads. On the other hand, if obliging someone to behave as if they cannot control their bodily functions, when they in fact can, does not enable a person to live with dignity and autonomy, then a right to respect for private life may not be appropriately respected by the provision of incontinence pads. Furthermore, defining clearly what the interests of a disabled person encompasses is important to establishing their particular needs, which the authorities must have due regard for in the ‘fair balance’ test.¹⁸⁹ In this regard, it is notable that Lord Brown engaged in limited discussion of the content of the interests protected by Art 8, although noting that the authorities afforded some degree of respect for dignity and autonomy, as well as safety and independence.¹⁹⁰

It is argued here that access to a toilet for a disabled person who can control their bodily functions does relate to private life and the inability to access such facilities may have a significant impact on the dignity interests of applicant. In this regard, a disabled person who can control their bodily functions may have a vital interest protected by the Convention in receiving support necessary to access a toilet. Private life, as was seen above, encompasses the protection of the dignity interests of an applicant. This requires a holistic consideration of the potential and simultaneous impact of inaccessibility to basic facilities on the social, mental, recreational and physical functioning of the individual. It cannot be denied that failure to provide appropriate access to toileting facilities for a continent person, who wishes to remain active and mobile, is likely to give rise to feelings of humiliation and distress, capable of impinging on dignity, and quality of life. It is well-documented

¹⁸⁹ *Abdulaziz, Cabales, and Balkandali v United Kingdom* (1985) 7 EHRR 471, 67.

¹⁹⁰ *McDonald v RBKC* (n 209).

that urinary incontinence has multiple implications for the sufferer, including depression and shame associated with not being able to control bodily functions.¹⁹¹

Of course, in many cases, incontinence is unavoidable and measures can only be taken to help individuals cope with the negative feelings associated with loss of bodily functioning. In this respect, incontinence pads, like hoisting in *East Sussex*, may be the most effective means of preserving the dignity of the applicant. In some cases, as Lady Hale recognises, there may even be people who can control their bodily functioning who consider incontinence pads a 'more convenient, comfortable and safer way of solving the problem.'¹⁹² In this regard, and as mentioned above, dignity is responsive to the context-specific needs of a disabled person and a one-size fits all approach may not be suitable to determining those needs.

At least in cases where a person is unwilling to act as if they were incontinent, when they can in fact control their bodily functioning, certain negative feelings may conflict with the image of the self, which might reasonably be avoided. In its decision in *McDonald*, the ECtHR recognised the concerns of older people that they may be forced to linger in 'states of advanced physical or mental decrepitude which conflicted with their strongly held ideas of personal identity'.¹⁹³ In this regard, it went on to accept that the applicant faced living in a manner that conflicted with her 'strongly held ideas of self and personal identity' and the use of incontinence pads could have 'undignified and distressing' consequences.¹⁹⁴ The Court then expressly endorsed the opinion of Baroness Hale and held that human dignity fell within Art 8 and stated that the principle was infringed when 'someone who could control her bodily functions was obliged to behave as if she could not'.¹⁹⁵

The prospect of significant distress at not being able to access the toilet is, it is argued, to be expected in light of the way that the use of incontinence pads for a disabled person could result in reduced bodily functioning and physical activity. Negative emotions, as well as the way in which obliged incontinence contrasts with strongly held ideas of personal identity, relate to the way in which characteristic bodily functioning and mobility may be prematurely diminished. As argued in chapter

¹⁹¹ See text at FN

¹⁹² *McDonald v RBKC* (n 209) 75.

¹⁹³ *Ibid* 47.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

two, experiencing a certain emotion, such as shame, is an idea in the mind that perceives the body and its modifications in a certain way. Mental processes map body states, from which a mental image of the body can emerge, which act as the basis of emotion. In this respect, being obliged to act as a person who cannot control bodily functioning can be registered by feelings of despair, distress and humiliation. These emotions indicate the modifications in the characteristic functioning of the body. The protection of the bodily functioning of the individual is potentially captured by Art 8, at least for the disabled, which has been held to address issues of mobility and quality of life, as well as compensatory measures to ameliorate the impact of disability as an aspect of physical integrity.

Previous case law, as well as international treaties setting down obligations in regards to disabled persons, supports the contention that a lack of night-time care may fall within the scope of Article 8. In *East Sussex*, Munby J held that not only would Art 8 be engaged, but also Art 3, if the consequence of failing to personally lift a person would mean they could not access a toilet, or would be left remaining sitting in 'bodily waste', unable to be moved for an appreciable period of time.¹⁹⁶ Presumably, this reasoning would be especially relevant to a person who is capable of controlling their bodily functioning.

It is notable that in the interpretation of the Convention, courts will draw inspiration from other international instruments, including the 'evolving norms of national and international law.'¹⁹⁷ This method of interpretation has had an impact on the development of positive obligations under Article 8 in other contexts, and has led to a narrowing of any margin of appreciation afforded to states where a growing international consensus can be demonstrated.¹⁹⁸ Of particular relevance in this context is the CRPD, which contains a number of obligations that are pertinent to the treatment of disabled persons, and are designed to promote dignity. The most important of which is Article 19 that provides a right to live in the community, which includes ensuring that persons with disabilities have access to a range of in-home residential and community support services, including personal assistance necessary to support living in the community. They should also have the opportunity

¹⁹⁶ *East Sussex* case (n 2) 114.

¹⁹⁷ *Demir and Baykara v Turkey* [2008] ECHR 1345, 68

¹⁹⁸ *Waddington* (n 198) 349.

to choose their place of residence and not be obliged to live in a particular living arrangement. These rights are further supported by Art 26 and Art 25 of the EU Charter on Fundamental Rights.

One of the others interests protected by Article 8, which may be relevant in this context, and was referred to by the ECtHR, is the 'development of the personality' of the individual. Whilst the development of personality under the Convention is commonly associated with the possibility of developing relationships with others and the outside world, it also includes the 'intimate' dimensions of bodily functioning, which are also central to personal identity. Indeed, case law on Article 8 has attached significant weight to the 'intimate aspect'¹⁹⁹ of private life and it has been claimed that 'acts of daily living' are more likely to be treated as central to the 'fulfillment of one's personality' in cases relating to disability under Article 8.²⁰⁰

The concept of personality, it is suggested, is also capable of embracing a consideration of the impact of action or inaction of an authority on the unfolding and development of the personality of the person into the future. In this respect, it can encompass a wider temporal perspective on the interests of the applicant. This was a clear consideration of Lady Hale, who placed particular emphasis on the impact of obliging incontinence on the applicant prematurely, as this can lead to a person becoming 'unnecessarily dependent' upon them and make them behave as if they cannot control their bodily functions, when, in fact, they can do.²⁰¹ According to Dupré, this aspect of the reasoning of Lady Hale recognises the importance of ensuring that a person who was already in a situation of great dependence is not forced into one of greater dependence.²⁰² Dignity is concerned with protecting as long as possible a tolerable status quo. Incontinence pads are also not risk free, and evidence suggests they carry the prospect of 'infection and compromised skin viability.'²⁰³ There premature use thus has the possibility of diminishing 'human time' by denying people the ability to affect the speed with which they undergo the process

¹⁹⁹ "the more intimate the aspect of private life that is being interfered with, the more serious must be the reasons for interference before the latter can be legitimate" *Douglas v Hello* [2001] QB 967, 168.

²⁰⁰ *Olivier De Shutter* (n 225) 61.

²⁰¹ *Mcdonald* (n 209) 75 (Lady Hale).

²⁰² Catherine Dupré, 'Dignity, Democracy and Civilisation' (n) 277.

²⁰³ *Clements* (n 1) 683-684.

of deterioration (if inevitable) and, in addition, leads to their characteristic functioning being diminished prematurely.

A concern related to increased dependence is that (obliged) incontinence might accelerate the process of deterioration in social functioning by leading to premature institutionalisation. Clements has suggested that 'incontinence (albeit that, in this case, it is *forced incontinence*) is the second greatest cause for older people being institutionalised in the United Kingdom.'²⁰⁴ This is undoubtedly contentious, and Clements does not provide the necessary evidence to support it and it is not clear whether the necessary evidence would be relevant to obliged incontinence. However, a number of studies do provide data that suggest that urinary incontinence can be a significant risk factor associated with admission to an institutional care setting.²⁰⁵ Incontinence is further related to resultant risks of despair, shame and depression, which have also been recognised in studies as associated prognostic indicators of institutionalisation.²⁰⁶ Further evidence has suggested, as noted above, that incontinence pads should not be offered prematurely in case a person becomes unnecessarily dependent on them.

Obliging incontinence might therefore diminish the prospect of the person to 'participate in the life of the community' and to remain in their home, which, as was discussed in the previous chapter, has a 'relational structure' providing emotional warmth, security and the commitment of human relationship.²⁰⁷ It is notable that, in other contexts, such as moving elderly persons from their care home on an

²⁰⁴ Ibid.

²⁰⁵ See BAS, Broome, 'The impact of urinary incontinence on self-efficacy and quality of life' (2003) 1 Health and Quality of Life Outcomes 35; Shibley Rahman, *Living Better with Dementia: Good Practice and Innovation for the Future* (Kingsley, 2015); M Nuotio et al, 'Predictors of institutionalization in an older population during a 13-year period: the effect of urge incontinence' (2003) 58 Journal of Gerontology 756; Melanie Luppá et al, 'Prediction of Institutionalization in the Elderly: A Systematic Review (2010) 39 Age and Ageing 31; 140; M. Powell Lawton, *Annual Review of Gerontology and Geriatrics, Volume 9; Volume 1989* (Springer, 2013) 94; John Brocklehurst, *Urology in the Elderly* (Livingstone, 1984) 90; C Bradway, 'Urinary incontinence among older women: measurement of the effect on health related quality of life' (2003) 29 Journal of Gerontological Nursing 13; DH Thom et al, 'Medically recognized urinary incontinence and risks of hospitalization, nursing home admission and mortality' (1997) 26 Age and Ageing 367.

²⁰⁶ P Meade-D'Alisera et al, 'Depressive symptoms in women with urinary incontinence: A prospective study' (2001) 21 Urologic Nursing 397–400; AJ Watson et al, 'A perspective study examining the association between the symptoms of anxiety and depression and severity of urinary incontinence' (2000) 88 European Journal of Obstetrics and Gynecology and Reproductive Biology 7; BH Zorn et al, 'Urinary incontinence and depression' (1999) 162 Journal of Urology 82–84.

²⁰⁷ See p 171.

involuntary basis, the ECtHR has been willing to countenance expert evidence that such a measure might carry a risk of negatively affecting life expectancy and the health of such a person.²⁰⁸ This looks to the potential implications of a measure on the development of the person into the future. However, and crucially, it must be established that there is a 'particular and quantified risk' in such circumstances.²⁰⁹ In this respect, it is unlikely that the applicant in McDonald would have been able to establish a necessary and direct link between the development of their own personality, and the prospect of entering into a care home due to the use of incontinence pads.

Positive Obligation: Establishing a Duty to Provide Night Care

Central to establishing a positive obligation to secure effective respect for private life is the existence of a direct and immediate link between the measure sought and the private life of the applicant. An overview of cases where such a link has been established, or at least assumed to exist, in contrast to cases where no such link exists, demonstrates that the concept has been interpreted narrowly. According to Olivier De Shutter, such a link is more likely to be established where the applicant is 'permanently affected in their everyday life [and activities] by the alleged refusal to provide them with support' and where it impacts on the immediate surroundings of the applicant.²¹⁰ In this respect, where a measure is sought that is a 'personalised care measure, for the benefit of particular individuals, as opposed to a general measure for the benefit of an ill-defined community', a special link can be established. This includes situations where the lack of action has a 'direct impact on his/her functioning in daily life' and affects the 'capacity to perform acts of daily life (such as switching a computer on, making telephone calls, eating or drinking)'.²¹¹ In contrast, an obligation leading to wide-scale restructuring and transformation of the environment for the temporary benefit of an ill-defined group would be 'too broad and indeterminate' in scope.²¹²

This interpretation of 'direct and immediate link' is supported by the cases of *East Sussex* and *Bernard*, which, as was discussed above, concerned the permanent impairment of the 'normal incidents' of everyday life (such as bathing, moving around

²⁰⁸ *Louisa Watts v United Kingdom* [2010] ECHR 793.

²⁰⁹ *Ibid* 84.

²¹⁰ Olivier De Shutter (n 225) 40.

²¹¹ *Ibid*.

²¹² *Ibid* 41.

the home, using the toilet) and the impact of immediate surroundings on their disability (such as unsuitable housing and inappropriate facilities). In *East Sussex*, it was made clear that an 'enhanced degree of protection' was called for as A and B were so 'disabled as to be critically dependent on the help of others for even the simplest and most basic tasks of *day to day living*.'²¹³ In this light it appears clear that *McDonald* satisfies the criteria for establishing a special link, in the sense that what was sought - continued access to a toilet for a continent person through night-care - was a personalised care measure for the benefit of a disabled person that would affect her functioning in an intimate aspect of daily life and her capacity to perform everyday acts in her immediate living environment. Ms McDonald was likely to be permanently affected by any refusal to provide her with night care and use of a toilet is undoubtedly part of the 'normal' and intimate aspects of private life.

Fair Balance: Existence of an Obligation

Even where a direct and immediate link can be established, in 'determining whether or not a positive obligation exists, regard must be had to the *fair balance* that has to be struck between the general interests of the community and the interests of the individual.'²¹⁴ The fair balance test will require a consideration of whether the factors of public interest weight against the need of the applicant to obtain access to night-time care. In striking any balance, it is important to take into consideration the degree of vulnerability of the individual. As noted in relation to both *East Sussex* and *Bernard*, 'enhanced weight' may need to be attached to the interests of a disabled person in the balancing exercise due to their particular vulnerability and degree of dependence. A key factor that affects the vulnerability of a disabled person is the degree to which their power of acting and rest for mind and body are circumscribed, as well as the extent to which a person is isolated. On this account, the more circumscribed a life is in terms of the different possibilities for activity, the more important is the remaining access and control over those activities a person can engage in, and, importantly, anything that further impacts on that activity and pleasure of life is of commensurate importance.²¹⁵ In *East Sussex*, even the simplest of activities, including bathing, took on a particular significance in light of the already circumscribed and isolated lives of the disabled children.

²¹³ *East Sussex* case (n 4) 93.

²¹⁴ *Rees v United Kingdom* (1986) 9 EHRR 56, 64.

²¹⁵ See p 175.

Moreover, any discretion afforded to authorities in determining an appropriate balance, should be influenced by external developments in the field of human rights. In particular, and as noted above, the CRPD represents an emerging international trend towards the recognition of the rights of disabled persons to personal assistance necessary to support living and to not be obliged to live in a particular living arrangement. It is therefore suggested that the existence of positive obligation to provide access to a toilet at night, in light of the degree of vulnerability of the applicant, and international developments, did not fall within the discretion of the State and was not outweighed by the interests of the community. Nevertheless, such interests and discretion may still be relevant as to the appropriate means of achieving respect for the right to private life.

Discharging the Obligation: Reasonable and Appropriate Measures

A State may demonstrate that it has discharged its positive obligation by having taken 'reasonable and appropriate' steps to respect the private life of the individual. In some positive obligation cases, further reference is made to the need for 'adequate and effective' measures to safeguard the applicants' interests under Article 8. In order to effectively respect the rights of the individual, it has been suggested, a disabled person must be enabled to function as a continent person by having accessing a toilet or commode, where they are, in fact, capable of controlling their bodily functions. It would neither have been a reasonable nor an appropriate response to the needs of a disabled person in such circumstances to have *solely* sought to satisfy those needs by providing them with incontinence pads (although it is unlikely to be unreasonable to offer this as part of a variety of alternatives enabling access to a toilet). The use of such pads would not afford the requisite protection of the dignity interests of the applicant safeguarded by Article 8. This would have been, as Baroness Hale put it, to have met the need to get access to the lavatory with the provision of a type of support suited to the very different need of protection from uncontrollable bodily functions.

It might further be open to an applicant to claim that a failure to treat differently a continent person, from an incontinent one, is unjustified discrimination under Art 14 ECHR.²¹⁶ The sole provision of incontinence pads would also have been inconsistent

²¹⁶ "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat

with *Bernard*, which recognises that the steps taken by the authorities, in terms of the provision of accommodation suited to an able-bodied person, were unsuited and not adapted to the particular needs of the disabled person identified under Art 8, and thus did not enable a 'normal private and family life'.

In determining what measures an authority should adopt to fulfil a need, the State, as discussed further below, is entitled to have regard to the interests of other care users, but such interests should not operate to obscure the nature of that need. This makes clear that a positive obligation to secure the rights of a disabled person under Art 8 cannot be discharged by measures unsuited to addressing their particular needs or where they are ineffective in respecting the interests identified as falling within the scope of private life.

Nevertheless, in this context, even if a positive obligation is established to provide night-time access to a toilet, it was clearly open to the State to claim that it had discharged its obligation by taking reasonable steps to ensure that the applicant would be able to access a toilet at night, which the applicant had unreasonably rejected. The authority had proposed a range of acceptable responses to her need, such as a Home Share Scheme and Extra Care Sheltered Housing Scheme, which would have enabled her to receive night care and access a toilet at night. It is at this stage that the important remarks raised by Lord Brown become pertinent. In particular, his recognition that the local authority had taken reasonable measures to consult with the appellant and to provide her with the possibility of other options that demonstrated sufficient respect for her autonomy and dignity.²¹⁷ Although not using these terms, to the extent that there was a positive obligation to provide night care, this was discharged by the provision of a range of suitable options capable of enabling her to access the toilet.

In choosing a particular scheme, the applicant, as Baroness Hale argues, can be expected, once the needs have been identified properly, to 'cooperate with the authority in choosing the most economical and acceptable way of meeting the need that she has'.²¹⁸ This is compatible with a number of ECHR decisions concerning positive obligations, such as *O'Rourke* and *Marzari*, in which the Court emphasised

differently persons whose situations are significantly different." *Thlimmenos v Greece* (2001) 31 EHRR 411, 44.

²¹⁷ *Mcdonald* (n 209) 19.

²¹⁸ *Ibid* 74 (Lady Hale).

the substantial role of the applicants in being responsible for the deterioration in their functioning, following a refusal of a range of appropriate and adequate options that would have effectively respected private life.

The concept of co-operation, as discussed in chapter two, is an integral part of investment dignity. There is a responsibility on an individual to cooperate in the interpersonal dialogue with the State and other service-users. A dialogue is clearly two ways, and whilst dignity may be used to ensure that the authorities are receptive to the particular experiences and needs of the individual, the individual must also be willing to cooperate with the authorities and recognise that they are part of a network of relationships in which the good of others is an aspect of their own good.²¹⁹

It has been suggested by Foster and Herring that the notion of a 'fair balance' implicitly recognises that individuals have responsibilities towards others on the basis of the intermingled nature of the interests of persons in a relational nexus.²²⁰ Thus, an applicant can be expected to take account of the dignity of other particularly vulnerable people as an aspect of their own dignity in responding to the opportunities made available to them. In determining what steps are to be taken to ensure compliance with the positive obligation, a State is entitled under the ECHR to have regard to the 'fair balance that has to be struck between the competing interests of the individual and society.'²²¹ Thus, in assessing the range of available options designed to enable night care for the applicant, the authority was entitled to have regard to the dignity interests of other persons in its decision as to how to respect those rights and the applicant was expected to accommodate the interests of others in their decision-making.

It is true that the co-operation expected of an individual in recognising the interests of others may have certain limits. As was seen in relation to *East Sussex*, and as an aspect of 'good intentions vulnerability' in investment dignity, use of a particular means to realise dignified ends can itself end up violating human dignity.²²² The intention to achieve a certain dignified end for particularly vulnerable people can exacerbate vulnerability to the extent that certain means may be deployed that in reality violate human dignity. In the context of *McDonald*, an assessment may need

²¹⁹ See p 95

²²⁰ Herring and Foster (n 204) 491.

²²¹ *Sentges v The Netherlands* (App 27677/02), 8 July 2003.

²²² See p 94 and p 137.

to be undertaken to determine whether obliging a person to move home, or requiring them to allow others to live in their home, in order to access night care, would itself respect the dignity of the individual. This would itself make up an assessment of the appropriateness of the steps to be taken. It is not possible at this stage to explore fully these complex considerations and the wealth of guidance on caring for the elderly, but it is highly unlikely in this context that an obligation can be said to exist to provide the applicant with a professional night carer in her own home. In this respect, *East Sussex* appears to be on a quite different scale in terms of the degree of seriousness of the issues raised by the choice of means to realise dignified ends. In that case there was clear evidence that hoisting had put the two severely disabled applicants at risk, and this understandably had caused them significant distress. Moreover, hoisting had proven ineffective in enabling access to an appropriate range of social and recreational activities. In contrast, in *McDonald*, there was little evidence to suggest that the alternatives would have been inappropriate and ineffective, or violated human dignity, beyond the concern that Ms McDonald had about a 'stranger living in her home' and her unwillingness to move.

To summarise, it is suggested that there is a positive obligation on the state to provide night-time care to enable a disabled, but continent person, to access a toilet at night. However, this positive obligation does not entitle a disabled person to a specific means of realising their needs, save that the means used are not inappropriate to realising those needs or don't themselves diminish respect for human dignity. In this respect, a disabled person is expected to cooperate with authorities and recognise the interests of other vulnerable persons in choosing from a range of alternative schemes that may enable the individual access a toilet at night.

Retrospective Measure: Establishing an Interference

The second possible ground for taking a claim under Art 8 ECHR was that the decision to reduce the care package that the applicant had benefited from on the basis of reassessment of her needs constituted an interference with private life. This is how the case was approached by the ECtHR, which avoided a consideration of whether there was a positive obligation to provide the level of care requested. The claim of Ms McDonald under Art 8 was partially successful. Ms McDonald succeeded on the grounds that the local authority had interfered with private life of the applicant

and during November 2008 and 2009 had failed to reassess her needs or to meet her needs in 'accordance with the law' under Article 8. However, the complaint concerning the proportionality of the new care package after 2009 was held to be manifestly ill-founded.

The decision taken by the local authority to reduce the care package constituted an interference with Art 8 on the basis that it would impact on her 'mobility' and quality of life, as well as lead to a situation in which she was obliged to behave as if she could not control her bodily functioning, which conflicted with her strongly held ideas of personal identity'.²²³ This is largely in line with an approach to rights that requires authorities to take progressive steps to realise and fulfil the rights of disabled persons, which conforms to the progressive nature of the obligation established in *East Sussex and Botta*.²²⁴ Such an obligation prevents unjustified retrogressive measures that diminish, limit, suppress or restrict the content of the provision afforded to a disabled person.

Justifying Interference: Rights of Others and Minimising Impact

On the issue of justification for the interference under Art 8(2), the ECtHR held that the care package given to the applicant during November 2008 and November 2009 was not in 'accordance with the law' and could not therefore be justified.

The decision to adjust the care package from November 2009 onwards, although an interference with Art 8, was held to pursue a legitimate aim, and was found to be in accordance with the law, as well as within the margin of appreciation. According to the Court, the measure was capable of being justified on the basis of the social responsibility of the public authority to allocate scarce resources to provide care to the community at large and to respect the rights of other service users. The Court refused to substitute for the national authorities (the UKSC) its own assessment of the proportionality of the measure.²²⁵ This is despite the fact that the margin of appreciation, which Lord Brown relied upon his judgement, is a concept not strictly speaking relevant at the domestic level.

This is problematic as it means no proper proportionality analysis was undertaken in *McDonald*. Lord Brown, in his decision, predicted how the ECtHR might decide the

²²³ *McDonald v United Kingdom* [2014] ECHR 492 [47].

²²⁴ *Ibid* 48-49.

²²⁵ *Ibid* 57-58.

case in light of the margin of appreciation and, in turn, the ECtHR relied on the margin of appreciation to find the measure justified. In this respect, the exchange is an example of what Luke Clements has called the ‘mature expression of the “pass the parcel” deference game’.²²⁶ A more rigorous analysis of the proportionality of the measure might have considered the potential future costs of obliging incontinence compared to the provision of a night-time carer, compared to any immediate cost saving in the reduction of the care package. As noted above, some evidence exists to suggest, albeit capable of dispute, that incontinence is a prognostic indicator of institutionalisation. In this respect, Clements suggests that (forced) incontinence might potentially entail significant costs by increasing the risk of a person entering an institutionalised setting, which, crucially, would be the same as the cost of providing someone like Ms McDonald with a night-time carer.²²⁷ However, without, as discussed above, establishing the existence of a ‘particular and quantifiable risk’, it is highly unlikely that such evidence will weigh heavily (if at all) in any assessment.

In determining whether a reduction in care is justified, it has been made clear by the Courts that a measure taken to minimise any impact on the interests of the applicant will be of significance in determining the proportionality of a measure.²²⁸ In this respect, as with the issue of the measure taken to discharge a positive obligation, it is clear that in reducing the package the authorities had provided a range of options that would have continued to enable the applicant to access a toilet at night. The provision of pads was only part of a wider range of options that would have enabled her to receive personal care and remain living independently. In this respect, reduction in the care package is unlikely to be considered disproportionate in light of the need to respect the dignity interests of other care users and the need for the individual to accommodate the interests of others within their own circle of concern.

Justifying Interference: Maximising Privacy, Safety and Independence

The focus of the ECtHR on the interests of the community, and the rights of other service users, as a basis for justifying the measure, can be partially contrasted with the focus of Lord Brown in the UKSC, who appears to argue that the measure was *also* in the best interests of the applicant. Although primarily addressing the issue of Art 8 from the perspective of a positive obligation, as noted earlier, Lord Brown went

²²⁶ Clements (n 1) 677.

²²⁷ Ibid

²²⁸ *Watts* (n 246) 98-99.

on to address whether any interference, assuming it had occurred, could be justified under Art 8(2). It is suggested that many of the actual reasons given for justifying the replacement of night-care, which concern the personal interests of the applicant, do not withstand scrutiny, are not entirely consistent with the concept of dignity, and are incompatible with the reasoning of earlier case law.

As mentioned above, Lord Brown, accepting the arguments put by the Local Authority, held that the measure, reducing the care package, even if it interfered with Art 8, could have been justified on the basis that it maximised the privacy, independence and safety of the applicant. These claims are problematic as they effectively suggest that an individual, who is not incontinent, and wishes to maintain control over bodily functioning, would be better off by being less capable of having control over that functioning and the place, or manner, in which they expel bodily fluids. Reading between the lines, it appears that the privacy of the individual is understood to be best protected by isolation, through excluding other parties from sight, whilst the individual urinates. This aspect of the reasoning is, it is suggested, not context-specific, in the sense of relating to the particular problems, concerns or experiences of the individual in the particular case, taking account of their difference or 'otherness'.

Whilst, in general, excluding people from intimate functions will respect privacy (preventing emotions such as shame or humiliation) the argument in this particular case is somewhat questionable when it is considered that, regardless of whether the appellant is made mobile, so as to access the toilet, or whether they are left to urinate in an incontinence pad, a care-worker will be required to support the applicant by helping to clean them the next day. Even Lord Walker, for the majority, recognised that this scenario may be 'quite unpleasant for both the user and the carer'.²²⁹ The view, therefore, that privacy is maximised entails the application of a generalised understanding of privacy, applicable to the 'norm', without due regard to the person specific needs of the individual. It therefore can be contrasted with the decision in *East Sussex*. It is also not entirely logical to find that a measure that has interfered with the private life of a person also maximises their privacy.

²²⁹ *Mcdonald* (n 209) 32.

A similar issue arises in the argument that the measure would maximise the safety of Ms McDonald by reducing the risk of falling. In this particular case, there was no actual evidence to suggest that the current night-time care posed any risk to safety.²³⁰ Moreover, it is important to keep in mind the argument, which began to emerge in the last chapter, that it is neither possible, nor desirable, from the perspective of dignity, to eliminate all vulnerability from life. Some things that are our source of activity may always carry certain risks of harm, which cannot be removed without also making that activity impossible.²³¹ Dignity may actually require people to be vulnerable to certain manageable risks, as, otherwise, their life may become miserable and extremely circumscribed.²³²

This is, perhaps, why Baroness Hale was concerned about the potential implications of *McDonald*. Baroness Hale seemed particularly concerned that the focus on maximising safety, in contrast to personal dignity, might also enable the withdrawal of care during the day, or to the use of pads to enable defecation for someone who does not suffer from faecal incontinence, subject to the need to avoid infection or other hazards.²³³ Whilst Lord Walker rejected this implication, calling it deplorable, it is notable that no actual reason was provided by him to explain why Lady Hale was wrong in this regard.²³⁴ The potential, albeit unexamined, consequence of the majority reasoning is that, when the local authority provides care during the day, by enabling the individual to access the toilet, they are actually treating the appellant or less well than they do during the night (at least in respect of privacy, safety and independence).

Such reasons are more problematic in terms of the implications they carry for someone in a situation that was similar to the applicant, who may not be afforded the same range of options the applicant was afforded. The implication of the decision is that an authority is entitled to provide pads on the basis that they are the most suitable measure to address the needs of the applicant, and, as such, provision of alternatives enabling access to a toilet may not be strictly necessary. In those circumstances, it might be recognised that, despite any interference with private life,

²³⁰ “[Ms McDonald had] no problem in urinating safely at night.” *Mcdonald* (n) 39.

²³¹ *Westminster City Council v Sykes* [2014] EWHC B9.

²³² See p133.

²³³ *Mcdonald* (n 209) 77.

²³⁴ *Ibid* 32.

it was in their best interests of the disabled person to have their mobility and control over bodily functioning reduced.

4. Convention Rights and the Openness of Human Dignity

The potential of Art 3 and Art 8, in terms of establishing a positive obligation to protect the care needs of particularly vulnerable people has not always been consistently realised in case law. However, some of the cases discussed above tentatively point towards the possibility that such potential is most likely to be realised when human dignity has a significant and prominent role in the reasoning of the Court. This section draws together some of the themes that have begun to emerge where human dignity has made a substantive difference to the outcome of cases, and contrasts this with cases where the concept of human dignity is given less significance. It explores the manner in which human dignity, where it is deployed successfully, performs a more inclusive functional role. It claims that this corresponds to existing commentaries that have identified three important 'open' facets in the judicial use of human dignity. 'Openness' is used here to denote responsiveness to the other, receptiveness to singularity, and acceptance of creativity.²³⁵ It is argued that these aspects of openness correspond to the way dignity is used by the judiciary to respond to difference, embrace a wider set of human dimensions and provide space for dialogue in which dignity can be co-created through a range of actors across boundaries. These open facets, it is argued, encompass the following aspects of investment dignity, specifically, differentiation of life in time, multifaceted humanity and interconnectedness.

4.1. Openness and Difference

The first open dimension of the judicial use of human dignity under the HRA concerns its responsiveness to difference and 'otherness'. This represents an open dimension in the sense of an obligation to others which is not delimited to a particular group on the basis of preference and worthiness or insulated from concerns of those outside the group on the basis of difference.²³⁶ Dignity is open because it is inclusive and can be 'receptive and responsive to singularity'.²³⁷ This is a role that has already been recognised by Catherine Dupré and Conor Gearty. Dupré has, for instance,

²³⁵ Alexandre Lefebvre, *Human Rights as a Way of Life: On Bergson's Political Philosophy* (Stanford University Press 2013) 90.

²³⁶ *Ibid* 91.

²³⁷ *Ibid* 95.

argued that in respect of a number of cases where dignity is deployed in majority reasoning, it is deployed in such a way that it respects the ‘other’ by having ‘an inclusive effect, bringing under the mainstream protection offered by the law all those who did not benefit from it due to their difference’.²³⁸ Similarly, Gearty has recognised the inclusive effect of dignity as a legal value by arguing that case law demonstrates a ‘respect for human dignity that is on the move, expanding the moral dictates of civilised society *ever outwards, bringing more and more persons within its field of vision*’.²³⁹ Importantly, this inclusive role of dignity has required the law to be attentive to difference and, in some cases, as in *Bernard and East Sussex*, has required the law or social environment, built around the ‘normal man’, to be adjusted or refined to incorporate the person-specific needs, experiences and capabilities of the ‘other’.

Human dignity is receptive to the emergence of difference in human life and responds to the claims of the unfamiliar. The open tendency, as an aspect of dignity, embraces uniqueness, the possibility of discovering or learning something new.²⁴⁰ The creative potentiality of human life recognises that, over time, through experimentation with our surroundings, differences can emerge in the form of novel modes of being and new forms of activity or relationality.²⁴¹ This represents a *temporal* form of ‘otherness’ in which humanity differentiates itself over and across time.²⁴² The open tendency of dignity has, in this regard, been central to responding to this form of ‘otherness’ in law. Dignity has, for instance, had an inclusive effect in terms of incorporating the experiences of post-operative transgender individuals who did not correspond to historical paradigms of sexual identity.²⁴³ It is true that dignity has not always been used by the judiciary to embrace every ‘new’ type of activity or mode of being.²⁴⁴ However, it is contended that this reflects the uncertainty about the

²³⁸ Dupré, ‘Dignity, Democracy and Civilisation’ (n 148) 270.

²³⁹ Gearty, *Principles of Human Rights Adjudication* (n1) 96.

²⁴⁰ John Marks, ‘Representation’ in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005) 227; Gilles Deleuze, *Bergsonism* (trs Hugh Tomlinson and Barbara Habberjam, Zone Books, 1991) 20.

²⁴¹ See p 108.

²⁴² “Creativity is the most striking feature of [Life]...the continuous and ever-increasing production of difference” [103] “Over time life becomes more and more differentiated” [105] Lefebvre (235) .

²⁴³ *Bellinger v Bellinger* [2003] UKHL 21, *Goodwin v United Kingdom* (1996) 22 EHRR 123, *R. (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220.

²⁴⁴ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings Oviedo, 4.IV.1997.

consequences of such new courses of action because it is unclear whether it will be beneficial or destructive, such as, for instance, whether allowing voluntary euthanasia will release the vulnerable from suffering or place undue pressure on them to end their life.²⁴⁵ Human beings do not always possess a fully adequate idea of the effects of a particular course of action and must be careful not to chart a course based on imagined, rather than real consequences.²⁴⁶

In such circumstances, as Dupré argues, the role of dignity is 'not to close a debate by providing a once and for all answer, but rather to open it, so that similar questions may be raised in subsequent instances'.²⁴⁷ Dignity thus has an open dimension in the way it creates space to continuously examine, with patience and prudence, contentious issues in light of new knowledge, experiences and social conditions. In addition, there may be concerns that being open to a new course of action will restrict future openness and limit the continuing differentiation of human life.²⁴⁸ Human dignity, in this regard, may well, at least without better understanding, be closed to certain possibilities precisely in order to keep the future open in the sense that it enables continuing experimentation, difference and creativity.

4.2. Openness and Multifaceted Humanity

A second open dimension of the judicial use of the concept derives from its use as a holistic tool and bridging device.²⁴⁹ In this regard, dignity as a holistic concept enables individuals to be treated 'as a whole' which represents a 'shift from a mono-dimensional to a holistic, or pluridimensional' understanding of humanity.²⁵⁰ This represents, it is argued, an open tendency in that it embraces an inclusive understanding of humanity, which encompasses a wider set of dimensions than 'abstract individual autonomy'.²⁵¹ Such a holistic understanding of human dignity is therefore much more likely to capture the experiences, needs and aspirations of

See Roger Brownsword, 'Human Dignity, Human Rights, and Simply Trying to do the Right Thing' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013);

²⁴⁵ *Pretty* (n 25) 239. For a discussion of the arguments, see Hazel Biggs, *Euthanasia, Death with Dignity and the Law* (Hart, 2001) 169.

²⁴⁶ See p 110.

²⁴⁷ Dupré, 'Dignity, Democracy and Civilisation' (n 148) 273.

²⁴⁸ Explanatory Report, Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings (ETS No. 168), para 3. See Jonathan Herring, *Medical Law and Ethics* (3rd ed, Oxford University Press 2010) 397-403.

²⁴⁹ See p 155.

²⁵⁰ Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) EHRLR 190 194.

²⁵¹ *Ibid* 196.

'real' people, particularly those that do not fit the 'autonomy norm' and may be excluded as 'other' because they lack a particular feature of the human ideal.²⁵²

Treating people 'as a whole' has important implications for conventional legal constructs, such as the public-private divide, which separate social identities in to separate spheres of activity. Dignity may, for instance, require the law to respect the continuity of the multiple identities of a person regardless of the sphere of activity in which they are operating.²⁵³ This is evident in the *East Sussex* case where Munby J held that the carers of the disabled applicants also had dignity interests and, in the circumstances, such interests could not be excluded because the carers were professionals or because the activities were within the sphere of work.²⁵⁴ This, again, demonstrates a potential open tendency in dignity, in the way that it can be used to include the identities of a person in a 'sphere' where such an identity is traditionally excluded, thus opening the traditional dividing boundaries.

4.3. Openness and Dialogue

The final open dimension of human dignity as a legal value under the HRA is, it is argued, inherent in the way dignity is constructed through dialogue by a range of actors across traditional boundaries. Human dignity has, for a considerable time, been employed by judges to 'legitimate and license transnational jurisprudential *openness*'²⁵⁵ and has justified 'transnational transfers of human rights norms across different courts and contexts'.²⁵⁶ Indeed, it has been recognised as one of the key potential functions of human dignity in the interpretation of human rights.²⁵⁷ In this way, dignity is understood to be intrinsically suited to dialogue.

This role is supported by the particular legal context in which human dignity jurisprudence is constructed, as case law and academic commentaries treat dialogue as a core feature of the HRA underpinning many of the operative provisions and structuring the relationship between the UK courts and the ECtHR, as well as

²⁵² Ibid 193. See Baroness Hale, 'Dignity' (2009) 31 *Journal of Social Welfare & Family Law* 101, 106.

²⁵³ Dupré 'Unlocking Human Dignity' (n 250) 196.

²⁵⁴ *East Sussex* case (n 250) 116.

²⁵⁵ Paulo Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 *EJIL* 931, 934.

²⁵⁶ Ibid 940

²⁵⁷ Ibid. See also Vicki Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana Law Review* 15.

the UK courts and the legislature.²⁵⁸ In this way, the HRA provides a particularly fertile legal environment in which dialogue on human dignity can take place. With respect to the meaning of dialogue in such an inter-institutional context, a number of definitions have been proposed.²⁵⁹ It has been defined as, *inter alia*, a 'process of rational persuasion...[where] each participant must be willing to expose their views to the critical analysis of the others and must be ready to change them if others put forward better arguments'²⁶⁰ and the participants must 'take into account each other's perspective and try to incorporate them into their own views'.²⁶¹ Importantly, the process aims at 'taking decisions in common; reaching agreement; solving problems or conflicts collectively; determining which...thesis is true, the most justified or the best'.²⁶² The form of dialogue represents a genuine open dimension through the way it possesses the qualities of reciprocity, responsiveness, mutual respect, and exposure to otherness. Dialogue, in this regard, must be contrasted with a 'monologue' in which a court simply deploys 'ideas of conclusions [that] are borrowed by foreign courts, whether on the national or supranational level'.²⁶³

Granting a dialogic role to human dignity is controversial. The concept has been treated by some as inappropriate to any meaningful dialogue because there is no consensus meaning beyond a minimum core and any transnational sharing of human rights norms will, in this light, simply be an exercise in arbitrary judicial choice.²⁶⁴ However, it is questionable whether dialogue would be necessary at all if such a clear or determinate consensus was forthcoming. Dialogue is, more often than not, a process of seeking to reach agreement, rather than finding it. In this regard, Paulo Carozza proposes a more convincing claim that the dialogic function of human dignity is primarily –

²⁵⁸ Merris Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 *International and Comparative Law Quarterly* 557; Tom Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2006] *Public Law* 306.

²⁵⁹ See Merris Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 *International and Comparative Law Quarterly* 557, 558-559.

²⁶⁰ Luc Tremblay, 'The legitimacy of judicial review: the limits of dialogue between courts and legislatures' (2005) *ICON* 617, 632.

²⁶¹ *Ibid.*

²⁶² *Ibid* 630-631.

²⁶³ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *U Richmond L Rev* 99, 113.

²⁶⁴ Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *EJIL* 655.

A provocation to reflect more deeply, collectively, and comparatively on the breadth of human experience and the fulfilment of elemental human needs and desires.²⁶⁵

Dialogue in this respect is less about transporting dignity from one jurisdiction into another, but is rather a discussion that seeks to incorporate and respond to lived experience, an experience that is 'concretely encountered in the Other and recognised in oneself'.²⁶⁶ In this way, in line with an experimental and inductive process of reasoning, dignity is something that is developed and discovered through engagement with the 'other'.²⁶⁷

There are a number of interconnecting forms of interaction which can be understood to take place in the construction of human dignity under the HRA which conform to this abstract understanding of dialogue. The first type of dialogue differs from the preceding discussion as it occurs between the court and the victim on an interpersonal level and is, perhaps, the least visible or prominent. It is, however, no less important for it allows victims to propose their own dignity argument according to their experiences and individuality. The court will, if it is open to dialogue, address those arguments, take account of the experiences of the victim and try to incorporate them, but, where it decides against the victim, provide reasonable arguments that justify the conclusion. The principle of co-operation, which has been introduced in the chapter, means that, in turn, the applicant must be open to recognising the dignity of the 'other' as a dimension of their own dignity. The importance of the experiences of the victim to the construction of dignity is clearest in the way the judiciary has already relied on the concept to respond to the person-specific problems, needs and desires of the victim. An exemplary approach of the responsiveness to human experience is the decision in *Napier*, where Lord Bonham placed significant emphasis on the testimony of prisoners, who he termed 'experienced students'.²⁶⁸ This represents an open tendency in the formation of

²⁶⁵ Carozza (n 255) 944.

²⁶⁶ Paolo Carozza, 'Human Rights, Human Dignity, and Human Experience' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013) 627-628.

²⁶⁷ Ibid

²⁶⁸ *Napier* (n 89) 51.

dignity, which is capable of being developed through the sharing of narratives, experiences and testimonies.²⁶⁹

The inter-institutional dialogue that operates between the ECtHR and the UK courts is still in the very early stages of development. Most leading analyses focus on the notion of inter-judicial dialogue, without a particular focus on the role of human dignity as a concept that structures any such dialogue. However, it is possible to discern some tentative judicial trends in the use of human dignity, as part of the judicial dialogue, from the selective case-analysis that has been undertaken. Such trends are most easily identified by contrasting cases like *Napier or East Sussex*, where human dignity played a significant role in the reasoning of Court, from cases like *McDonald*, where the human dignity argument was given considerably less weight. A particularly important trend that can be tentatively extrapolated is that, where human dignity plays a substantive role in the outcome of a case, the UK Court draw widely on the reasoning and animating principles of ECHR case law, creatively deploying those principles in a rigorous fashion to novel factual circumstances. Thus, in *East Sussex*, Munby J engaged in an extraordinarily detailed analysis of some key dimensions of human dignity interests in the case law and applied these to the unique situation of the disabled applicants. This is in marked contrast to the judgment of Lord Brown in *McDonald* who limited his analysis predominantly to the facts of a number of ECHR cases and then held that, in light of such facts, the Art 8 claim was 'hopeless' and would clearly fall within the margin of appreciation.²⁷⁰ Far less attention was paid to the potential effect of the framework of dignity interests that might be relevant to the particular case. This, it is suggested, reflects the idea that the case law of the ECHR should be treated as a ceiling of human rights protection, which cuts off engagement with the particular encounter.²⁷¹ Focusing on dignity interests, in contrast, entails less emphasis on a 'narrow and pedantic' approach related to the 'austerity of tabulated legalism'.²⁷²

²⁶⁹ Catherine Dupré, 'Constructing the Meaning of Human Dignity: Four Questions' and Edwin Camerson, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013) 116.

²⁷⁰ A similar approach is evident in two Court of Appeal decisions on positive obligations, see *R (Burke) v the General Medical Council* [2005] EWCA Civ 1003 and *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406. See: Catherine Dupre, 'Human Dignity and the Withdrawal of Medical Treatment: A Missed Opportunity' [2006] 6 EHRLR 678, 682.

²⁷¹ See J. Lewis, 'The European Ceiling on Human Rights' [2007] Public Law 720.

²⁷² *Minister of Home Affairs v. Fisher* [1980] A.C. 319, 329.

The cases where the dignity argument is accepted also suggest that the UK Courts are more willing to draw on a wider body of sources than just the case law of the ECtHR. This is exemplified in *Napier* where Lord Bonham relied on an impressive range of 'external benchmarks' in order to construct human dignity.²⁷³ Most notably, reference was made to reports of the Chief Inspector of Prisons for Scotland, European Prison Rules, United Nations Standard Minimum Rules for the Treatment of Prisoners, and the Committee for the Prevention of Torture.²⁷⁴ Moreover, Lord Bonham made extensive use of expert evidence from psychiatrists and environmental psychologists to find that the conditions made the applicant feel 'small, inadequate and worthless'.²⁷⁵ Similarly, in the minority opinion of Baroness Hale in *McDonald*, reference was made to a number of sources to support the claim that the measure was incompatible with human dignity, including Care Quality Commission Guidance.²⁷⁶ In contrast, the reasoning of the majority was lacking in such sources and has been criticised for failing to address important instruments, such as the CRPD and the EU Charter of Fundamental Rights.²⁷⁷

It is impossible to prove a direct correlation between the expansive use of external materials and human dignity, but there are at least some good reasons for explaining why such a correlation might exist. First, the 'semantic open texture'²⁷⁸ of human dignity and its sensitivity to the particular context means that guidance will have to be sought to define the requirements of the concept in the specific case, by drawing on established experience and expertise. Second, and more importantly, human dignity is the foundational value of all human rights and, as has been argued, performs a bridging role between rights in different human rights instruments. It is hardly surprising, therefore, to see additional international instruments being cited in case law in order to inform and flesh out the meaning of human dignity. In addition, human dignity is a key principle at the centre of good care practice.²⁷⁹ Many, therefore, of

²⁷³ Clements (n 1) 677.

²⁷⁴ *Napier* (n 89) 235

²⁷⁵ *Ibid* 251.

²⁷⁶ *Ibid* 235.

²⁷⁷ Luke Clements and Pauline Thompson, *Community Care and the Law* (Legal Action Group 2011) 241.

²⁷⁸ Robert Alexy, *A Theory of Constitutional Rights* (OUP 2009) 64.

²⁷⁹ Part 3, Section 2, Regulation 10, The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014; *Report of the Mid Staffordshire NHS Foundation Trust* (2013). See also, Parliamentary and Health Service Ombudsman, *Care and compassion? Report of the Health Service Ombudsman on ten investigations into NHS care of Older People* (Stationary Office, 2011); Commission on Improving Dignity in Care (2012), *Delivering dignity: securing dignity in care for older*

the policy documents and guidance cited by Baroness Hale and Lord Bonham set down key requirements for respecting human dignity.²⁸⁰ In this light, reliance on dignity may draw a court away from the narrow confines of the facts of previous cases to a broader range of dignity materials and benchmarks. This aspect of the jurisprudence ensures that human rights are not determined in isolation and challenges exclusive reliance on conventional norms or the legal status quo. Thus, for instance, Baroness Hale in *McDonald* relied on the dignity materials to break from the traditional judicial reluctance of UK Courts to scrutinise resource allocation concerns. This makes the legal system less insular and more porous or outward facing. It represents an open dimension in the way dignity is constructed through a sharing of human experience and expertise by a range of actors, as well as by learning from other conceptual responses to (potentially) shared problems.

Dialogue, of course, must be two ways and there are clearly some routes by which UK Courts might seek to influence the construction of human dignity at the international level, particularly before the ECtHR. One such route is through reliance on the argument that the jurisprudence of the ECtHR is 'unconvincing', 'unclear' or 'inconsistent'.²⁸¹ This could potentially have a beneficial impact on improving the dignity reasoning of both courts.²⁸² This is clearly not an aspect of dialogue that is intrinsic to human dignity, but is a consequence of the context in which adjudication on human dignity takes place. However, the open texture of human dignity makes it particularly amenable to such dialogue. One trend, however, which does appear directly related to human dignity, is its use in cases which extend beyond the minimal standards of protection of human rights established by the ECHR. Thus, for instance, both Nicolas Bratza and Baroness Hale have suggested that (at least at the time) the UKHL in *Limbuela* went beyond the case law of the ECHR.²⁸³ It is also noteworthy that in none of the cases on disability (prior to *McDonald*) had the ECtHR held that there had been a violation of Art 8, in contrast, for instance, to the findings of the High Court in *East Sussex* and *Bernard*. Not only does this enable the UK Court to

people in hospitals and care homes, NHS Confederation, Local Government Association and Age UK. For a good overview of the material, see Foster (n 1) 68-79.

²⁸⁰ *McDonald* (n 209) 78.

²⁸¹ Merris Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 *International and Comparative Law Quarterly* 557, 566-567.

²⁸² *Ibid* 559.

²⁸³ Brenda Hale, *Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?* (2012) 12 (1) *Human Rights Law Review* 65; Sir Nicolas Bratza, 'The Relationship Between the UK Courts and Strasbourg' (2011) *European Human Rights Law Review* 505.

be open to developing human dignity to address the holistic needs of particularly vulnerable people, as they emerge over time, it also enables the UK Courts to inform the development and improvement of human dignity standards at the level of the ECHR.

5. Conclusion

A perusal of the cases where human dignity has been used to establish positive obligations, suggests that the injection of dignity improves, rather than worsens, the quality of decision-making in comparison to cases where the concept is absent. The concept of dignity has sometimes been associated with arbitrary decision-making on the part of judges, a concept that provides insufficient guidance or constraints.²⁸⁴ However, the reasoning of the courts in cases where human dignity is given a prominent role are more nuanced, carefully considered and supported by a wide body of evidence and experience. This is a consequence of, rather than in spite of, the openness of human dignity. Such openness requires the judiciary to build its understanding by turning to sources beyond themselves and even the limited legal culture of which they are a part. This appears less arbitrary than the alternative, where the human dignity argument is rejected. In such cases, the judiciary appears more comfortable engaging in minimal scrutiny of resource allocation concerns.²⁸⁵ More systematic use of human dignity may therefore prompt an important shift in the constitutional culture and democratic discourse in the UK, issues that are further explored in the next two chapters. A shift, it is argued, which makes the law more reasonable and representative, not less so. However, it is important to keep in mind that Convention Rights are not primarily designed to encompass or address socio-economic concerns and it is therefore understandable that judges have approached the issue of resource allocation in a cautious manner.²⁸⁶

The positive contribution that human dignity has made to the case law on positive obligations under Art 3 and Art 8 has been interpreted through the prism of investment dignity. The concept, it has been argued, entails a more holistic perspective on the interests of individuals, recognizing the overlapping needs of the

²⁸⁴ Conor Gearty, 'Socio-economic rights, basic needs and human dignity: A perspective from law's front line' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013) Ch 8

²⁸⁵ Clements (n 1) 683.

²⁸⁶ See Daphne Barak-Erez and Aeyal M Gross, *Exploring Social Rights: Between Theory and Practice* (Hart, 2011) Ch 8, 9, 11. .

individual in terms of social, emotional, physical and recreational functioning. The clear emphasis on the concept of vulnerability as a basis for giving rise to a heightened responsibility for human dignity across a spectrum of dependency supported by the concept investment dignity, whilst also being largely in tune with the definition of the concept outlined in the decisions of the High Court. This has provided not only the basis for determining the conditions upon which a positive obligation arises, but also aids to set certain boundaries on the limits and stringency of that obligation..²⁸⁷ Within this framework individuals are expected to cooperate with the State in order to recognize the dignity of others as an aspect of their own good.²⁸⁸ This co-operative attitude, expected of the individual, creates one side of the dialogue between the state and the individual. In turn, the state should be sufficiently in tune with the relative and context-specific needs and experiences of the individual. These strands of discussion begin to raise questions about what dignity requires in respect of an appropriate relationship between the community and the individual. It is the nature of this relationship, structured by an appropriate dialogue, which is the main focus of the following chapters.

²⁸⁷ See text at fn 160.

²⁸⁸ See text at fn 185.

Chapter Five: The Rule of Law as a Productive Encounter

1. Introduction

The final section of the thesis addresses the transformative implications of investment dignity for two central concepts that have been closely connected to human dignity and which clearly affect the relationship between the individual and the community. This includes the concept of the rule of law, which is the focus of this chapter, and the concept of democracy, which is the focus of the next chapter.¹ In one of the leading, and most influential, discussions on the concept of the rule of law, Joseph Raz has stated that ‘observance of the rule of law is necessary if the law is to respect human dignity.’² Lon F Fuller has also argued that the rule of law entails a ‘certain built-in respect for human dignity.’³

Impressively, associations with human dignity cut-across different conceptions of the rule of law, so that both formal and substantive conceptions have been linked to the concept.⁴ However, it cannot be imagined that the introduction of a new construction of dignity into discourse will leave those connections the same. This is a necessary repercussion of the conceptual methodology that was discussed in the introduction. The process of constructing a concept has resonating effects for cognate concepts. This is because other concepts may possess some components which are shared with other concepts, or because there are established bridges that connect concepts. A concept, such as the rule of law, which is connected to human dignity, is likely to be affected by the construction of that latter concept.

The aim of this chapter is to explore the current relationship between the rule of law and human dignity, as well as the implications of an investment concept of dignity for current thinking on the rule of law. The first part of the chapter establishes the existing theoretical connections between the rule of law and certain constructions of human dignity. The formation of the content of the rule of law is demonstrated as

¹ See p 10.

² Joseph Raz, ‘The Rule of Law and its Virtue’, in *The Authority of Law: Essays on Law and. Morality* (Oxford 1979) 221.

³ Lon L. Fuller, ‘A Reply to Professors Cohen and Dworkin’ 10 (1965) *Villanova Law Review* 655. 665-666.

⁴ Joseph Raz, ‘The Rule of Law and its Virtue’ in *The Authority of Law: Essays on Law and. Morality* (Oxford 1979) 222. For a non-formalist account see, Trevor Allan, *Constitutional Justice: A liberal theory of the rule of law* (Oxford, 2001).

being related to a consideration of the source of dignity in the human condition. The first perspective - the stability of rules - connects the practice on the rule of law to dignity by either creating a stable normative framework by which people can guide their behaviour and plot their futures.⁵ This is a conception that favours dignity-as-autonomy. The second approach, which is considered, connects the practice of the rule of law to protecting dignity on the grounds that humans are rational beings, who cannot have a burden imposed without adequate justification through principled adjudication.⁶

Once the connections between the rule of law and the concept of dignity has been established, the second part of this chapter argues that stability and justification should be recognised as two equally important and interconnected dimensions to the protection of human dignity. These dimensions, it is argued, are both essential to the protection of human dignity on the grounds that humans are neither entirely rational, nor irrational, neither entirely active, nor passive. It will be argued that stability is important on the grounds that it is necessary for active agency, so that individuals are capable of securely investing in and ordering 'productive encounters' without arbitrary interference. Stability is required in order to restrain the possibility of being subject to the passive desires of another, ensure the continuity of life, and to establish space for creative experimentation. The second dimension of the rule of law, justification, requires that state coercion be, as far as possible, exercised on the basis of reasons that can be formed with those most affected by a legal decision. It includes the formation of adequate ideas that correlate to the relations that mutually sustain and enhance the capabilities of the individual, as well as restricts those relations that lead to decomposition and destruction.

The chapter concludes by highlighting how the two dimensions of the rule of law in their connection to dignity can be promoted through the concept of dialogue. It is argued that the law is an encounter between those most affected by a legal decision and the state. Law on this model is neither a fixed set of rules that individual cases are subsumed under, nor are they a complete set of ideal principles. Instead, law is a

⁵ Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004) 60; Raz, 'The Rule of Law and its Virtue' (n 2) 222; Thomas Bingham, *The Rule of Law* (Allen Lane, 2010) 165.

⁶ Ronald Dworkin, *Justice in Robes* (Harvard 2006); Ronald Dworkin, *Law's Empire* (Hart 2010); Trevor Allan, *Constitutional Justice* (Ibid); Nigel Simmonds, *Law as a Moral Idea* (Oxford, 2010) 142; David Dyzenhaus, 'Form and Substance in the Rule of Law' in C. Forsyth, *Judicial Review & the Constitution*, (Oxford: Hart Publishing, 2000) 157.

creative dialogue responding to the particularities of the individual situation, unfolding case by case, in exactly the same way as life is unfolding in different events over time.⁷

2. The Protection of Human Dignity and the Rule of Law

2.1. An Immanent Connection to Human Dignity

In this first section of the chapter, connections between human dignity and the rule of law are clearly established. It becomes clear that the meaning ascribed to the rule of law is fundamentally connected to a consideration of human dignity. This is established by focusing on two major conceptions of the rule of law. The first focuses on the idea of the rule of law as necessary for creating stability and the second on the need for principled justification.

2.2.1. Respect for Rational Autonomous Agency

The first important paradigm of the rule of law is the creation of a set of clear, predictable and prospective rules that enable individuals to regulate their conduct.⁸ On this account, law must be 'capable of guiding the behaviour of its subjects.'⁹ Joseph Raz is a leading proponent of this conception of the rule of law and has outlined some of its key tenets. These include the requirement that law be clear, prospective, relatively stable, accessible, and administered fairly by an independent judiciary.¹⁰ Raz claims that there are a number of reasons to value this concept of the rule of law, including the idea that observance restricts the exercise of arbitrary power and promotes individual freedom.¹¹ However, according to Raz, the most important of the virtues of the rule of law is that its observance is necessary if the law is to respect human dignity..¹²

The rule of law is understood by Raz to respect human dignity in two ways. The first is that stability in law respects the ability of human beings to plan their future.¹³ The second is that the rule of law protects human dignity by preventing entrapment or

⁷ Gilles Deleuze, *L'Abécédaire de Gilles Deleuze avec Claire Parnet* 'G as in Gauche' in Paul Patton, 'Deleuze and Democracy' (2005) 4 Contemporary Political Theory 400, 406.

⁸ Raz, 'The Rule of Law and its Virtue' (n 2).

⁹ Ibid 214.

¹⁰ Ibid 214-219.

¹¹ Ibid 219-220.

¹² Ibid.

¹³ Ibid 222.

manipulation that results from the thwarting of settled expectations.¹⁴ The law cannot therefore encourage people to rely on it in order to guide conduct only to then withdraw any of its assurances after the event. This would, according to Raz, encourage 'autonomous action only in order to frustrate its purpose.'¹⁵ On this account, there is, built in to the rule of law, a certain presupposition that human beings are 'rational autonomous creatures' in the way it 'attempts to affect their actions and habits by affecting their deliberations.'¹⁶ According to Raz, this version of the rule of law is still compatible with very many ways in which the law can violate human dignity.¹⁷

2.2.2. Solution to Conflict

There are other versions of a stability-based concept of the rule of law that are premised on different conceptual ties to the concept of human dignity. Conor Gearty has, for instance, argued that the rule of law is needed as a solution to the problem caused by the uncertainty and conflict inherent in human dignity. As an example, Conor Gearty had proposed a concept of the rule of law that requires prospectively and foreseeability in order for individuals to be able to regulate their conduct, which is very similar to the model proposed by Raz.¹⁸ The need for such a conception, according to Gearty, arises because there is often a lack of consensus about the concrete meaning of concepts like human dignity. The result of this is a 'clash of conflicting interests and struggle for power characteristic of pluralist democracy.'¹⁹ A sovereign democratic body is necessary to create clear and stable rules to settle the content of dignity and its place within the order of values. This thereby replaces conflict in social relationships with stability and predictability by ensuring that people, as well as judges, do not rely on their own particular conceptions of moral values.²⁰ On this account, the rule of law appears to be connected to dignity in settling the meaning of that concept, but only in order to solve the kinds of problems that it supposedly creates.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid 221.

¹⁸ Gearty (n 5) 70.

¹⁹ Ibid 61.

²⁰ A similar strain of argument can be found in the work of Raz who argues that one of the virtues of the rule of law is in "stabilizing social relationships which but for the law may disintegrate or develop in erratic and unpredictable ways" Raz 'The Rule of Law and its Virtue' (n 2) 220.

2.2.3. Equal Respect

A very different approach to the rule of law, which connects with dignity, requires the justification of state force on principled grounds. Perhaps the leading and most well-known formulation of this approach to the rule of law is the one proposed by Ronald Dworkin who has argued that it entails treating people with equal concern and respect.²¹ This requires that the community act in a 'principled and coherent manner toward all its citizens' by extending to 'everyone the substantive standards of justice or fairness it uses for some.'²² On this account, differences between the rights of citizens should not be based on unreasonable or arbitrary distinctions, but must be objectively justifiable in reference to principle.²³ There are therefore two key strands to this form of the rule of law. The first is the presupposition that the existing body of legal material should be interpreted, subject to constraints of fit, in line with the best possible theory of justice and fairness.²⁴ The second is that the best conception of justice and fairness should be extended to all without unfair distinction. Importantly, for Dworkin, these responsibilities are imposed on all members of the community who are expected to govern their behaviour in reference to those principles of justice and fairness that the community shares.²⁵

The equal respect-based approach to the rule of law entails an important role for the individual in identifying the public standards of the community.²⁶ This role presupposes a wider view of the individual capacities that need to be respected in order to treat people with human dignity. The stability-based approach replaces recourse to underlying moral values or reasons that a person may have to act in favour of a set of clear and authoritative regulations.²⁷ The equal respect-based approach treats individuals as capable of moral agency by requiring an individual, when 'deciding how to treat his neighbour when their interests to conflict, to interpret deciding the common scheme of justice to which they are both committed.'²⁸

²¹ See Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2008) 176-177; Ronald Dworkin's, *Law's Empire* (Hart, 2010).

²² Dworkin 'Justice in Robes' *Ibid* 165.

²³ Allan, *Constitutional Justice* (n 6) 39.

²⁴ Dworkin, *Law's Empire* (n 21) 407.

²⁵ *Ibid* .

²⁶ Dworkin, *Law's Empire* (n 21) 189.

²⁷ Dworkin, *Justice in Robes* (n 21) 175.

²⁸ Dworkin, *Law's Empire* (n 21) 189; Trevor Allan, 'Dworkin and Dicey: the Rule of Law as Integrity' (1988) 8 *Oxford Journal of Legal Studies* 266.

Dworkin relates these features to concepts often connected to human dignity, including, most importantly, personal responsibility and the ideal of self-legislation.²⁹ This is because each member of the community is said to be under a personal responsibility to identify for themselves the moral scheme of the community and to treat themselves as the author of that moral scheme.³⁰ There is, underlying this construction, a strong Kantian element and therefore a possible conceptual connection to the moral autonomy-based concept of human dignity.³¹ This construction of human dignity, it will be recalled, is premised on the rational capacity of individuals to guide their conduct by reasoning to universal moral principles which they are understood to impose upon and 'will' for themselves.³² The second model of the rule of law engages and respects a variation of this moral capacity. An individual is expected to determine the best scheme of moral principles shared by the community, which must be capable of being rationally extended on a universal basis to all members and for which each member identifies as *their own* scheme.³³

The central focus of moral agency, as an aspect of human dignity, also entails certain burdens and duties on the state in its treatment of the individual. Significantly, this account of the rule of law depends on the assumption that the coercive power of the state must be capable of justification on principled grounds and this justification must be directed to the parties affected.³⁴ Trevor Allan has argued that this aspect of the Dworkinian account is necessary to respect human dignity in the way that it seeks the co-operation and rational consent of those affected by the outcome of a particular legal decision.³⁵ This can only be satisfied, according to Allan, when a decision is underpinned by values that a citizen is capable in principle of accepting.³⁶ This can be understood to respect moral agency in the way that it appeals to the capacity of the individual to understand, as well as consent to, the reasons and values justifying the outcome.

Respect for moral autonomy does not exhaust the possible conceptual connections between this construction of the rule of law and human dignity. First, Dworkin argues

²⁹ Ibid 189, 199.

³⁰ Ibid.

³¹ See p 41.

³² Ibid.

³³ Dworkin, *Law's Empire* (n 21) 189.

³⁴ Allan, *Constitutional Justice* (n 6) 40.

³⁵ Allan, *Constitutional Justice* (n 6) 65.

³⁶ Ibid 65

that his conception of the rule of law is a 'rights conception', as opposed to a 'rule-book conception', which 'presupposes particular rights. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.'³⁷ Clearly, this could include the protection of human dignity-based rights. Indeed, in later works, Dworkin has argued that any intelligible scheme of justice will include a conception of dignity.³⁸ These rights must also be extended on an equal basis. This entails a further possible connection to human dignity in that, according to Dworkin, it ensures that 'each person is as worthy as any other.'³⁹ According to Dworkin, if the practices of a community demonstrate a particular commitment to certain principles, it must extend those principles to all if it is to treat each person's life as equally important and that each member must express concern for the well-being of each of the other members.⁴⁰

2.3. Dignity at the Crossroads

The preceding analysis has argued that human dignity stands at the crossroads between two major conceptions of the rule of law. It has shown how these concepts of the rule of law differ depending, at least, in part, on a consideration of those capacities of humanity that must be respected in order to treat someone with human dignity. The first model of the rule of law, requiring the stability provided by clear rules, is understood to respect the capacity of individuals to plan their future. However, on some accounts, this need only arises because concepts like dignity, as part of moral reasoning, give rise to conflict and clashes of power. In contrast, the second model of the rule of law, requiring principled justification, respects the moral reasoning of an individual, requiring them to extend the moral dimensions of decision making to all members of the community, treating each member as equally important. Unsurprisingly, due to the disagreement, each conception poses problems for the other about how best to respect human dignity.

The stability of rules model of the rule of law, for instance, can be criticised for its formalism and the view that the rule of law is merely instrumentally valuable. Raz, for instance, argues that the primary virtue of the rule of law is efficiency, which is a non-moral value. Conformity to the rule of law enables the law to effectively guide the

³⁷ Ronald Dworkin, *A Matter of Principle* (OUP, 1985) 11.

³⁸ See Ronald Dworkin, *Justice for Hedgehogs* (Belknap: Harvard University Press 2011).

³⁹ Dworkin, *Law's Empire* (n 21) 213.

⁴⁰ *Ibid* 200.

behaviour of citizens to whatever ends the law is put. In order for obedience to be possible, law must be capable of figuring in the practical reasoning of the citizen. In this regard, efficiency is a virtue which is morally neutral as to the ends to which the law as an instrument is directed. Whether it does have moral value depends on whether the aims of the legal system are morally good. Thus, the rule of law does not claim a positive moral virtue and, as such, should not be confused with promotion of human dignity.⁴¹ It only claims a negative virtue in terms of reducing the risk of a particular form of harm to dignity which only the law itself makes possible. That is, it limits the evil of frustrating expectations and exercise of arbitrary power, which are dangers that only the law creates.⁴² Observance of the formal requirements is necessary if the law is to avoid violating human dignity, but this is not the primary virtue or justification of the rule of law. Dignity does not require establishment of a legal system based on the rule of law, nor does conformity to the rule of law enhance respect for dignity.

This contrasts with the view of Lon Fuller whose basic precepts of the rule of law are largely similar to Raz's formal requirements. Fuller claims that 'law is – the enterprise of subjecting human conduct to the governance of rules.'⁴³ Fuller believes that conformity to the rule of law is a necessary condition for the protection of human dignity as it treats the citizen as a responsible and rational agent capable of 'understanding and following rules, and answerable for his defaults.'⁴⁴ This is particularly the case with the precepts of natural justice, as aspects of the rule of law, which are not explicable by reference to efficient governance alone.⁴⁵

The rule of law, as an aspiration to restrain the use of arbitrary force, over regulation and possible contingency in human affairs is associated with an orientation towards a particular conception of the person as a rational agent.⁴⁶ Through the necessary constraint of regulation of behaviour the rule of law establishes spheres of optional conduct that 'make space for choice and self-constitution' that are independent of official whim.⁴⁷ This is not to say that the rule of law exhausts the requirements of human dignity. Those who follow Fuller tend to recognise that the observance of the

⁴¹ Raz, 'The Rule of Law and its Virtue' (n 2) 224.

⁴² Ibid 211.

⁴³ Lon L Fuller, *The Morality of Law* (Yale UP, 1964) 130.

⁴⁴ Ibid 162.

⁴⁵ See Allan, *Constitutional Justice* (n 6) 55.

⁴⁶ Stephen Riley, 'Human Dignity and the Rule of Law' (2015) 11 *Utrecht Law Review* 91,

⁴⁷ Ibid 101.

formal requirements are not equivalent to full respect for human dignity, and is only one dimension of a 'morally healthy relationship' between the government and the governed.⁴⁸ The rule of law entails a substantive constraint on power, and otherwise plays a role in limiting other forms of unjust goals of government, with a commitment to establishing the conditions under which a person is capable of planning their affairs and making important choices.

For a Fullerean, efficiency does not explain the virtue of the rule of law, as it appears obvious that in many circumstances a totalitarian government seeking malevolent ends may more readily achieve those ends by violating the rule of law. The rule of law is likely to 'curtail the efficiency for evil of an evil government because it systematically restricts its freedom of manoeuvre'.⁴⁹ There is, in this respect, a 'deep tension between ruling by law and systematically pursuing unjust ends'.⁵⁰ According to Murphy, it is difficult to envisage an alternative system of governance, not based on the rule of law, that is capable of treating citizens as 'responsible and self-directed agents in the way and to the extent that a legal system does'.⁵¹ The alternative to the rule of law is the subjection of persons to a particularly humiliating condition by creating 'uncertainty and fearfulness because one's fate lies in the hands of official whim [and]...can choose at will to stigmatize conduct as criminal'.⁵² The rule of law is not therefore merely a negative virtue by which a risk of a violation of dignity is avoided. It is a positive value that establishes a minimal set of conditions under which social co-operation, reciprocal reliance and mutual trust is possible.⁵³ Whilst Raz focuses on the perspective of the government, treating the rule of law as a means of successful governance, Fuller places greater emphasis on the value of the rule of law to the citizen. From the alternative perspective of the citizen the rule of law is 'primarily a set of constraints that limit the pursuit of [government]...objectives in the interests of individual autonomy and security'.⁵⁴ It is valuable as a means of creating a predictable environment in which a person can confidently pursue certain conduct in the knowledge that it is independent of the will of another and can rely on

⁴⁸ Colleen Murphy, 'Lon Fuller and The Moral Value of The Rule of Law' (2005) 24 *Law and Philosophy* 239, 246.

⁴⁹ Raz, 'The Rule of Law and its Virtue' (n 2) 56.

⁵⁰ Colleen Murphy, *A Moral Theory of Political Reconciliation* (CUP, 2010) 62.

⁵¹ *Ibid* 54.

⁵² David Lubban, 'The Rule of Law and Human Dignity: Reexamining Fuller's Canons' (2010) 2 *Hague J. on Rule of Law* 29, 41.

⁵³ Murphy, *A Moral Theory of Political Reconciliation* (n 50) 61-64.

⁵⁴ Allan, *Constitutional Justice* (n 6) 55.

others to similarly act in accordance with a common scheme of rules.⁵⁵ It also limits the 'individual's vulnerability to official direction on unfair or unpredictable grounds'.⁵⁶

Trevor Allan has suggested that a Fullerean judge will inevitably seek the full meaning of the rule of law in those values of dignity which explain adherence to the precepts of formal justice. In the practice of adjudication on the concept of the rule of law, a judge is 'bound to have constant regard to its underlying rationale, and the values which that rationale implies'.⁵⁷ According to Allan, these 'values, in turn, will have important implications for the substantive content of law'.⁵⁸ Thus, unlike Raz, there is an expanding outwards from the formal elements which are argued for on grounds of dignity to substantive elements that carry over to the ends of law.⁵⁹ Riley has similarly criticised Raz for suggesting that the aspiration of the rule of law is successful government. He argues that, taking account of the conception of the person the rule-based conception of the rule of law seeks to protect, the true aspiration of the rule of law is that of justification, which means a concern with justifying the use of power to a responsible agent. In this respect, the rule of law is not only concerned with limiting a certain form of rules, but also with ensuring that the kind of rules are endorsed that are 'consistent with human interests or agency and capable of being consented to...rule of law is the...self-constraint of those who could otherwise tyrannically impose a self-serving form of order without concern for the common good'.⁶⁰

The second potential criticism of the stability of rules is it emphasises on conflict as an aspect of the human condition.⁶¹ Each person may disagree, as a matter of opinion, about what is necessary for right action, including ideas about the content of dignity, which is resolved by rules that replace the moral considerations giving rise to conflict.⁶² This approach can be problematic in downplaying the co-operative and interdependent aspects of humanity, including the importance of common striving,

⁵⁵ Ibid 58.

⁵⁶ Ibid 55.

⁵⁷ Trevor Allan, *Law, Liberty and Justice: the Legal Foundations of British Constitutionalism* (Clarendon, 1993) 27.

⁵⁸ Ibid.

⁵⁹ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2010) *New York University Public Law and Legal Theory* 2. See also Fuller (n 3) 665-666.

⁶⁰ Riley, 'Human Dignity and the Rule of Law' (n 46) 95.

⁶¹ Gearty (n 5) 61.

⁶² Gearty (n 5) 62.

concerns and aspirations, even in a world characterised by differences.⁶³ More importantly, from the perspective of an investment concept of dignity, it is premised on a particular conception of power, as well as reasoning, which is disembodied and makes few distinctions between types of knowledge upon which people act. Power, for instance, is largely conceptualised by Gearty as the pursuit of authority, control, or influence over decision-making in the choice of ethical values to the loss of others. It is as if 'power were a possession to be fought over.'⁶⁴ This contrasts with a more productive and co-operative conception of power inherent in a Spinozist and Deleuzian image of the human subject at the heart of the investment concept of dignity.

Power, on this account, entails a capacity to act, to affect and be affected, which is not about the successful control of one group over another. It is concerned with organising relations with others that compose, join and unite to mutually maintain and maximise affectivity and activity. Reason is not opposed to this concept of power, but concerns the development of common notions, which is the perception and comprehension of what is 'common between my body and another that affects me with joy'.⁶⁵ It is, on this account, the more passive aspects of our selfhood underpinned by inadequate ideas that drive us towards conflict, such as hatred, disgust, revenge and envy. This thereby requires us to be attentive to the way in which law is not just a command, replacing our reasons for acting, but embodies a kind of knowledge, which can be more or less adequate, depending on whether it enhances or diminishes the development of the capabilities of each person in a relational network.⁶⁶

Principled justification, in contrast to the stability of rules can be subject to the opposite criticism that it overemphasises the rationality of agents to converge on the best scheme of community principle. Individuals are trusted as moral agents capable of understanding the complete set of moral reasons that underlie the existing legal practices in the right way.⁶⁷ Importantly, this employs a protestant conception of the morally autonomous agent who is capable of 'imposing purpose on an object or

⁶³ "[C]itizens of life differ but share at least some common concerns." Mark Olssen, *Liberalism, Neoliberalism, Social Democracy* (Routledge 2010) 111.

⁶⁴ Etienne Balibar, *Spinoza and Politics* (Verso 1998) XIX.

⁶⁵ Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light 1988) 56.

⁶⁶ See Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporality* (Routledge, 1996) 113.

⁶⁷ Dworkin, *Law's Empire* (n 21) 190-191.

practice'.⁶⁸ This approach can be criticised for conceptualising the moral capabilities of individuals at a very abstract level. In the pursuit of a coherent account of principles, a person is inevitably led away from an appraisal of lived experience, including the issues and problems faced by real people in a particular case, to a grand overarching scheme of principle that becomes increasingly more abstract. It *assumes* that those principles are simply there *a priori* to be understood and then applied, rather than being refined, deepened or corrected through application in the encounter.⁶⁹

The second model can also be challenged for undermining security on the grounds that people may have very different perceptions of the scheme of principle the law embodies.⁷⁰ It focuses on the herculean man who independently seeks to identify and interpret the existing scheme of community principle. This contrasts with a view of reason that is understood not in the process of thinking separately from others, by finding the 'goodness or badness in the object', which for Dworkin is legal practice, but in our encounters with others, through the relations of mutual agreement and association.⁷¹ Reasoning, on this account, is very much an embodied experience that subverts a mind-body dualism. This is because reasoning to an idea is 'not a picture or an image of things deposited "in the soul"; it is an action on the part of a thinking individual, who at the same time is affected by other individuals (human or not), or on the part of several individuals thinking together, that is, forming the same idea.'⁷² Ideas thus form not merely as abstract image in the mind, to be imposed on practice, but in reference to the particularities of the encounter with specific cases and individuals.⁷³

2.4. Conclusion

It has been established that the stability of rules and principled justification concepts of the rule of law are subject to certain problems. The difficulties arise, in part, due to the way in which each of the models conceptualise the moral and reasoning capabilities of individuals as aspects of human dignity. Principled justification prioritises the rationality of humanity. Specifically, a Kantian variant of moral

⁶⁸ Dworkin, *Law's Empire* (n 21) 413.

⁶⁹ *Ibid* 181.

⁷⁰ See p 19.

⁷¹ Gatens (n 66) 129.

⁷² Balibar (n 64) 108.

⁷³ *Ibid* 101.

autonomy in which individuals self-legislate the moral principles shared by the community and govern themselves by those principles. In contrast, the stability of rules places far less faith in the ability of individuals to morally agree on the appropriateness of conduct without recourse to clear and settled rules. One of the dangers of this approach is that it does not sufficiently differentiate between the passive and destructive ideas which legal rules may embody. There is, in both approaches, a rather narrow consideration of dimensions of our humanity to be respected, as opposed to a holistic approach, which encompasses both passive aspects that may lead to conflict, as well as active dimensions, which are found in composing relations with others and developing an adequate idea of how those relations lead to a joyful increase in the power to affect and be affected.

3. Stability in the Promotion of Human Dignity

3.2. Introduction

There is, it is argued, a need to reconceptualise the idea of human dignity connected to the rule of law to accommodate both stability and justification. These are both needed on the basis that humanity is never entirely active or passive, reasonable or unreasonable. It is thus argued that a stable 'plan of life' is required in order 'to render life and the state secure' as well as protect individuals from the dangers or relationships based on the passive dimensions of our humanity.⁷⁴ On the other hand, justification is needed in order to promote the active dimensions of our humanity, including enhanced understanding of those relationships and compositions that are destructive or productive. This section therefore explains the manner in which stability and justification are connected with, as well as promote, investment dignity.

3.3. Active Agency

It was established in chapter two that individuals are in a process of becoming active. Individuals may begin with passive desires or knowledge, which over time can be replaced with more active ones as individuals understand why certain encounters are productive. This enables individuals to invest in ordering and selecting a set of productive encounters in a plurality of ways, with all individuals becoming unique in the process.⁷⁵ A productive encounter being defined, as discussed in chapter two, as those situations in which people compose relationships

⁷⁴ Benedict Spinoza, *A Theologico Political Treatise* (Cosimo, 2007) 59.

⁷⁵ Balibar (n 64) 107.

with others that mutually enhance their power of acting and joyful passions. People, individually and collectively, can be subject to passive desires, in the form of harming other people, on the grounds of an irrational hatred or disgust based on an inadequate idea of the dignity of the other as a source of a productive encounter.⁷⁶ These inadequate ideas are based not on reason, but on imagination, entailing various illusions and superstitions that can lead to destructive tendencies.⁷⁷ It is in light of this combination of rationality and passivity that stability is needed. Stability seeks to solidify the processes of becoming active, against the destructive power of passivity. The ‘overriding aim is the establishment and maintenance of relatively stable forms of interaction between different kinds of force.’⁷⁸ The rule of law in emphasising stability recognises that those in power cannot be wholly trusted to use it reasonably, as they can be collectively drawn to passive desires in the same way as they individually can.⁷⁹

3.4. Insecurity Vulnerability

The promotion of stability against destructive passion is closely related to protecting the individual against insecurity vulnerability. The establishment of stability protects individuals from the anxiety that they may experience about how state coercion will be applied in the future, or how other people might interact with them. In a society where individuals are overwhelmingly subject to the passive will of others, because of wide discretionary powers, or unclear obligations, it is likely to encourage fear about engaging in particular activities, because the individual may feel insecure about the consequences that might result.

The ‘insecurity vulnerability’ that results from instability is a particular threat to investment dignity. Human dignity protects diverse channels of human activity for individuals who are always in the process of becoming, so that they can invest themselves in productive encounters that conform to their own desires. In being subject to the arbitrary will of others, an individual cannot feel secure in that process. The lack of sufficient stability has a potentially chilling effect in terms of creating fear of engaging in potentially productive, creative and experimental encounters, as

⁷⁶ Beth Lord, *Spinoza’s Ethics* (Edinburgh University Press 2010) 123

⁷⁷ Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press 2004) .

⁷⁸ Paul Patton, ‘Deleuze’s Political Philosophy’ in Daniel Smith, *The Cambridge Companion to Deleuze* (Cambridge University Press, 2012) 203

⁷⁹ “...The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.” *R v Somerset County Council, ex parte Fewings* (1995) 1 All ER 513, 524

individuals cannot know whether others may punish them on the basis of passive desires.

3.5. Active Striving

It has been established that stability is an important means by which to protect individuals from destructive passion. On this account, the 'State and rule of law [are] needed to prevent people harming one another.'⁸⁰ The rule of law is a guarantee to ensure that we can 'persevere in our being', which encompasses our active striving in 'seeking survival and well-being.'⁸¹ This conceptual connection to dignity does not mean that stability is important for its own sake, separate from a consideration of how it contributes to the security and development of the mental and physical capabilities of individuals. Investment dignity would thereby impose constraints on the possible content of law, specifically restricting legal norms that appear underpinned by passive desires in which people *imagine* that capturing, dominating, exploiting, or limiting the power of another is to their advantage.⁸² Not all power is, as was discussed above, concerned with conflict. In fact, the power of individuals is productive as creative and diverse potential, developed in the process of becoming.

The investment conception recognises the value of encounters between individuals in increasing their powers of acting. The combination of different individuals is not always a clash of power, but rather it can promote potentiality. It is therefore rational that individuals join with other powers in productive encounters. This has an important consequence in recognising that a state or community is *more* powerful to the extent that it is based on compositions or relationships that allow each person to fully develop their power and capabilities.⁸³ Stable structures are needed to ensure the process of becoming different and active can continue, whilst deterring harmful and destructive forces from interfering with that process. This therefore leads to a consideration of the other dimension of the rule of law, in the form of justification.

⁸⁰ Beth Lord, *Spinoza's Ethics* (Edinburgh University Press 2010) 123.

⁸¹ Benedict de Spinoza, *Ethics* (New York: Hafner 1949) 135, III, Prop VI.

⁸² Lord (n 80)122.

⁸³ See for a discussion on this point, Gatens (n 66) 114-115.

4. Justification as a Condition of Dignity

4.2. Introduction

This section highlights the ways in which justification is interconnected with an investment conception of dignity. It will be argued that the rule of law must ensure that it does not treat individuals as merely passive objects; law is 'quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog.'⁸⁴ The rule of law recognises the active nature of agency; by attempting to ensure that people possess an adequate idea of their actions and the reasons behind the imposition of an obligation, or the failure to confer an opportunity. In this light, the law must be capable of justification by reference to some adequate idea about why it is productive in increasing powers of acting to those most affected.

4.3. Active Agency

In light of the fact that the investment conception of dignity recognises that humans are to some degree active beings, there is a commitment to the view that individuals are capable of developing adequate ideas about why some activity is productive, whilst other activities are destructive. Importantly, one of the main ways that the rule of law attempts to realise this dimension of dignity is through the way in which judicial hearings aim to justify a verdict to an individual. It is suggested that the point of a trial is to seek the co-operation and contribution of the citizen, whilst attempting to justify the verdict to the individual by eliciting their consent.⁸⁵ This is reflected in the requirement that an individual should be heard in proceedings that apply to them. This means that individuals are recognised as having a 'view of perspective of their own to present on the application of the norm to their conduct and situation.'⁸⁶

In light of the fact that justifying a decision on the basis of reason is developed in common compositions with others, a trial is the site of the development of reasons necessary in order for all parties to have an adequate idea of why certain action is prohibited, or why certain action is necessary. As was highlighted in chapter two, reason is based on the development of adequate ideas, which entails an understanding of what is common to different bodies, rendering the body more capable, whilst also entailing an understanding of destructive compositions.⁸⁷ A trial

⁸⁴ Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 the Cambridge Law Journal 200, 206..

⁸⁵ Allan, *Constitutional Justice* (n 6) 113.

⁸⁶ Waldron, 'How Law Protects Dignity' (n 84) 210.

⁸⁷ Deleuze, *Spinoza* () 55.

can justify law on the basis of reason if it formulates adequate ideas between the different parties about why a particular relationship is productive or destructive. The justification of law is therefore not based on abstractly imposing a purpose or value on an institution, but is rather developed in the encounter between different groups.

The preceding account is a somewhat idyllic view of the legal process, for it envisages it to be a productive encounter that is important to the process of becoming-active of those affected by the system, but it not without support in terms of the rehabilitative and reason sharing dimensions of law. The individual, through cooperation, is educated in understanding the need for norms, which can in turn lead them to have more adequate ideas of why their activity was destructive and why they should become different into the future, or why the decisions of the authorities were necessary. This approach can fundamentally be connected to the becoming and unfolding nature of human personality that was directly connected to dignity as potentiality. The cooperative nature of the legal process can be a means to enable a person to construct a more productive future becoming in seeking to understand why it is to a person's advantage to promote common productive compositions.

4.4. Exclusion Vulnerability

The forgoing analysis has recognised the importance of justification as a requirement of the rule of law. It is suggested that justification is not plausible where the norms themselves have a content that is destructive or oppressive, as it is not possible to impart adequate ideas of why a norm protects what is common to different bodies and our own, so that a person can become active into the future, if that norm is itself based on destructive passions. 'Common notions' being adequate ideas that properly capture the way in which relations between two bodies adapt themselves to one another to inspire each person with joy and an enhanced capability to affect and be affected.⁸⁸

This dimension of justification immediately rules out any law that is based on the belief that some groups are unworthy, useless, or unpopular. This links in to the protection of individuals from exclusion vulnerability. The second chapter explained that some people can be rendered vulnerable because of the way in which social structures exclude the needs or concerns of particular groups. This is because those structures are designed around a paradigm from which other groups fall short. In

⁸⁸ Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light, 1988) 54.

many cases, those who fall outside of the paradigm are treated with various degrees and forms of indignation, ranging from pity and disgust, to pure hatred. These attitudes are incompatible with the idea of the equal potentiality of all and they cut off the creative nature of becoming different, in which potential unfolds in diverse ways, not merely towards a majoritarian norm.

The amelioration of exclusion vulnerability cannot, however, purely be realised by justifying the imposition of burdens, or the assimilation of excluded into an existing majoritarian standard. It is argued that the inclusion of groups must go further than this, in that it requires the law be reconstructed to take account of the difference in the process of creative becoming. Thus, it is not just necessary to assimilate people into the current model, but also to change the very nature of public institutions in order to accept difference as valuable in itself. The amelioration of exclusion vulnerability therefore requires not only the absence of burdens, but also the positive action of the community to rectify institutional exclusion. There can be no passivity or indifference, specifically towards the needs of the most vulnerable.

4.5. Conclusion

The connections between the justification and stability dimensions of this construction of the rule of law are mutually supportive in their advancement of human dignity. Stability protects active agency against the dangers that come with the imposition of passive desires, whilst justification requires that the content of law is productive and based on adequate ideas, requiring that law be given a content that is premised on reason and common notions. The rule of law is therefore complete, in the realisation of its ideal, when it exists as a stable framework capable of protecting and promoting productive encounters, against the expression of passive indignation.

5. The Rule of Law as a Productive Encounter

5.2. Introduction

The two dimensions of stability and justification have turned out to be equally important dimensions for the protection of investment dignity. It is now important to consider how these two dimensions can be mutually supportive. It will be argued that these two dimensions can work in tandem to protect investment dignity, if the rule of

law is re-imagined as an active encounter.⁸⁹ It is neither an abstract set of principles, nor fully determinate set of rules. The law is a body of knowledge, which can be more or less adequate to the extent that it aids ‘an individual in the fullest development of his powers.’⁹⁰ It is a body of knowledge that exists in a characteristic relationship of motion and rest between its component parts, which is an “open multiplicity.”⁹¹ The characteristic relationship of the law, as a body of knowledge, is creatively modified in the process of application, in other words in the encounter with those directly affected. In this way the law is reflective of dignity, for it is based in creative potentiality; it is a potential for transformation.

It will be argued that the unfolding of potential occurs case by case; the rights of individuals being actualised in each case as a new event. In this light, the law is justified in the event of application or activity. At the same time, it will be argued that that, in light of the combination of passivity and rationality in all agents, there is a need for assurance that rights are firmly based on adequate ideas. Some degree of certainty is therefore to be expected about whether a legal encounter is productive, which will require ongoing dialogue with those affected.

5.3. Law as Knowledge

It is common to conceive of law, including as an aspect of the rule of law, as a set of clear commands or decrees laid down by the sovereign.⁹² The rule of law, in this regard, is sometimes purely conceptualised as making the law more efficient in serving the purposes of the sovereign.⁹³ This approach to law, as Moira Gatens has argued, prepossesses a particular understanding of human personality that treats the intellect and will as separate faculties, so that a body can arbitrarily set down a particular rule without affirming any particular ideas or, in the act of willing a particular rule, replace those ideas upon which a person might act.⁹⁴ This contrasts with a Spinozist conception of human personality, central to investment dignity, which ‘denies that intellect and will are separate faculties.’⁹⁵ The will is not merely an expression of the desires of a person or body, but rather the ideas and concepts that

⁸⁹ See Gilles Deleuze, *Spinoza: Practical Philosophy* (n 88); Baruch Spinoza, *Ethics* (trs by G.H.R. Parkinson, OUP, 2008) 54-55.

⁹⁰ Bekaief, *Spinoza's Philosophy* (Mouton 1971) 104.

⁹¹ Alexandre Lefebvre, *The Image of Law: Deleuze, Begson, Spinoza* (Stanford University Press, 2008) 204

⁹² Gatens (n 66) 113.

⁹³ See Raz ‘The Rule of Law and its Virtue’ (n 2) 225.

⁹⁴ Gatens (n 66) 114-115.

⁹⁵ Ibid.

they affirm. Law thus operates more like a body of concepts and ideas about the 'good' (productive) or 'bad' (destructive) ordering of different types of encounters, compositions and relationships.⁹⁶

This has a number of important consequences for understanding law. Firstly, it means that law can be more or less adequate, depending on whether it encompasses ideas that are based on reason, which entails composing relationships that aid the development of the powers of each person. In contrast, law can be inadequate when it is based on illusions or fictions that affirm forms of sociability based on capture, dominance or oppression, which can be absorbed by society and affect the character of the population.⁹⁷ Secondly, understanding law as knowledge has a potential beneficial effect on the development of capacities of persons. Treating law as a system of commands, or independent rules, is not the same as knowledge. As Gatens argues, it can, 'at best, only imitate knowledge.'⁹⁸ A system of command acts more through guiding behaviour through passive aspects of personality, such as 'fear of punishment or hope of reward.'⁹⁹ An individual is more passive and less active in a society of law as command as it 'encourages obedience without understanding' which renders people 'incapable of either acting or expanding their powers of acting.'¹⁰⁰ A system of law, understood as knowledge, is more likely to lead to a strong form of sociability that increases and develops the capacities of individuals to act. Finally, as will be explored further below, treating law as a body of knowledge gives it a more dynamic quality than a system of commands.

5.4. Law as an Encounter

The model of legal judgment that characterises the stability of rules and principled justifications is that of subsumption, whereby a case is either decided in accordance with a clear rule or in accordance with a set of abstract principles.¹⁰¹ Subsumption is considered necessary if the law is to respect human dignity. What both these

⁹⁶ Ibid.

⁹⁷ Ibid 116.

⁹⁸ Ibid 116.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ See Lefebvre, *The Image of Law* (n 91); Paul Patton, *Deleuze and the Political* (Routledge 2000) 109-131.

accounts miss in connecting the rule of law to dignity, is that it is more than merely autonomy and it is not just a fixed ideal that needs only to be applied.¹⁰²

Dignity as investment, as has been seen, is a concept that is marked by the creative process of transformation that unfolds over time. As a direct result of this, it is not possible to predict *a priori* exactly what a person is capable of doing or being, as they engage over life in various experimental encounters, in ways that either increase or decrease their power of acting. Our understanding of dignity is only formed through the development of adequate ideas, which represent what is common to bodies in our encounter with others. This is quite unlike the stability of rules or principled justification framework, as dignity can be given further content through our common understanding of what promotes our potential in specific circumstances, which can be experimental and new. However, there can be relative certainty concerning what enhances or diminishes our dignity gained from lived experience. It is, as argued in chapter two, possible to gain knowledge about how particular combinations, encounters or assemblages may be destructive or productive, which is knowledge gained from human experience that enables an art of organising 'good encounters' as well as the prevention of 'bad encounters'. It is clear, for instance, that torture is a universally prohibited practice that damages the dignity of both the victim and the torturer.¹⁰³ However, even then, it is not possible to have a complete understanding of a practice, such as torture, in the abstract. It must always take account of individual experiences and the particular circumstances of the case, such as the state, age and health of the victim, as well as the surrounding social environment in the form of 'present-day conditions'.¹⁰⁴ On this account, an adequate understanding of what will enhance or diminish dignity is understood, modified and enriched with each new encounter or application to a case in a particular social milieu.

This investment concept of dignity has some significant repercussions for the rule of law. It has a potentially transformative impact in terms of existing paradigms, in the way that law is no longer needed as subsumption in order to protect dignity. As Gadamer reminds us, understanding is 'not merely a reproductive but always a

¹⁰² Dupré, 'Dignity, Democracy and Civilisation' (2012) 33 Liverpool Law Review 263, 277.

¹⁰³ See Rt Hon Baroness Hale of Richmond Justice of the Supreme Court of the United Kingdom, 'Dignity' (Ethel Benjamin Commemorative Address, New Zealand, July 2010) .

¹⁰⁴ *Selmouni v France* [1999] ECHR 66.

productive activity as well.¹⁰⁵ It is only possible to have a complete understanding of how the law protects (or should protect) dignity when rights are actualised in specific decisions in particular cases. The law is properly an activity that creates affects in particular circumstances through the way it assembles different forces, whereas rules or principles are merely ‘virtual singularities.’¹⁰⁶ To have an adequate idea therefore requires an understanding of actual affects that can only be discerned in the event of application.

This is not an entirely novel approach to the rule of law, for, as Gadamer long ago argued, there is no separate process by which it is possible to understand in the abstract a legal principle, which can then be merely applied to a case. Rather, application is part of understanding, so that a ‘case involves not merely applying the universal principle according to which it is judged, but co-determining, supplementing, and correcting that principle.’¹⁰⁷ An understanding of a principle can thus actually be improved, shaped or discovered through the experience of applying it, rather than it being determined completely ‘independently of the situations in which they must be applied.’¹⁰⁸ The authority of law, on this account, is found not in an abstract code of principles or rules, which are immovable, but in the active dialogue that occurs between the need for stability or tradition and change or transformation in relation to a conversation with real people over time.

This creation or modification of norms to deal with the particularities of the encounter collapses the traditional distinction between the justification of a norm and its application. The traditional distinction understands norms as relating to a number of scenarios that it needs only to be applied to. Application only makes the norm ‘more determinate.’¹⁰⁹ In contrast, focusing on the encounter recognises that applications modify the ‘norm in a creative application.’¹¹⁰ The collapse between the stages of justification and application mean that the law is constituted through engagement with concrete situations. Alexandre Lefebvre, in his excellent commentary on the implications of Deleuze and Spinoza to legal thought, has provided a formalised image of this form of judicial enterprise. He argues that for both writers the

¹⁰⁵ Hans Georg-Gadamer, *Truth and Method* (Garrett Barden and John Cumming trs, Sheed and Ward, 1975) 296.

¹⁰⁶ Paul Patton, *Deleuze and the Political* (n 101) 127.

¹⁰⁷ Gadamer (n 105) 39.

¹⁰⁸ Simmonds (n 6) 145-148.

¹⁰⁹ Lefebvre, *The Image of Law* (n 91) 54.

¹¹⁰ *Ibid* 45.

encounter is the transcendental condition of thought, an 'encounter imposes itself.'¹¹¹ The encounter cannot always be subsumed by a preconceived rule. This leads to the formulation of a problem 'able to create concepts to adjudicate the encounter.'¹¹² It is through the creation of the concept that a problem gains a deeper sense and determination. Importantly, however, the creation of a concept is realised through reciprocal engagement with the characteristic relationship of the existing parts of the law, or ideas, modifying them into a new assemblage in a way that it is actively capable of advancing the problem. In this regard, 'various actualised elements of the pure past of law entertain new and creative relationships.'¹¹³ This model of adjudication, by focusing on the encounter, can advance dignity to the extent means that the law is not treated as fixed but capable of addressing the specific problems that unfold over time.

5.5. The Becoming of Law

It has been established that every new case or situation of application of law is an event that entails an encounter between various different actors. Notably, each event is not a pure repetition of identical facts, but rather a new encounter with particular circumstances and stakeholders. In reflecting this dimension of dignity, the movement between each case as an encounter is properly defined as the "pure movement evident in the changes between particular events."¹¹⁴ The law as a characteristic assemblage of component parts has the potential to move through each case, adapting and changing its characteristic with each new encounter. This is the becoming of the law, in so far as the characteristic relationships of the components alter between encounters, making the law genuinely creative. However, the law can become more adequate, to the extent that it has a 'greater or less appreciation and affirmation of its capacities.'¹¹⁵ This includes 'allowing itself to be affected by those things that enhance its powers and encourage the formulation of common notions.'¹¹⁶

It is suggested that this process of becoming is an immanent part of the legal process in its current form. A particularly useful example of the becoming of law is

¹¹¹ Ibid 177.

¹¹² Ibid 210.

¹¹³ Ibid 216.

¹¹⁴ Cliff Stagoll, 'Becoming' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press 2005) 22.

¹¹⁵ Lefebvre, *The Image of Law* (n 91) 217.

¹¹⁶ Ibid 235.

demonstrable in the transition of the law on marital rape in the UK, culminating in the ECtHR decision in *S.W. v United Kingdom*.¹¹⁷ In this case two men had been convicted of raping their wives. At the time of the act they thought there was a common law immunity protecting husbands against conviction. The issue before Strasbourg was whether the conviction was an illegitimate form of retrospective punishment as prohibited by Article 7 of the Convention. This Article is clearly underpinned by the principle *nullum crimen, nulla poena sine lege*, which is understood to be a core element of the rule of law. In deciding whether Article 7 had been violated the Court -

...[D]id not separate the question of strict lawfulness or legal certainty from substantive considerations. It recognised the interests of justice in having rules that are on the one hand accessible and clear and on the other fair and substantively just.¹¹⁸

The Court held that Article 7 had not been violated on the basis that the punishment was not at odds with its object and purpose, which provides 'effective safeguards against arbitrary prosecution, conviction and punishment.'¹¹⁹ The requirements of accessibility and foreseeability were held to have been satisfied because –

This was an area where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable. In particular, given the recognition of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the adaptation of the ingredients of the offence of rape was reasonably foreseeable..¹²⁰

What is notable is that the law had progressively been changed over a period of time. Originally, judges had developed a legal principle that meant wives were recognised as having consented to intercourse through the covenant of marriage, a consent that could not be 'unilaterally withdrawn.'¹²¹ In light of the consent to the unity of marriage with husbands as the head of the household, husbands were

¹¹⁷ *S.W v the United Kingdom* (1995) 21 EHRR 363.

¹¹⁸ Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) 159.

¹¹⁹ *S.W. v the United Kingdom* (1995) 21 EHRR 363 [34].

¹²⁰ *Ibid* 40.

¹²¹ "The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... she cannot unilaterally withdraw it." *R. v. Roberts* (1986] Criminal Law Reports 188.

believed to have a dominant property interest in their wives, who were likened to the 'subservient chattel'.¹²² However, with each new encounter with a marital rape case there was a gradual erosion of the immunity.¹²³ This process of change concluded with the case of *R v R* that fully removed the immunity.¹²⁴ The Court held that the image of a woman as having impliedly consented was a "common law fiction which has become anachronistic and offensive."¹²⁵ The notion of implied consent was 'artificial because the legal consequences of marriage were not the result of the parties' mutual agreement.'¹²⁶ The existing artificial construction was replaced with a new juridical construction, one in which marriage was a 'partnership of equals.'¹²⁷ This is representative of the way in which norms evolve according to their engagement with concrete situations. As was stated in *R v R*, the 'law...is capable of evolving in light of changing social, economic and cultural developments.'¹²⁸

The law is a continuous unfolding through encounters with present problems and situations. Law is "placed in a constitutive relationship with its outside – *with cases* – which forces it into action and invention."¹²⁹ This constitutive relationship was, importantly, clearly implicit in the decisions taken in *S.W.* by the ECtHR. In this case there was no separate substantive consideration of the dignity of the women from a discussion of foreseeability of punishment. On the contrary, the continuing recognition and certainty about the interests of women was a part of the evidence given for claiming that a development of the law was foreseeable.¹³⁰ It was reasonably foreseeable that rape, as an offence designed to protect the dignity of women, should evolve so as to recognise that no distinctions can be made between women purely on the basis of the nature of the pre-existing relationship that exists between a rapist and his victim. The Court was clearly influenced by substantive considerations of the nature of the act as a component for the determination of whether the object and purpose of Article 7 had been violated.

¹²² *R v R (Rape: Marital Exemption)* [1992] 1 A.C. 599, 616 [per Lord Keith].

¹²³ Working Paper 116 "Rape within Marriage" completed on 17 September 1990, the...Law Commission

¹²⁴ *R v R* (n 122).

¹²⁵ *Ibid* 611.

¹²⁶ *S.W. v the United Kingdom* (1995) 21 EHRR 363 [26].

¹²⁷ *R v R* (n 122) 616.

¹²⁸ *Ibid*.

¹²⁹ Lefebvre, *The Image of Law* (n 91) 59.

¹³⁰ *S.W* (n 126) 44.

The example of marital rape demonstrates how law moves through encounters with concrete situations, in an active and inventive form. This process is potentially capable of protecting dignity in the way that the law can develop adequate ideas of why certain encounters are destructive of life potential, or promote it. Additionally, it demonstrates the need to be vigilant in re-examining past decisions to consider whether they were based on destructive images or inadequate ideas, which are always a possible consequence of the passive dimension of personality. That is, superstitions or illusions that represent confused, partial or mutilated knowledge of persons and their interactions, relationships and connections to other bodies.¹³¹ Thus, marital rape is a destructive encounter based on inadequate ideas, which the law had for too long accepted. The encounter with the victim and her experience allowed for the erosion of this fictional and negative image of women as passive objects. It is, in light of the process of becoming in our understanding of the nature of the encounter with the victim, that the punishment of marital rape cannot be considered arbitrary.

5.6. Stabilising the Becoming of Law

The law as a process of becoming therefore offers the potential for productive metamorphosis, as rights move through a process of adaptation between their actualisation in specific cases.¹³² At the same time, it is important not to lose sight of the importance of stability to the rule of law. The process of the becoming of law is most certainly capable of being productive, but it also carries with it risks. Although experimenting with new compositions with others is potentially productive, it is not always possible to know the full effects of particular combinations. Some encounters may have potentially destructive and unknown effects. This requires on the part of the 'experimenter' a great deal of 'patience and prudence.'¹³³

One of the dangers in law is the possibility that becoming can be directed in an arbitrary fashion according to passive desires that have destructive affect or without a degree of certainty about the potential consequences. This is the danger of the passivity which is inherent in human life, posing particular risks to individuals who

¹³¹ Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light 1988) 19.

¹³² "Just as philosophy responds to problems by the creation of concepts, so when we respond to particular situations by legal means we are involved in jurisprudence, meaning the creative modification of existing legal principles or the invention of new ones to fit particular cases" Paul Patton, 'Deleuze and Democracy' (2005) 4 *Contemporary Political Theory* 400, 405.

¹³³ Claire Colebrook (n 62) 92.

become subordinate to the passive will of another. Instability in becoming may also be dangerous where decision can have effects that cannot be fully known in advance and, in such circumstances, modifications of law carries important risks to the powers of acting of different stakeholders. This is an example of good intentions vulnerability. It is, perhaps, with this in mind, that judges have been cautious to extend the law to permit assisted dying or euthanasia, in part, due to the uncertainty about the consequences of such a decision for the treatment of the particularly vulnerable in terms of being constructive or destructive.¹³⁴

In light of the inherent dangers of a completely experimental becoming, the process must be marked by a degree of stability, so that change is not violent, arbitrary or unpredictable. What defines stability is not fixed rules or principles applied to each case, but rather the idea of laws characteristic relationship. Each component part of the law is in a characteristic relationship with other component parts, depending on their “movement, speed, and consistency”.¹³⁵ This reflects dignity and treats the law as a social body, defined by the –

[R]elations of its parts (relations of relative motion and rest, speed and slowness) and by its actions and reactions with respect both to its environment or milieu and to its internal milieu.¹³⁶

The law is thus the characteristic relation of the speed/motion and slowness/rest between its parts in reaction to encounters with society. The stability of law fundamentally varies according to the pace with which changes and modifications of the characteristic relationship of norms take place in the unfolding between particular encounters and in relation to the social environment.¹³⁷

The way in which the characteristic relationship of the law determines the degree of stability is best understood by examining a practical example. Consider, for instance, the modification of rights of transsexuals under the ECHR. Originally, the construction of gender, in the form of ‘male’ and ‘female’ was interpreted as not encompassing the new sex of a post-operative transgender individual. An individual who had transgender surgery would continue to be classified according to their

¹³⁴ See p 200.

¹³⁵ Bruce Baugh, ‘Body’ in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005) 31

¹³⁶ Ibid 31.

¹³⁷ *N.F. v Italy* (2002) EHRR 106 [31].

sexual features at birth. The ECtHR, in adjudicating on these cases, began by recognising the lack of scientific or social understanding of the issue, although recognised that developments over time might occur.¹³⁸ With each new encounter there was a greater recognition of the distress suffered by transsexuals, alongside recognition of societal and scientific developments.¹³⁹ Eventually the ECtHR held in *Goodwin* that a failure to recognise the new sex of an individual resulted in a violation of the Convention.¹⁴⁰ Although it recognised the importance of legal certainty, it held that rights must be 'practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.'¹⁴¹

The transformation of law over time, culminating in *Goodwin*, represents a number of important commitments. This includes a commitment to the idea of creative transformation, effective protection by engagement with present day conditions and active improvement of social conditions. It is arguable that the law on transgender individuals was *becoming* different through the transition between encounters with individuals and social developments, leading to a greater understanding.¹⁴² At the same time, this becoming was not achieved haphazardly, but entailed time for reflection and consideration. The level of stability in the law was dependent on both the level and pace of modification in light of an understanding of the nature of the problem.¹⁴³

This is not to say that modification and creation of rights are determined by some fixed duration of time or fixed speed. Instead, the degree of stability required fundamentally depends on a return to the kinds of circumstances in which the law is actively transitioning. The level of prudence required in the process of becoming cannot therefore be established in the abstract. To actually gain an adequate idea of the level of prudence required, one must be attentive to the effects of modification or creation in each specific encounter, addressing the specific nature of the problem. In some fields, such as criminal law, any pace of change may need to be steadily

¹³⁸ *Rees v. United Kingdom* (1987) 9 EHRR 56 [47].

¹³⁹ *Cossey v United Kingdom* (1991) 13 EHRR 622; *Sheffield and Horsham v. United Kingdom* (1999) 27 EHRR 163.

¹⁴⁰ *Goodwin v. United Kingdom* (2002) 35 EHRR 447.

¹⁴¹ *Ibid* 74.

¹⁴² *Ibid* 77.

¹⁴³ Cliff Stagoll, 'Becoming' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005) 22.

incremental, in light of the severe consequences of deprivation of liberty. The speed with which creation or adaptation can progress in the process of becoming depends therefore on the kinds of circumstances in which the law is actively transitioning.¹⁴⁴ The becoming of law in each new encounter will depend on such factors as the nature of the parties, the content of the dispute, changes in circumstances in society, and the range of those potentially affected by any decision.¹⁴⁵

5.7. Dialogue with those Most Affected

One of the most important consequences of the unfolding of law across different encounters is that it requires an understanding of an adequate idea of how that encounter is productive in respect of those affected. The event of application is an encounter between various actors, including the judge, the defendant, the claimant, victim or prosecutor, and in complex resource allocation cases, a public authority, and the wider public. It is not possible to have an adequate idea of the justification of the law apart from understanding its active effects in the encounter between the different stakeholders. This reflects dignity in the way in which it is only possible to know the extent to which an encounter will extend powers of acting by looking at what is common to persons in their specific encounters with various groups and people. This means that the law is justified only to the extent that each encounter is capable of being rationally justifiable as productive in the way that it promotes the different powers of acting of agents, whilst deterring destructive passions, discernible in the particularities of the case.

The law is therefore importantly formed with those 'people most directly affected.'¹⁴⁶ The role of the judge is not simply to be the wise man inventing rights in light of passive desires, but rather to adapt rights through the development of common notions with those most affected.¹⁴⁷ This treats those encountered as active agents, as they are enabled to communicate the effects of decisions and encounters with others in their process of becoming, shaping our understanding of how the law should be applied. This characterises the law in the process of unfolding as a form of dialogue with those affected.

¹⁴⁴ (2000) 29 EHRR 241 [31].

¹⁴⁵ Ibid.

¹⁴⁶ Paul Patton, 'Deleuze and Democracy' (2005) 4 Contemporary Political Theory 400, 406.

¹⁴⁷ See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trs William Rehg, Polity Press 1996) 224.

5.8. Conclusion

This Chapter has established that the rule of law is directly connected to the concept of dignity. This was highlighted through a consideration of the stability of rules and principled justification version of the rule of law, with each taking a different perspective of the source of dignity in the human condition. These two accounts were both rejected on the grounds that focusing on subsumption to pre-existing categories could not encompass the creative difference of dignity. It was argued that dignity can only be understood in the unfolding between different encounters, by understanding what would enhance powers of acting in the concrete case.

In order for the rule of law to reflect this approach to dignity, law should be treated as a process of becoming between productive encounters. The law is in a process of transition as it attempts to deal with the particularities of each new case, becoming different in the process. This conception of the rule of law bypasses subsumption in favour of modification and creation. This approach is mutually supportive of both justification and stability. The former is accommodated by the development of adequate ideas about why a particular encounter is productive and stability is realised through the relative degree of speed and slowness in the modification of the characteristic relationship between norms in each encounter. This re-imagining of the rule of law establishes a potentially rich source of dignity protection. This is especially the case as there are existing pathways to its advancement. It also creates an important conceptual connection to the common law.

Chapter Six: Respecting Investment Dignity through Dialogic Democracy

1. Introduction

The discussion of the rule of law demonstrates that the protection of the concept of investment dignity is not something that can be realised in a vacuum or in isolation from other concepts. Nor, importantly, can an individual be considered separately from the power and ambit of the community or the collective body politic. One of the significant debates surrounding the growing use of human dignity is the proper relationship it requires between the individual and the state or community as a whole.¹ Does it require a limited or expansive role for the state? Should the community be paternalistic or liberal? Whatever the particular relationship, it is generally recognised that dignity is only compatible with, and may even provide the foundation for, a democratic model of governance. Indeed, in many jurisdictions around the world, dignity has been closely related to the concept of democracy.²

Such connections are tentatively emerging in the UK where some judges have even suggested that a democratic society is ‘founded on’³ or ‘based on’⁴ human dignity. The difficulty, as Erin Daly has eloquently noted, is that the exact association between the concept of dignity and democracy has not always been fully explained. Indeed, different cases appear to reflect different theoretical assumptions, without ‘distinguishing among them or evaluating the implications of the differences’ between them.⁵ Some discussions on human dignity, for instance, proceed by suggesting that the concept is sceptical of state power and sets up the relationship with the democratic community as one of potential conflict or antagonism. In contrast, some concepts of dignity are more favourable towards state power, demanding an ‘expanded sphere for the state to respect what is inherent and to fulfil what is to be nurtured by providing public goods and services’.⁶ Despite the differences between

¹ Erin Daly, *Dignity Rights* (Pennsylvania Press, 2013) Ch 5 Anne Hughes, *Human dignity and fundamental rights in South Africa and Ireland* (PULP, 2011) 92; Christoph Möllers, ‘Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law’ (2009) 42 *Israel Law Review* 416; Robert Post, ‘Dignity, Autonomy, and Democracy’ Inaugural Richard Daub Lecture at J. W. Goethe Universität, Frankfurt M, November 1999; Neomi Rao, ‘Three Concepts of Dignity in Constitutional Law’ (2011) 86 *Notre Dame Law Review* 183, 241.

² Erin Daly, *Dignity Rights* (ibid) Ch 5

³ *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [132].

⁴ *Hall v Bull* [2012] EWCA Civ 83 [47].

⁵ Daly (n 1) 146.

⁶ Daly (n1) 130.

these approaches, in both cases dignity has a foundational role that informs the limits and direction of democratic governance, shaping the grounds of its legitimacy.

It is the aim of this chapter to consider further the connections between the dignity of the individual and the concept of democracy.⁷ The concept of democracy is at the core of the existing form of community life in the UK and the backbone to parliamentary sovereignty. Discussions on the relationship between dignity and democracy will therefore have significant implications for the current structure of the relationship between the individual and the collective. In the first part of this chapter, existing conceptions of democracy are assessed in order to determine their connections to the concept of dignity and the extent to which these concepts can advance an investment concept of dignity. These include three main competing models of democracy that have been connected to dignity; majoritarian (Waldron, Gearty)⁸, partnership (Dworkin)⁹ and communicative concepts (Habermas).¹⁰ It is argued that, whilst these constructions of democracy advance some dimensions of an investment construction of dignity, this protection is limited to the extent that these models of democracy, in their focus on abstract reason, do not encompass the creative potentiality of life, which unfolds over time in concrete situations. These models of democracy create systems of representation, under which individuals and cases can be recognised according to rationally justifiable norms that may be agreed upon by 'self-governing' free and equal persons.¹¹ This creates a closed and abstract form of dialogue, separate from the possibility of openness and responsiveness to discovering creative diversity, through encountering the particular needs of individuals in a specific case.¹²

⁷ "human rights form part of an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play." *Rafah Partisi v Turkey* (2002) 35 EHRR 3 [43].

⁸ Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004); Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999); Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 214; Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 Proceedings of the Aristotelian Society 307.

⁹ Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press, 2008); Ronald Dworkin, *Justice for Hedgehogs* (Belknap: Harvard University Press, 2011).

¹⁰ Jürgen Habermas, *Between Facts and Norms: Contributions to a discourse Theory of Law and Democracy* (trs William Rehg, Polity Press, 1996).

¹¹ See Dworkin, *Is Democracy Possible Here* (Ibid) 145.

¹² Alexandre Lefebvre, 'Habermas and Deleuze on Law and Adjudication' (2006) 17 Law and Critique 389.

In order to enhance protection of an investment concept of dignity, an alternative model of social dialogue is proposed, which is then connected to the concept of democracy and the institutions that embody it. Thus, rather than beginning with a focus on inter-institutional dialogue, which is a dominant focus on the concept in the legal literature, the chapter starts with a discussion of the inter-personal dialogue that exists between individuals, and between individuals and the community. This is in line with judicial developments in other jurisdictions that conceive of the democratic relationship between the individual and the state as dialogic in nature.¹³ The issue of inter-institutional dialogue is a secondary concern, which should be structured, it is argued, in such a way as to best promote and facilitate a constructive inter-personal dialogue. Inter-personal dialogue is recognised as a key consequence of the interrelationality and interdependence of human life, so that capability of our bodies and minds to affect and be affected are always relational to other beings in the world. It is argued that this dialogue enhances dignity, as it entails openness to the discovery of uniqueness and diversity, by being responsive to the 'other' and openness to the disruption of repetition, so that law does not just repeat itself, but is creatively modified to address the particular needs of an individual in a case. It is argued that this form of dialogue is inherently respectful of human dignity, as it depends on the idea that a person is to be valued in terms of contributing to defining the problems that affect them and responsiveness to addressing the needs of those most directly affected by a decision.

2. Democratic Theory and Human Dignity

2.1. Introduction

The concept of democracy has, as noted above, been connected to the concept of dignity. The relationship between these concepts varies according to the meaning given to the concept of dignity and democracy, although a variation in the meaning of either necessarily has consequences for the other. In this regard, three main concepts of democracy demonstrate very different relationships to human dignity. In the beginning of this section, the majoritarian concept of democracy is considered in order to determine the connections that are made to the concept of dignity and more specifically to consider its ability to advance some dimensions of an investment concept of dignity. It is argued that the concept of majoritarian democracy, an

¹³ Daly (n 1)153.

underlying justification for the doctrine of parliamentary sovereignty, gives expression to hostile desires and views humanity in perpetual conflict over power, in contrast to the view that (rational) encounters between individuals entail productive combinations that increase and secure the capabilities of all, as well as increasing knowledge about the potentiality of different persons.

2.2. Majoritarian Democracy

The concept of majoritarian democracy is largely a procedural concept of democracy that seeks to ensure an equal impact or influence of ordinary citizens over areas of controversy.¹⁴ Conor Gearty, amongst contemporary legal theorists, has set out the case for a majoritarian concept of democracy. As elucidated in the rule of law chapter, according to Gearty, concepts like dignity, equality and justice lack a consensus or objective meaning.¹⁵ In this light, inevitably there are conflicts in claims over rights, with individuals competing for power over claims about the proper balance between rights.¹⁶ Democracy therefore becomes a 'struggle for power'.¹⁷ Majoritarian democracy settles the conflict and justification of rights at the legislative stage by creating a system of stable rules capable of regulating conduct.

The connections between this concept of democracy and dignity are largely based on the idea that the former solves the problem of the latter. The problem of conflicting conceptions is solved by ensuring that individuals have an equal influence over decisions through the right to vote. Importantly, the majoritarian model of democracy does not discriminate between the different types of reason that may be used to determine the balance or compromise between conflicting claims, treating humans as mere containers of preferences, without regard to their content. This leads to a problem that has long been recognised by Ronald Dworkin, in the form of giving official recognition to hostility and contempt.¹⁸ Thus, the majority might prefer to deny homosexuals the right to succeed to a tenancy and can democratically do so.¹⁹ The problem with this decision is that it may be premised on an attitude that

¹⁴ See Ronald Dworkin, *Freedom's Law: the Moral Reading of the American Constitution* (Harvard University Press, 1996) 26-29.

¹⁵ Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004) 64.

¹⁶ *Ibid* 61.

¹⁷ *Ibid*.

¹⁸ Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 236. Dworkin, *Is Democracy Possible Here* (n9) 97; Ronald Dworkin, *Justice for Hedgehogs* (n 9) 388.

¹⁹ *Ghaidan* (n 3).

certain groups have less value or are unworthy of protection.²⁰ It can give expression to the passive dimension of human personhood, in the sense of indifference or indignation to other people on the grounds of their difference, leading to vulnerability through oppression and subordination. This is the antithesis of a rational view that recognises that it is to mutually reinforce the capabilities of all, not to engage in destructive activity, by ignoring or diminishing the capabilities of other people, *imagining* the destructive activity to be to individual advantage.²¹

In ultimately treating the preferences or opinions of the majority as a basis for selecting and balancing conflicting claims, the majoritarian concept of democracy lacks a critical standpoint from which to assess those preferences. This is problematic for two reasons. Firstly, people's preferences are highly adaptive to the social environment.²² Preferences can be shaped through historical subordination, so that individuals come to expect the status quo. The second problem with preferences is that they are often reason based, so a preference will often, as Raz argues, depend on a reason for thinking something is good or bad.²³

On this view, considering preferences in themselves are not a good measure of what is the right action to take, as it does not take account of the fact that '[w]e take pleasure in something, and the pleasure we take is mostly contingent on thinking that it is good'.²⁴ It would be an oversimplification of the majoritarian concept of democracy to suggest that a supposed lack of consensus on dignity is the only connection to that concept. The concept of majoritarian democracy has been connected to the concept of dignity on the grounds that majority rule is the only *fair* method of ensuring the settlement of a dispute, as it is the only method that enables individuals to determine themselves the distribution of rights. Jeremy Waldron is a prominent advocate of this aspect of majoritarian democracy and has argued that participation in the majoritarian democratic procedure is the 'right of rights'.²⁵ The contribution of individuals in the process leads to what Waldron has called the

²⁰ Ibid 132.

²¹ Etienne Balibar, *Spinoza and Politics* (Verso, 1998) 110; Baruch Spinoza, *Ethics* (G.H.R Parkinson, OUP, 2000) 240.

²² Martha Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' (1992) 20 *Political Theory* 202, 230.

²³ Joseph Raz, 'Liberalism, Scepticism and Democracy' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995) 116.

²⁴ Dworkin, *Justice for Hedgehogs* () 207.

²⁵ Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 *Proceedings of the Aristotelian Society* 307.

'dignity of legislation'.²⁶ Importantly, Waldron has connected this to his rank-based concept of dignity, in the sense that one of the greatest historical rights of the nobility was to be heard in disputes and contribute to decision-making.²⁷ According to Waldron, controversy must ultimately be decided by an individual as an equal in the decision-making process. The difficulty with this justification of majoritarian democracy concerns an inconsistency. On the one hand values such as dignity, equality and liberty are inherently contentious, requiring a procedure to settle conflict, whereas, on the other hand, democracy is objectively a fair procedure based on equal self-government (equal positive liberty).²⁸ The difficulty, as Dworkin notes, is that the justification of majoritarianism contradicts itself by firstly beginning with a sceptical claim that values, upon which rights are based, are controversial and inherently contestable, but in the end majoritarian democracy adopts those same values to argue that it is objectively the fairest procedure.²⁹ Its claim to fairness is unconvincing, particularly in light of the fact that it establishes an asymmetry of power, between a dominant majority group which determines the content of rights, and can adapt social structures to their own benefit, with a subordinate group, who may be a 'identified and disliked minority'.³⁰

2.3. Partnership Democracy

A very different account of the concept of democracy to the majoritarian democracy is the partnership concept of democracy, or constitutional democracy. The leading legal theorist on this form of democracy is Ronald Dworkin, who argues that a true democracy is an ideal, which entails that in -

Politics [members]...must act with *equal concern and respect* for all the other partners. It can be a partnership, that is...if each accepts a standing obligation not only to obey the community's law but to try to make that law consistent with his good faith understanding of what every citizen's dignity requires.³¹

In contrast to a procedural account of democracy, the partnership concept of democracy is substantive in the sense that a political community must be legitimate if

²⁶ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 2.

²⁷ "Jeremy Waldron, 'Dignity and Rank for the memory of Gregory Vlastos (1907-1991)' (2007) 2 Archives Européennes de Sociologie 201, 222.

²⁸ For a criticism, see Dworkin (n 14) 16-21.

²⁹ Ibid. See also for a similar critique of the "subjectivist" view, Martha Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' (1992) 20 Political Theory 202, 212

³⁰ Dworkin, *Justice for Hedgehogs* (n 9) 387.

³¹ Dworkin, *Justice for Hedgehogs* (n 9) 384.

it is to be democratic.³² This has a notable advantage over the majoritarian concept of democracy in that it rules out any decision that would deny rights to individuals on the grounds that they are unworthy or unpopular, an attitude wholly incompatible with the idea of equal dignity. The partnership concept of democracy therefore attempts to be intrinsically connected to the concept of dignity, for it seeks to value every individual equally, even if the majority do not. It also entails a great deal more cooperation between members of the political community, who are recognised as members of a 'fraternity'.³³ The extent to which this concept of democracy can advance the protection of an investment concept of dignity, however, depends fundamentally on the meaning given by Dworkin to the claim that the community must act with 'equal respect and concern' and make law consistent with a 'good faith understanding of human dignity'.³⁴ Importantly, as has been seen, Dworkin proposes a fixed concept of dignity, alongside equal concern and respect that is based on 'luck'.³⁵ This means that, rather than seeking to transform the majority norm, or the social structures that exclude particular groups, in order to recognise diversity, individuals are compensated on the grounds that they are 'unlucky' because they differ from the norm. Elizabeth Anderson has argued that, as a model of democratic equality, Dworkin's approach is not particularly convincing, in that it locates injustice and unfairness in the deficiencies in individual's innate talents or skills. Individuals therefore 'lay claim to the resources of egalitarian distribution in virtue of their inferiority to others'.³⁶ It is significant that Dworkin, in developing the idea of the disabled as unlucky or innately deficient, proposes a form of democratic equality that preconditions our attitude and understanding of certain groups..

2.4. Communicative Democracy

An alternative concept of democracy to the partnership concept, which recognises the importance of decisions being agreed upon by those affected, is the 'communicative' concept of democracy. This concept of democracy is most prominently advocated by Jürgen Habermas.³⁷ According to Habermas a democracy involves individuals establishing communicatively generated norms, which entails

³² Ibid 392

³³ Dworkin, *Law's Empire* (n 21) 206.

³⁴ Dworkin, *Is Democracy Possible Here* (n9) 35.

³⁵ see Ronald Dworkin, *Sovereign virtue : the theory and practice of equality* (Harvard University, 2000) 287, 80.

³⁶ Elizabeth S Anderson, 'What is the Point of Equality' (1999) *Ethics*, Vol 109, 306.

³⁷ Habermas (n 10).

that law is valid only if it has been dialogically agreed upon by all those affected.³⁸ This communicative model is thoroughly Kantian in spirit in its connection to moral autonomy, recognising that the 'addresses of legal norms may at the same time understand themselves, taken as a whole, as the rational authors of those norms'.³⁹ Legal norms are 'human in the strongly Kantian sense of respecting the humanity – the communicative reason – of all those affected by the norm'.⁴⁰ Citizens are thus seen as both the rational authors and the recipients of a legal norm, once the norms have been agreed upon by free and equal persons operating in rational discourses. This entails the protection of both basic rights, which are rights to engage in the democratic process, as well as derivative rights, in the sense of the rights that could be accepted by those engaged in the communicative process.⁴¹

The communicative concept of democracy can be connected to an investment concept of democracy to the extent that it recognises the need in the legal process to justify decisions to those most affected. The difficulty is the Kantian model of 'dialogue' that is at the core of Habermas' communicative concept of democracy. At the core of this model is a closed concept of dialogue based on creating categories of recognition and meaning, which do not always encompass the creative potentiality of life. In Habermas' account, law is fixed and justified at the stage of its creation in the democratic process, so long as it complies with basic rights that formalise the conditions of 'discursive processes of opinion and will formation in which the sovereignty of the people assumes a binding character'.⁴²

This has a number of implications that Alexandre Lefebvre has noted. Firstly, it entails a non-creative image of law, whereby all is given from the outset, entailing little room for the creative modification of norms to address particular situations.⁴³ According to Habermas, application of a norm cannot 'modify the norm in any substantial way'.⁴⁴ Secondly, Habermas' form of dialogue is invariably kept separate from concrete situations, so that the exchange of opinions is 'pitched at a necessarily

³⁸ Ibid 107-109.

³⁹ Ibid 33.

⁴⁰ Lefebvre, 'Habermas and Deleuze' (n 12) 397.

⁴¹ Habermas (n 10) 122-131.

⁴² Ibid 108

⁴³ Lefebvre, 'Habermas and Deleuze' (n 12) 407.

⁴⁴ Ibid 403.

high or indeterminate level of abstractness'.⁴⁵ In this light, rights are created on an abstract plane separate from concrete problems arising in specific situations.⁴⁶ Discussion thus begins to dissipate the 'singularity of that problem and its solutions in favour of communicable generality'.⁴⁷ Thirdly, and most importantly for dignity, Habermas' form of communication seeks to inscribe modes of recognition. Dialogue creates norms that enable us to recognise and anticipate all cases, but this cuts off the potential for uniqueness, difference and otherness. This is problematic for the investment concept of dignity which has been defined as functionally open to respond to diversity and holistic personality, recognising that adequate ideas about what is good for a person is developed in 'encounters' between individuals, which unfold over time in concrete situations.⁴⁸

2.5. Conclusion

The concepts of majoritarian, partnership and communicative democracy would provide variable degrees of protection of investment concept of human dignity. The majoritarian concept of democracy would provide protection of an investment concept on a purely contingent basis, to the extent that the majority prefer to protect that concept. The partnership concept of democracy provides better protection for the dignity of minority groups, but is problematic in the way that it connected to a fixed concept of dignity based on abstract rationality, which is formulated in advance of encountering people in the world. A similar problem was experienced with the communicative concept of democracy.

In Habermas' theory, for instance, dialogue appears to take the form of the exchange of opinion, which pre-exists action, so that ideas or knowledge are developed *a priori* to action. The actions of a person therefore take on a meaning in so far as they correspond to the norms created communicatively. This differs fundamentally from the form of knowledge that has been advocated so far in reference to Spinoza, who argued that adequate ideas or knowledge about what a person is capable of being and doing is only ever formed inductively through activity and exploration.

⁴⁵ Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008) 42.

⁴⁶ Deleuze and Felix Guattari, *What is Philosophy?* (trs Hugh Tomlinson, Graham Burchill, Verso, 1994) 79.

⁴⁷ Lefebvre, *The Image of Law* (n 45) 407. A similar point has been made by Gadamer, who argued that "everything that is set down in law is in a necessary tension with definitive action, in that it is general and hence cannot contain within itself practical reality in its full concrete form." Hans Georg-Gadamer, *Truth and Method* (Garrett Barden and John Cumming trs, Sheed and Ward, 1975) 286

⁴⁸ Baruch Spinoza, *Ethics* (trs by G.H.R. Parkinson, OUP 2008) 55.

Knowledge of the meaning or value of an act, is not merely an abstract idea agreed upon in advance, but develops through activity; in which different persons encounter one another in ever new and different combinations. This approach, according to Balibar, offers an alternative politics of communication.⁴⁹ This is because knowledge of a person's powers of acting and rest are always relational to others and in this sense there exists a continuous dialogue between persons, as individuals become active through being open to mutually reinforcing the capabilities of each other.⁵⁰

3. Democratisation and Dialogue

3.1. Introduction

This section explores some of those potential implications of investment dignity for theories of democracy. It is argued that investment dignity requires a particular form of dialogue for its realisation, which could entail important implications for the majoritarian, partnership and communicative conceptions of democracy. This is a holistic and open conception of dialogue, whereby the powers of the mind and body are relational to others and dependent on certain forms of interaction for their development. This conception of dialogue requires attentiveness to difference and disruption of repetition.

3.2. Communication and Interrelationality

The investment concept of dignity is understood to require investment into the creativity potentiality of a person, which is expanded by increasing the powers of acting and rest of the individual by enhancing what the body is capable of doing and the mind capable of thinking. Significantly, this concept of dignity is fundamentally premised on an inter-relational and interdependent view of humanity. This is because the powers of the body to act and the mind to think are dependent on interactions with the external world.⁵¹

The power of a person to simultaneously act and think is therefore always a matter of interactions with forces in the world; the capability of a person to affect and be affected is essentially relational to other forces. A person can increase their power of acting when they combine with things that increase its ability to act and a person can

⁴⁹“Passion and reason are both, in the final analysis, modes of communication between bodies and ideas of bodies. In the same way, political regimes should be thought of as orders of communication: some of them are conflictual and unstable, others are coherent and stable,” Etienne Balibar, *Spinoza and Politics* (Verso 1998) 95.

⁵⁰ Beth Lord, *Spinoza's Ethics* (Edinburgh University Press 2010) 118.

⁵¹ Lord (n 50) 85.

increase their power of thinking when they develop adequate ideas or knowledge about why a particular combination enhances what they are capable of being and doing. This essentially means that '[p]assion and reason are both, in the final analysis, modes of communication between bodies and between ideas of bodies (the mind)'.⁵² The activity of the mind and body are therefore enhanced or diminished in the way that people communicate with one another, when they combine together and interact.⁵³ Most importantly, productive communication occurs when bodies combine to mutually reinforce, secure and enhance the powers of each person to act, whilst at the same time developing adequate ideas by reasoning with those affected about how those combinations enhance what the body is capable of doing.

This model of dialogue that is inherent in investment dignity has some potentially significant implications for the idea of democracy. The first is that dialogue is not limited to the exchange of opinion through speech, but also entails the interactions between bodies, which necessarily have meaning in the correlative formulation of ideas in the mind. This means that democratic dialogue cannot be merely concerned with the creation of equal impact on decision-making, but must also be concerned with the creation of equal relations of power by abolishing 'oppression—that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others'.⁵⁴

The second consequence for democracy that arises from the need to create equal relations of power is that dignity is enhanced through interactions with others in society, which requires increasing inclusion and engagement with others.⁵⁵ This is because a person enhances their dignity by increasing their powers of acting through combining with others and increasing their powers of thinking by developing adequate ideas with others about why some combinations are good. It is therefore the case that a person's dignity is promoted to the extent there exist more possibilities to interact with them and developing or acting on ideas about why particular combinations are good. This, significantly, means that the promotion of dialogue entails not only the ability of individuals to participate in the political

⁵² Balibar (n 49) 95.

⁵³ Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light 1988) 55.

⁵⁴ John Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Ashgate, 2008) 68.

⁵⁵ Balibar (n 49) 103.

process, but the removal of physical and social barriers that prevent individuals from engaging or interacting with others.⁵⁶

The nature of the concept of dialogue that is inherent in the investment concept of dignity is one that is notably pervasive in character. Dialogue between persons occurs between persons constantly, including within, but not limited to, a certain legal framework. This has a significant repercussion for democracy in that it is not possible to limit the idea of dialogue to a particular zone of conduct. One of the hallmarks of many liberal concepts of democracy is the division between the public and the private.⁵⁷ This division has historically been, and continues to be, the subject of much feminist criticism for the way in which the private is often treated as a natural and unregulated space and the public a constructed space based on power relations.⁵⁸ The model of dialogue that arises from investment dignity could not maintain such a distinction and would suggest that democracy be concerned with creating equal relations of power in all domains of human activity.⁵⁹

3.3. Openness to Difference

The concept of dialogue inherent in an investment concept of dignity is not only pervasive in character, but is also open and responsive to difference. Importantly, it has been argued that each person has creative, diverse and transformative potential, which unfolds in the process of *becoming*.⁶⁰ This does not entail separateness, but essentially depends on the interactions with other forces in the world, by being dependent on combining with others, whilst at the same time asserting individuality and identity.⁶¹ It is also the case that, in light of the creative potential of human life, it is not possible to know fully ahead of time and before interaction with others, exactly what the body is capable of being and doing, or the mind capable of thinking.⁶² It is therefore essential to be open to the possibility of discovering the unknown and unrecognised in the encounter with an individual. In this light, as persons interact

⁵⁶ Clements and Janet Read, *Disabled People and European Human Rights: A review of the implications of the 1998 Human Rights Act for disabled children and adults in the UK* (Policy Press, 2003) 67.

⁵⁷ Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004) XIII.

⁵⁸ Mark Olssen, *Liberalism, Neoliberalism and Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education* (Routledge, 2009) 119.

⁵⁹ See: Carole Pateman, 'Self-Ownership and Property in the Person: Democratization and the Tale of Two Concepts' (2002) 10 *The Journal of Political Philosophy* 20, 48.

⁶⁰ Balibar (n 49) 107.

⁶¹ *Ibid* 61.

⁶² See Gilles Deleuze, *Spinoza: Practical Philosophy* (City Light 1988) 17-18 and 60; Gilles Deleuze, *Expressionism in Philosophy: Spinoza* (tra Martin Joughin, Zone, 1992) 226.

with one another, not all is given, so that dialogue with others can cause us to create new ways of thinking and new ways of actively accommodating diversity.

The nature of dialogue inherent in the investment concept of human dignity is not only open to the possibility of difference, but also actively embraces it. This is significant in that it recognises the importance of difference not only to the individual, but also to the community. This is because, as was outlined in chapter two, to desire the good of others is treated 'as a function of my own good'.⁶³ It is rational to desire that other persons 'develop their own powers and know what is of use to them more and more adequately.'⁶⁴ This does not entail a desire for the person to be the same, but that they should develop their own potential as it unfolds in unique, creative and diverse ways in relation to others, which open up new possibilities for future dialogue between persons that have not as yet been envisaged or imagined. The possibility for exploring our own becoming is maximised to the degree to which we live in a community where others' capacities to affect and be affected are as open as possible, which correlates to activity and joy.⁶⁵

3.4. Disruption of Repetition

The open and responsive nature of dialogue that is at the core of an investment concept of human dignity entails a further consequence in the form of disrupting the repetition of particular practices. One of the difficulties with some norms is that they become fixed, repeating the same stereotypical representations of particular groups in a manner that can be oppressive. An example of this can be drawn from the previous chapter on the issue of marital rape based on the idea that women through the doctrine of coverture were chattel in the protection of the husband.⁶⁶ Open dialogue entails the possibility of ultimately recognising the injustice of norms based on repression or subordination, which can be disrupted through a willingness to rethink one's position by addressing the experience of those affected.

The ability of an open dialogue inherent in an investment concept of dignity also has the implication of democracy in the form of disrupting the repetition of norms or practices in ways that are exclusive in focus. Some norms can entail narrow systems

⁶³ Balibar (n 49) 110.

⁶⁴ Ibid.

⁶⁵ Tamsin Lorraine, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity and Duration* (Sunny 2011) 137.

⁶⁶ Pateman, *The Sexual Contract* (Stanford University Press, 1988) 14.

of recognition or representation, whereby only a limited set of experiences are addressed in the protection of the law. As an example, a system of lifting regulations that permit only mechanical lifting for disabled people may not be suited to the needs of all disabled people.⁶⁷ Dialogue therefore entails the possibility of disrupting the existing norms in a way that allows the creative adaptation of norms in order to address difference.

The open dialogue inherent in dignity also prevents the disruption of repetition of norms that are premised on problems that were formulated in a very different context from the present. If legal judgment is to protect dignity; it must itself be capable of creative adaptation, in which the encounter forces the establishment of a problem.. An encounter, the formulation of a problem and the construction of concepts to adjudicate a problem will all take place within the 'shifting exigencies of the present *milieu*'.⁶⁸ The nature of dialogue enables the possibility of being open to addressing new problems in present day conditions with those most affected, disrupting the repeated use of concepts in a way that is premised on irrelevant problems.

3.5. Conclusion

The investment concept of dignity has a number of important implications for democracy in the form of openness to addressing difference and the new in the encounters with individuals as they unfold over time, developing new problems with those most affected. It secondly entails the disruption of repetition of norms that are oppressive or exclusive in scope, allowing a break from the past by asserting the need for creative and transformative change. Democracy is not therefore a fixed idea instantiated in a particular institutional form, but is rather an 'immanent event or process that is ongoing in the present'.⁶⁹ Democracy therefore represents a developing culture of democratisation, entailing an ongoing process of cultivating openness to discovering difference and uniqueness in the interaction between persons.

⁶⁷ *R (On the Application of A, B, X and Y) v East Sussex County Council (No 2)* [2002] EWHC 2771.

⁶⁸ Lefebvre, *The Image of Law* (n 45) 57.

⁶⁹ Paul Patton, *Deleuzian Concepts: Philosophy, Colonization, Politics* (Stanford University Press 2010) 171.

4. Enhancing Dignity through Democratic Dialogue

4.1. Introduction

The nature of dialogue that results from the investment concept of dignity through being open to difference and the new, as well as disrupting repetition, entails the important possibility for 'transformation or metamorphosis.'⁷⁰ This entails the potential of the positive *becoming* of human person in the development of their personality and in the relationship between persons in three significant ways. The first is the *becoming-active* of the individual, in ensuring a right to participate in the formulation of the issues or problems that most directly affect a person. This ensures that a person is not simply passive to having norms applied to them in a way that addresses problems as they are formulated by others, without reference to the individual's experiences or needs. The second potential for transformation entails the potential of *becoming-minor* of those who fall outside the qualitative majority norm and even the potential for transforming or disrupting that norm, providing the 'impulse for change at the level of social and political institutions'.⁷¹ The final potential positive becoming that results from the transformative nature of dialogue is the *becoming-other* of a person in the way that a person in encountering others becomes different to what they were through recognition of the position of the other in the encounter. Dialogue entails the need for a person to attempt take on the perspective of the other who is in a different position and has different experiences.

4.2. Becoming-Active

The *becoming-active* of the individual is the first way in which dialogue promotes the development of activity and rationality. As was discussed in previous chapters, drawing on the work of Spinoza, humans are to a degree passive and active, irrational and rational. Dignity is enhanced to the extent that the active powers of the body are increased and the mind develops adequate knowledge about why some combinations with persons or forces are constructive and others are destructive.⁷² In contrast, it is bad for a body to be merely acted upon, or the mind to be acted upon by inadequate ideas. One of the notable implications of a dialogic approach to democracy is that it offers the potential for enhanced activity on the part of a person in the legal process.⁷³ Individuals are instead encouraged to be active in articulating

⁷⁰ Ibid 170.

⁷¹ Patton, 'Deleuze and Democracy' (2005) 4 Contemporary Political Theory 400.

⁷² Lorraine (n 65) 124.

⁷³ Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 The Cambridge Law Journal 200, 206.

the issues and problems that affect them, in a way that treats them as agents who have a 'good sense of their own interests'.⁷⁴ In this way, the *becoming-active* of the applicant accords with the key democratic idea that 'decisions ought to be taken in consultation with those most affected by them'.⁷⁵ This ensures that the law does not attempt to impose general or presumed characterisations on the basis of imagined experiences of those it affects, without hearing the actual experiences of those affected.

The ability to share actual lived experiences in community with others is perhaps of particular importance to those who are the most vulnerable because they are subject to the greatest potential disadvantage. It was argued in previous chapters that vulnerability includes power-vulnerability, whereby society is constructed around a norm that excludes the experiences of many groups to the advantage of a majoritarian norm. Rather than being active in determining the experiences or problems that others are reasonably expected to accommodate in their own lives. This means that, in the dialogic process, significant weight must be placed on the voices of the most vulnerable that are subject to the most circumscribed conditions of life, granting them an active role in the process of maximising their potential and reversing their significant disadvantage. This grants a legitimate role to courts within the democratic process, particularly in regards to social or economic conditions of life, as a 'channel of participation for the vulnerable and marginalised, who are most likely to be excluded from the normal channels of democratic participation'.⁷⁶

The *becoming-active* of a legal subject is not only promoted by entitling them to a right to participate in the formulation of issues or problems that affect them, but also the justification of the application of norms to the applicant in light of the wider dignity needs of others in society. The applicant is treated as an active being in so far as they are recognised as part of a wider community and are capable of developing adequate knowledge about the need for norms in relation to other persons in society. Legal subjects are encouraged to respond to the decision with a deeper understanding of the priority needs of others, or of the implications of their conduct on others, in a way that entails a future becoming directed towards actively seeking

⁷⁴ Ibid 200.

⁷⁵ Patton, *Deleuzian Concepts* (n 69) 192.

⁷⁶ Ellie Palmer, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Oxford: Hart 2007) 33.

or accepting the good of others as a dimension of one's own good.⁷⁷ Significantly, this dimension of dialogue encourages an outward looking perspective on behalf of the legal subject towards others. This 'outwardness' is representative of the interconnected nature of humanity, as individuals are encouraged to understand how their powers of mind and body for activity and rest are relational to others.

4.3. Becoming-Minoritarian

The concept of *becoming-minor* or *becoming-minoritarian* is a key concept developed in the work of Gilles Deleuze and represents the idea that each individual exists in a 'process of continuous variation'.⁷⁸ This means that the concept of becoming is 'intimately linked to the concept of the minoritarian'.⁷⁹ Inherent in the concept of *becoming-minoritarian*, is the idea of creative difference, the view that potential can be channelled in unique ways not captured by a majoritarian ideology. This means that the aim of the minority is not to acquire the quantitative characteristics of the majoritarian image, which represent the autonomous, independent, self-sufficient, rational person.⁸⁰ In this regard, the majoritarian norm represents an unrealistic image of life, but more importantly it suppresses the potential for transformation in respect of new or different ways of living. The concept of *becoming-minor* is therefore treated as a positive force towards creativity, experimentation, and diversity.⁸¹

Significantly, *becoming-minor* does not only represent the idea that alternative possibilities to the majoritarian norm must be tolerated, but also the potential for corroding and transforming the majoritarian image in positive ways directed towards new possibilities for creative and experimental combinations. Thus, as an example, granting the right to homosexuals to marry may possess the potential for a creative change in the very institution of marriage or family, away from a view of it based on reproduction, to one based on more important factors, such as 'mutual support and companionship'.⁸² This can therefore have a positive impact on existing patriarchal images of marriage. The concept of *becoming-minor* is therefore a force that is

⁷⁷ Ibid.

⁷⁸ Paul Patton, *Deleuze and the Political* (Routledge 2000) 48; Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Continuum 2004) 114.

⁷⁹ Patton (Ibid) 80.

⁸⁰ Gilles Deleuze and Felix Guattari, *A Thousand Plateaus* (n 78) 116.

⁸¹ Patton, 'Deleuze and Democracy' (n 71) 400.

⁸² Kate Spencer, 'Same Sex Couples and the Right to Marry – European Perspectives' (2010) *Cambridge Law Review* 155, 169.

capable of creatively transforming the existing norms of society in ways that can enhance the capabilities of all.

4.4. Becoming-Other

The final way in which dialogue promotes the positive development of personhood and human dignity is through the concept of *becoming-other*. The concept of *becoming-other* arises from the idea that a person is in a continuous state of change, as capabilities are modified through interactions, or compositions with other persons.⁸³ Becoming thus occurs through 'relations composing, decomposing, or modifying an individual...augmenting or diminishing its power to act'.⁸⁴ In this process the concept of dialogue encourages individuals when encountering others in the world, through a transformative process, to understand the perspective of the other person encountered, in a way that entails empathy and deeper understanding. A useful explanation of the concept of *becoming-other* is provided by Paul Patton.⁸⁵ Patton gives the example of a real life pedagogic encounter, in which a student confronts a teacher after receiving a bad grade on a paper and challenges the teacher to go through it with him.⁸⁶ The outcome of this long process is an enhancement of the powers and capabilities of the teacher to positively affect others in a 'manner and to a degree she had never done before'.⁸⁷ The positive effect was reflected in the change in the student, through a 'distinct improvement in the student's powers as a writer'.⁸⁸ This encounter entailed a becoming-student on the part of the teacher, who in the encounter was 'forced to come to terms with [the student's]...version of what he had wanted to say in the paper'.⁸⁹ At the same time, it entailed a becoming-teacher on the behalf of the student who was 'forced to see his own text through the eyes of a more experienced reader'.⁹⁰ Each person in the encounter was engaged in a symbiotic relationship, whereby they reinforced or enhanced their own powers through their dialogic interaction.⁹¹ This is not a matter of literally becoming the other, for the student does not become the actual teacher, but rather of 'enhancing the powers one has or of acquiring new powers by entering into

⁸³ See Lord (n 50) 85.

⁸⁴ G Deleuze and F Guattari, *A Thousand* (n 78) 283.

⁸⁵ Paul Patton, *Deleuze and the Political* (n 78) 79.

⁸⁶ *Ibid* 76.

⁸⁷ *Ibid* 77.

⁸⁸ *Ibid* 76.

⁸⁹ *Ibid* 79.

⁹⁰ *Ibid*.

⁹¹ *Ibid* 79.

a proximity' with the other'.⁹² It is also not a one-sided relationship of domination exercised by the teacher over the student. It is a 'double-becoming' in the sense that the interaction entails a mutual modification or augmentation of the powers and capacities of the teacher and student through understanding the experiences, as well as good of the other.⁹³

The *becoming-other* through dialogic interaction has an important role to play in the field of law, as it entails a mutual empathy and understanding in the way that decisions are related to particular situations. Thus, for example, in the case of *Bernard* discussed in previous chapters, the judge, Sullivan J was in encountering the disabled mother forced to come to terms with her experiences in relation to the effects of the unsuitable accommodation, including the social, physical, recreational and psychological impact. In *Bernard* Sullivan J was affected by the situation of Mrs Bernard, in such a way that increased his capabilities and powers as a judge, by being open to creatively relating the norms to the individual situation.

It is necessary for the judge to be wary of the dangers of assessing the perspective of the other.⁹⁴ First, a judge should be cautious about presuming to know everything about how the 'differently embodied experience themselves or their situation'. In this regard, the notion of becoming-other does not absolve us of the need to ensure that the experiences of the marginalised are 'represented at all levels of legal, social and ethical life'.⁹⁵ Second, there is a danger of the judge projecting how they would have felt if they were in a similar situation to the 'other'. This is indeed a danger, but the cases that have been considered throughout the thesis, where human dignity has been successfully argued by the victim, demonstrate that it is possible for the judiciary to be appropriately in tune with the narratives and experiences of the 'other' in the specific case.⁹⁶ Becoming-other, in this regard, represents an attentiveness and responsiveness on the part of the judge to the singularity of the other, drawing the experiences of the other into their circle of concern, and allowing those experiences to shape the legal concept of dignity.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Moira Gatens (n 66) 141.

⁹⁵ Ibid.

⁹⁶ See p 203.

The becoming-other of the judge and law-maker is mirrored in the *becoming-other* of the citizen in legal cases, who are required to see their own conduct or interests through the eyes of an experienced judge and through the eyes of other stakeholders affected by a decision. Thus, as an example, in the case of *R v R* the husband through encountering the judge in the legal case was forced to see the nature of his debasing conduct through the eyes of his wife. This entailed the potential of *becoming-victim* of the husband, who through the process could have increased his powers of understanding in a way that would entail changing his attitudes and future behaviour in a positive manner. Notably, the increase in the capabilities of individuals through the process of *becoming-other* is 'not always a pleasurable experience'.⁹⁷ This is because reflection on others experiences requires a degree of humility in accepting error in past conduct, or judgments, which can be a difficult experience, but one that can have a transformative effect on the creative potentiality of those open to being affected by it. In conclusion, the concept of *becoming-other* recognises that the dialogic interaction between minds and bodies entails a degree of empathy and mutual understanding in democracy, which gives rise to the possibility of transformation in the future possible combinations and interactions between persons in society in a way that enhances the capabilities of all.

5. Conclusion

This concept of dialogue inherent in the investment concept of human dignity entails a number of important challenges to existing conceptions of democracy. In place of a procedural and closed democracy, the concept of dialogue embodies a way of life, an ongoing culture of democratisation across a fuller range of human activity. This culture embraces and promotes the idea of increasing connections between individuals, both *mind* (speech) and *body* (action), in ways that entail openness to difference and diversity. Furthermore, it is possible through dialogue to disrupt oppressive or exclusive norms. This inter-personal dialogue that should structure the relationship between the individual and others in the community has been the main focus of this chapter.

To conclude, it is possible to sketch some potential implications it might have for the current inter-institutional balance and constitutional culture in the UK. One such implication that has been implicit throughout the chapter is the claim that a

⁹⁷ Ibid 76.

strengthening of the powers of a Court is not necessarily an undemocratic practice. The adjudicatory space should be re-envisaged as a 'place for dialogue with parties' where 'localised individual interventions' may take place.⁹⁸ Courts are better placed to possess an adequate understanding of the particular situation and experience of the individual affected by a legal decision, properly supported by expert evidence and a wide-body of dignity materials, as well as the individual testimonies and narratives of the victim.⁹⁹ They can potentially afford a further avenue for the participation of those who are marginalised and excluded. In this regard, the judiciary are envisaged as having an important and limited role in realising the inclusion and participation of particularly vulnerable people in the community who, without intervention, may be at significant risk of living isolated and highly circumscribed lives, which strengthens, rather than weakens the legitimacy of the community.

The second potential implication of the concept of dialogue is the formation of a cooperative dynamic between the judiciary and legislature in the protection of human dignity. The recognition that individuals are part of a complex web of relations may make it difficult, in respect of certain decisions, to make an assessment of the implications of a decision only in an individual case. This is particularly true of the formation of complex systems of care and welfare provision. In this respect, whilst the judiciary may be able to assess the implications of a decision in an individual case, they are unlikely to always be best placed to understand or construct a complex solution to a multifaceted problem that impacts upon a large range of people. There may well be alternative means of addressing certain problems, which may need to be considered or evaluated against each other, requiring a certain level of expertise, resources, and wider perspective on social conditions.

A duty to invest in conditions that sustain or promote the development of the capabilities of an individual may be met by alternative (suitable) means or methods, a choice that will no doubt affect or have implications for other systems of social support in terms of resources and co-ordination. In these areas, it is likely to be the executive and legislative branches of government that are best placed to implement complex systems of social support and care, although, as noted above, it may be

⁹⁸ Daly (n 1) 148.

⁹⁹ See p 203.

permissible for the judiciary to make localised adaptations in response to the specific needs of a highly vulnerable person. However, whilst it is not a court that is always best placed to adopt the relevant implementation methods, it may be for the Court to insist that implementing action be taken where there is currently insufficient investment that realises the needs of the individual. This has been the experience of some other jurisdictions, with a more sophisticated system of human dignity jurisprudence, which provide a model for a relationship between the judiciary and legislature that is built on inter-institutional dialogue and cooperation. The Courts in these jurisdictions, such as Germany, South Africa and India, are able to insist that action be taken to protect dignity, including the provision of social or economic needs, whilst leaving it the political branches of government to determine the precise forms, methods and programs that put that investment into practice.¹⁰⁰ In this respect, dignity does not always 'determine the outcome – it does not establish how much money should be given to each person – but it does ensure that the legislative determination respects the equal worth of each person.'¹⁰¹ The adoption of a similar approach in the UK would entail a re-imagining of the relationship that currently exists between the different branches of government. It would see each branch as part of a joint project, engaged in mutual cooperation and dialogue, for the purposes of promoting and protecting human dignity.

¹⁰⁰ Daly (n 1) 155-156.

¹⁰¹ Ibid 156.

Conclusion

As this study draws to a close, the conclusion highlights two main contributions to the understanding of human dignity. The first concerns the issue of methodology and the use of constructivism to establish an investment concept of dignity, which moves beyond a narrow focus on autonomy or rationality, to encompass a far richer and more holistic conception of human personality. The second concerns the connections between the concept of dignity and various associated or related concepts, particularly those that structure the relationship between the individual and the community.

1. Constructing Human Dignity

Approaches to understanding human dignity typically proceed by a process of seeking to accurately represent or discover the existing content of the concept within and across different disciplines. This can sometimes lead to a paralysing search for the shared meaning of the concept by, for instance, uncovering a consensus definition adopted by judges across different jurisdictions.¹ Constructivism has entailed a distinctive methodological approach to understanding the concept that, it is hoped, will take the current debate surrounding the meaning of the concept in a more fruitful direction by focusing on developing, refining and modifying the concept to address the changing problems that emerge over time. Understanding dignity should not simply be a process of uncovering the content of a fixed concept, but also about constructing it in order to open up new legal pathways and extend others in a way that realises possibilities for more active, joyous and life-affirming modes of being. The value of a concept of dignity is thus not assessed by how accurately it signifies or repeats the past, but how successfully it changes and acts on the present arrangements to improve the future.² Much less focus should therefore be placed on addressing formal issues of consistency, coherence and continuity in the use of dignity, and much greater focus should be placed on substantive issues, developing the concept to respond to the concerns of disadvantaged, excluded or disempowered people, who may themselves appeal to dignity in order to realise progress in their social or living conditions.

¹ Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655.

² Paul Patton, *Deleuze and the Political* (Routledge, 2000) 133.

This approach to dignity will likely be objected to on the basis that it stipulates the content and, in addition, licenses judicial creativity.³ However, the move to constructivism seeks to progress the question beyond whether the concept should be modified, to instead recognise the invariable necessity of such modification. The concept of dignity needs to be adapted to address the seeming justice of the case or recognise new problems, experiences and differences that emerge in life.⁴ Constructivism seeks to foster 'more effective ways of working with inevitable change.'⁵ This is not to say that constructivism is a boundless process without the need for certain anchor points or constraints. Any construction will need to provide a definition within the constraints of the triadic nature of the concept (humanity, value and respect) in a way that at least makes some connections to existing social and legal developments, advancing our understanding of them and taking them further. Moreover, any development should test whether the concept performs a distinctive role that differentiates it from more familiar legal concepts.

One potential contribution that has been identified is in terms of developing dignity to encapsulate, as well as respond to, vulnerability and the experiences or needs of groups that are disadvantaged or rendered 'other' by the priority given in the law to the protection of a majoritarian norm.⁶ This has provided an important basis for constructing human dignity by tying the development of the concept to the experiences, needs and interests of those most affected by being excluded from the protection of existing legal and ethical concepts, whose voices are therefore most likely to go unheard. In this way, dignity can open up space in which marginalised people can engage directly in informing the content of that concept.

This has been the aim of constructing investment dignity. This construction draws people who are at the boundaries of existing concepts in to the centre of the concept of dignity and the protection of the law. Not only to provide better protection for disadvantaged groups, but to challenge the central case as an obscure reflection of

³ For a similar criticism directed at Dworkin and Kant, see Jeremy Waldron, 'Dignity and Rank for the memory of Gregory Vlastos (1907-1991) (2007) 2 Archives Européennes de Sociologie 201, 210.

⁴ Deleuze and Felix Guattari, *What is Philosophy?* (trs Hugh Tomlinson, Graham Burchill, Verso, 1994) 28.

⁵ Tamsin Lorraine, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity and Duration* (Sunny, 2011) 169.

⁶ See p 59.

actual lived experience.⁷ In terms of substance, the concept of investment dignity assembles the three core components of human dignity (value, respect and humanity) in a distinctive way that encompasses collective and personal investment (respect) into conditions that promote the creative potentiality (value) of each person by protecting their power of acting and rest for mind and body that is joyful rather than sad (humanity). Each of these concepts is a further multiplicity of sub-components. The concept of humanity encompasses, for instance, the concept of interdependence and interconnectedness, recognizing that capacities of mind-body are always relational to and dependent on other forces or people in the world.

According to investment dignity, humans are vulnerable beings whose openness is necessary to their composition, development, and activity. On the other hand, it is that very same openness that exposes us to risks of deterioration, destruction, passivity and sadness.. Vulnerability, on this account, shares much in common with the work of Martha Fineman, who wishes to reclaim some of the positive aspects of vulnerability from those who argue it is an exclusively negative concept associated with pity.⁸ Rather than conceiving of vulnerability as being exclusively associated with stigmatised subjects, Fineman argues that vulnerability is 'generative and presents opportunities for innovation and growth, as well as creativity and fulfillment'.⁹ It is this vulnerability that enables us to 'experience feelings such as love, respect, curiosity, amusement, and desire that make us reach out to others, form relationships, and build institutions.'¹⁰ Vulnerability is not only the source of harm and pain, but also the source of our connectedness, development and joy. It is, as argued in Chapter Two, intrinsic to the very kind of dignity that we possess as human beings. Moreover, this thesis has argued that vulnerability should not be perceived as a concept that always requires positive intervention. It may not be possible, or desirable, to eradicate vulnerability without rendering life miserable or highly circumscribed, thus diminishing the dignity of the individual. In this way, vulnerability might do some of the same work as autonomy, but through a more

⁷ See p 63.

⁸ Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, 8.

⁹ Martha Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility (2012) 20 *Elder Law Journal* 101.

¹⁰ *Ibid*

balanced and nuanced approach, which supports both positive and negative obligations.

The emphasis on concepts of vulnerability and interdependence mean that investment dignity is based on a theoretical framework that goes beyond the limited Kantian concept of the human subject which still informs much of the debate on human dignity and human rights discourse. The philosophies of Spinoza and Deleuze have provided a different theoretical basis by which to construct human dignity that challenges some of the dualisms that have historically limited the concept and shaped the development of law. The mind-body, independent-dependent, productivity-rest, individual-social, and emotion-reason dualisms, which give priority to particular aspects of our humanity over others, and create dichotomies between categories of people in which some are perceived as a deviation from the norm, have been replaced with a strong form of holism. Not only does this rehabilitate some of the neglected dimensions of human personality, but takes the concept in the direction of recognising that each dimension of our personality is connected and affected by each of the others (physical, social, emotional/psychological and recreational), as well as restructures the relationship between the idea of the norm and the deviation inherent in the dualist approach to personality.

Rather than conceiving the relationship between a dependent person (deviation) and independent person (norm) as discontinuous, investment dignity treats the distinction as continuous, in which all people are dependent to a lesser or greater degree due to the universal feature of vulnerability. The 'deviation' is placed at the centre and the 'norm' is challenged as an obscure reflection of lived experience. This has some important implications for our understanding of the legal subject and the approach of the law to human relationships. As seen in chapter three, treating people as part of a complex network of interdependence fundamentally shifts the focus of law, which is preoccupied with asking whether a relationship has been created between two independent and rational parties, in which a legal obligation may or may not be assumed, to the question of how to structure the relationships of which we always form a part and from which we cannot be extracted. Responsibility arises within this network of power relationships on the basis of the degree of vulnerability of the individual and the degree of control of the more dominant party to safeguard, protect

and promote the dignity interests of the 'other'. In this regard, investment dignity may require rethinking those fields of law, such as public authority liability, which sometime place the image of man as a separate, independent, personally responsible and atomistic individual at the centre.

This construction not only provides a theoretical justification for the use of human dignity as a holistic concept, capturing some of the work that the concept already does in law, but carves out a distinctive role that distinguishes it from other legal concepts, something that has proved elusive in the literature.¹¹ Other concepts, such as physical integrity, selectively focus on one dimension of human personality, whereas human dignity is the concept best able to ensure that the law encompasses a fuller or more complete picture of the relationship between those dimensions, directing the judiciary to see the implications of a decision on one dimension of personality for all of the others. The judiciary will therefore have to be even more attentive, for instance, to how unsuitable accommodation or forced incontinence, as discussed in chapter four, may limit or reduce the activity of the body, which may simultaneously render the mind more passive to sad emotions in light of the parallel ideas that the mind forms of the increased passivity of the body. In turn, it will have to consider the implications of the increased mind-body passivity on the social dimension of personality. Restricting the power of the body to act may entail limitations on the ability of a person to make those connections to others that sustain or develop their creative capacities and through those connections enhance their own enjoyment in life. The increased passivity of the mind, associated with feelings of worthlessness, shame, anxiety, humiliation and isolation, may also dampen the capacity or willingness of a person to actively seek out and invest in encounters with others that affects them with joy.

A strong form of holism recognizes that different dimensions of human life are interconnected, affecting and reflecting one another. The concept of becoming, central to investment dignity, further requires a consideration of how these interconnecting dimensions are affected over time, as they unfold and develop in relation to others in the community. This moves beyond a limited focus on the concept of (human) being, as the central focus for dignity, which can be associated

¹¹ See Charles Foster, *Human Dignity in Bioethics and Law* (Hart, 2011) Ch 3.

with a fixed sense of either physical or psychological identity at one particular moment. Human becoming requires a consideration of the implications of a decision for the future, deconstruction of past forces to create a more productive or stable becoming, appreciation of the impact of gradual processes on the continuous formation of personality and recognition of the need to prevent premature deterioration.¹² Use of this concept will undeniably make the legal picture more complex, for it is not possible on this account to look at one dimension of personality in isolation or to exclude features not covered by a narrower concept, but it will, it is hoped, make the legal picture more satisfactory in terms of reflecting something of the complex (and multilayered) nature of human lives.

2. Creating Connections

Overall this study of human dignity has brought to light a number of connections between that concept and others. Dignity has been closely associated with, even treated as integral to, the rule of law, democracy, human rights, and, more controversially, the common law. In light of these connections, constructing human dignity in law is not a task that should, or can be, undertaken in isolation from a consideration of the impact of the concept on surrounding and connected legal concepts (and vice versa). Constructivism recognises that changes in a concept like dignity will reverberate and have transformative implications for related concepts. The potential implications of an investment construction of dignity are briefly outlined further below, with a particular focus on the concept of dialogue, which has an important role in defining dignity, as well as the relationship between the individual and the collective.

2.1. Promoting Constructive Dialogue

Connecting investment dignity to democracy¹³, as well as the rule of law¹⁴, has contributed to drawing out a concept of dialogue that was inherent from the start. The connection between dignity and dialogue is not novel. Academic scholars, such as Trevor Allan¹⁵ and Paulo Carozza¹⁶ have, for instance, argued that dialogue is

¹² See Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) EHRLR 190.

¹³ See Chapter Six, p 241.

¹⁴ See Chapter Five, p 211.

¹⁵ Trevor Allan, *Constitutional Justice: a liberal theory of the rule of law* (Oxford University Press, 2001).

inherently a dignity respecting practice, a trend that has been reflected in the case law of a number of courts across the world.¹⁷

This thesis has taken the notion of dialogue one step further, treating it as a pervasive, ongoing and grounded concept. Dialogue is not limited to the political sphere based on the exchange of detached and abstract ideas, which cases are then subsumed under, It characterises the relationship between human beings in their encounters with one another (as well as potentially nonhuman others and the environment) as a mode of communication or relation that simultaneously encompasses a mental and bodily experience, which stems from the strongly holistic nature of investment dignity. Thus, rather than seeing dialogue as simply the exchange of words or opinions, aimed at seeking agreement or consensus, it encompasses the manner in which the physical and mental capabilities of a person to affect and be affected communicate with others that they come in to contact with.¹⁸ Dialogue is promoted where the capabilities to affect and be affected communicate in such a way that they join to mutually sustain or enhance activity, power and joy. The emphasis is on relations of agreement in which, by joining together, people can enhance their activity or capacities. Dialogue is essential to the preservation and the development of the capabilities of the individual which are in turn connected to the capabilities of the community.

2.2. Developing Capabilities in a Relational Framework

This definition of dialogue makes a number of important contributions to our understanding of the development and role of the law, as well as bridges different strands of argument addressed throughout the thesis. The first contribution is that law should protect, promote and respect those constructive relationships that enable people to mutually sustain or develop their capabilities., Law is to be considered or evaluated in terms of how it structures relationships, whether it enables people to develop their creative potentiality in relation to each other, or leads to mutual destruction. The concept of dignity that has been constructed in this thesis is therefore in line with emerging feminist legal scholarship that seeks to address legal rights in relational terms and which, in turn, explores the impact of the structure of

¹⁶ Paulo Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply* (2008) 19 EJIL 931, at 944; Paulo Carozza, 'Human Rights, Human Dignity, and Human Experience' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013) Ch 8.

¹⁷ Erin Daly, *Dignity Rights* (Pennsylvania Press 2013) 147.

¹⁸ See p 250.

those relationships on core values.¹⁹ The reliance on a strong conception of holism, as central to dignity, makes an important contribution to this relational approach by recognising that social or legal relationships are 'both ideological relationships (in mind) and physical relationships (in bodies) that are exactly correlated with each other.'²⁰

A clear consequence of this relational turn is that law must not support destructive relationships, which may correspond to the hostile emotions of people (even a majority). Moreover, law should not endorse, or otherwise construct, legal fictions that correlate to associations which establish systems of isolation or domination, which obstruct the capacity for creative interaction. The treatment of women as chattel, disabled people as 'unlucky individuals' in need of pity, individuals as self-reliant or separate atomistic beings are examples of fictions or ideas that reinforce relations in which the 'other' is obstructed or limited in their ability to develop their personality. In turn, this is damaging to the democratic community as a whole. The law should embody and reflect, as far as possible, adequate knowledge that correlates to relationships based on agreement where people can join with others to increase or sustain their power of acting. This concept of dialogue grants a much stronger role to the democratic polity than majority democracy requires. It requires the conversion and transformation of types of human association, with the aim of ensuring that, as argued by Spinoza, individuals can 'develop their mental and physical faculties in safety, to use their reason without restraint and refrain from the vicious mutual abuse that are prompted by hatred, anger or deceit.'²¹ The relationship between the collective and the individual is not treated as oppositional or antagonistic, but envisaged as mutually supportive. This is a substantive ideal of democratisation that should be embodied in the everyday encounters and relations between individuals, informing, potentially, the fields of family, work and social care.

2.3. Openness to Otherness and Difference

The second contribution that is made to the understanding of the role of law entails a positive requirement of the law to be responsive to difference, individuality and otherness. Democratic dialogue entails a continuous and open process of

¹⁹ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011), Ch 1.

²⁰ Etienne Balibar, *Spinoza and Politics* (Verso 1998) 106-107.

²¹ Baruch Spinoza, *Theological-Political Treatise: Gebhardt Edition* (S Shirley trs, Cambridge:Hackett 2001) 223.

communication with uniquely forming and creative beings. It has been reaffirmed throughout the course of this thesis that humans are always exploring new identities, capacities, modes of being and forms of sociability. They also possess an embodied experience that is unique to them and informed, in part, by their distinct position in the network of relationships of which they are a part. This requires a form of responsiveness and receptivity to the experiences of those with which the law interacts, as well as a willingness to re-shape or alter an existing pattern of relating to people. Therefore there is always a possibility of discovering something novel in the creative encounter with the 'other' which may prompt the formation of new and more constructive forms of engagement. This aspect of dialogue establishes a bridge to the case law on human dignity at common law and under the Human Rights Act. In regards to both, the use of human dignity was connected to an openness and responsiveness to the person-specific needs of those excluded from legal protection because of their difference.

One of the important contributions that this makes to the current discussion on human dignity is the refusal to treat conceptual openness as a necessarily negative attribute of dignity, and, instead, argues that there must be some degree of openness if the law is to adapt to address the emerging differences and problems that inevitably unfold in life. Indeed, there are undeniable limits on the extent to which a legislative body can know or address every eventuality, particularity or becoming, especially of those who are disadvantaged or excluded. In this light, the ability of the judiciary to adapt the law to address person-specific needs, as was the case in *East Sussex County Council, Napier and Bernard*, is not necessarily an undemocratic practice, as it provides a necessary pathway by which the interests of the most vulnerable can be reflected in law, as well as participate in shaping the law which most affects them. Nor is it necessarily contrary to the rule of law, as the law is only fully understood and justified in the process of application in relation to the particularity or specificity of the case. Appeals to dignity in this process of adaptation, as seen in chapter four, have not rendered legal decision-making by judges more arbitrary, and without limits, but have in fact improved the judicial reasoning process.²²

²² See p 203.

2.4. Co-Operation and Interdependence

Although dialogue entails responsiveness on the part of the community to the person-specific needs of uniquely forming subjects, it is not simply a one way process in which the community addresses the concerns or desires of the individual. An element added to dialogue in chapters three and four, and developed further in chapters five and six, is the concept of co-operation expected from the individual. The third contribution to the understanding of the role of law is that it must seek to garner the co-operation of the individual by attempting to justify an outcome to them, so they can understand and accept the reason for a particular legal measure. This links in with some of the mainstream theories on the rule of law, such as those of Trevor Allan, as well as builds on the reasoning of Baroness Hale in *McDonald*, but makes a distinctive contribution by arguing that co-operation stems from the fact that dignity requires individuals to recognise that their own good is invested in the good of others. Individuals should accommodate and respect the interests of others within their own lives, especially those who are more vulnerable. Once the needs of a person have been properly identified, they should be expected to cooperate with authorities by selecting those means which are most cost-effective to realise those needs.²³ The further implication of this concept of co-operation is transformative. It seeks through justification to transform individuals from a passive state to an active state. The aim is to expand the limited sphere of self-concern, which can so often be related to autonomy, to valuing others as part of one's own sphere of concern.

2.5. Stability and Creativity

This concept of dialogue is, at least in part, an aspirational concept and therefore differs from procedural notions which are easier to realise in law. It is unlikely that social relations and holistic communication between people will constantly be based on agreement and reason. Human beings are always passive to a degree and are therefore, to some extent, likely to communicate on the basis of destructive (and passive) emotions that cause isolation or oppression. Such forms of sociability will never be entirely eliminated. Law is required in this regard to stabilize relationships, one of the twin dimensions of the rule of law (the other being justification), limiting the arbitrary exercise of power and as a basis for keeping individuals within the bounds of reason. However, even law is likely to reflect aspects of the passive dimensions of human personality. The most that can be expected from law is that it

²³ See p 192.

is open to re-assessment in light of new knowledge or better understanding that challenges those engrained destructive relations. Continuous reflection should be the consequence of ongoing dialogue. This reflective attitude to the past should be mirrored by a cautious and careful attitude towards the future.

The capacity for creativity and experimentation brings with it certain dangers. The exercise of creativity does not always produce positive change. The first danger arises from the fact that it is not always possible to know in advance the outcome of experimenting with new relationships, changing institutions, creating identities and exploring new technologies. A boundless process of experimentation can mean that life unfolds in an entirely unpredictable manner or becomes 'destructive to the experimenter and to others.'²⁴ In this respect, law is needed to provide stability, ensuring that change and evolution can occur, within stable boundaries that carefully restrain the possibility for future destruction, breakdown or harm to the individual or others. Law should allow creativity, development and experimentation in relationships to be undertaken with prudence, patience and care. The second danger arises from the formation of new legal concepts, which might have unforeseen or unexpected destructive consequences for the legal subject. In this regard, the implications of using concepts to change the dynamics of existing relationships, institutions or structures may be hazardous. This is especially the case in respect to the formation of concepts that might have an impact on others within the wider network of relationships. As such, the exercise of creativity now, in order to alter the terms of legal relationships, may reduce, rather than enhance, the potential for future creativity, experimentation and difference.²⁵

3. Investing in the Future

This thesis has explored *inter alia* the connections between human dignity and vulnerability, interdependence and creativity, but an exploration of the implication of these connections for law is certainly not complete. Nor, according to constructivism, can an exploration of those implications ever be complete, for life is a continuous process of change, giving rise to new problems and issues, which may open up new lines of inquiry. Addressing these problems will not merely entail repeating the concept by applying it to numerous issues, but, importantly, developing and

²⁴ Claire Colebrook, 'Experimentation' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005) 92.

²⁵ See p201.

modifying it in response to the differences and 'specificity of the encounter'. However, briefly discussed below by way of suggestion of the further implications of the concept constructed in this thesis, is its potential for changing the way we conceive of the relationship between the individual and their environmental surroundings, future generations or the wider human species. At present, very little work has been undertaken to explore the implications of dignity for the relationship between human beings and their environmental surroundings.²⁶ This is not unsurprising, in light of the historical focus on autonomy-as-dignity, which prioritizes notions of separateness, independence, and control of resources. The shift towards dependence, as a consequence of vulnerability, may provide an important foundation for exploring the appropriate relationship of humanity to the environment as a whole, in which our activity and future development is so heavily invested.

Dignity might be developed in such a way as to create a more caring outlook and relationship to the world than one that treats it as the subordinate subject of human will. A closely related, but somewhat distinct issue, concerns the relationship between different generations of humanity, recognising their continuity and interconnectedness in the process of becoming.²⁷ Each generation may, importantly, be invested in, and dependent upon, the manner in which the previous generation has respected the world. The most obvious area for considering these potential implications of investment dignity is in the field of the third generation of human rights for which there is no clear foundation or system of protection.²⁸

A number of dimensions of investment dignity might cast light on, as well as enrich, existing theoretical explanations of this developing legal field. It is envisaged, for instance, that the concept of vulnerability, as a core dimension of dignity, might be explored in temporal terms, addressing how a member of each generation is dependent on their predecessors and on their successors for sustaining and fulfilling their creative potentiality. A member of each generation is dependent for the development of their creative potentiality not only on the investment of their contemporaries, but also their predecessors, whose actions inform the social,

²⁶ George Kateb, *Human Dignity* (HUP 2011) 114.

²⁷ Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) EHRLR 190, 204.

²⁸ *Ibid* fn 48 and 49.

physical and emotional environments that sustain and affect us. It may even be that the realisation of our own creative projects and aspirations, which began in life, will depend on the investment of a successor generation in order to see them to fruition or completion in death.²⁹ This might require a reimagining of the self as part of the continuity of time and existence, perhaps best captured by the idea of personality as a dynamic process of becoming, as opposed to that of being, which suggests a more fixed subjectivity that exists in a self-enclosed segment of time.³⁰ This thesis has laid the foundation for future work that explores the relational and temporal dimensions of dignity.

This thesis has ultimately sought to develop a different approach to understanding human dignity that moves the current debate on the meaning of the concept in a more productive direction. Constructivism seeks to respond to inevitable change, whilst building a better future for the most disadvantaged. This entails very different expectations of the concept compared to approaches that seek to find a singular determinate concept that is there to be applied. In this regard, the openness of dignity has been re-envisaged as part of its usefulness, enabling responsiveness to difference and attentiveness to singularity. The concept of human dignity that has been constructed entails a move towards a more dynamic, vulnerable, relational and holistic image of the human being, which is more in tune with the rich complexity of lived experience.

²⁹ On this see: Janna Thompson, 'Being in Time: Ethics and Temporal Vulnerability' in Catriona Mackenzie et al (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2013).

³⁰ Ibid 169.

Bibliography

Books and Journal Articles

- Alexander J, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Ashgate 2008)
- Alexy R, *A Theory of Constitutional Rights* (OUP 2009)
- Allan T, *Law, Liberty and Justice: the Legal Foundations of British Constitutionalism* (Clarendon, 1993)
- *Constitutional Justice: a liberal theory of the rule of law* (Oxford University Press, 2001)
- 'Dworkin and Dicey: the Rule of Law as Integrity' (1988) 8 *Oxford Journal of Legal Studies* 266
- 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 *OJLS* 563
- 'Legislative Supremacy and Legislative Intent: a Reply to Professor Craig' (2004) 24 *Oxford Journal of Legal Studies* 563
- Amos M, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 *International and Comparative Law Quarterly* 557
- Anderson E, 'What is the Point of Equality' (1999) 109 *Ethics* 287
- Aplin T, 'The Development of the Action for Breach of Confidence in a post-HRA Era' (2007) *Intellectual Property Law Quarterly* 19
- Aquinas T, *Summa Theologica, Volume XIII* (Blackfriars, 1964).
- Armstrong A, 'Some Reflections on Deleuze's Spinoza' in Keith Ansell-Pearson (eds) *Deleuze and Philosophy: The Difference Engineer* (Routledge, 2002)
- 'Autonomy and the Relational Individual' in Moira Gatens, *Feminist Interpretations of Benedict Spinoza* (Penn State Press 2009)
- 'The Passions, Power, and Practical Philosophy: Spinoza and Nietzsche Contra the Stoics' (2013) 44 *The Journal of Nietzsche Studies* 6
- Arneson R, 'Perfectionism and Politics' (2000) 1 *Ethics* 37
- Baer S, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 *U of Toronto L J* 417
- Bagaric M and Allan J, 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 257
- Balibar E, *Spinoza and Politics* (Verso 1998)
- Barak A, 'Human Dignity: The Constitutional Value and the Constitutional Rights' in McCrudden, *Understanding Human Dignity* (OUP, 2013)
- Barak-Erez D and M Gross A, *Exploring Social Rights: Between Theory and Practice* (Hart, 2011)
- Bardsley S, *Women's Role in the Middle Ages* (Greenwood 2007)
- Bartlett and Sandland, *Mental Health Law: Policy and Practice* (OUP, 2007)

- Bateman J, 'Human dignity's false start in the Supreme Court of Canada: equality rights and the Canadian Charter of Rights and Freedoms' (2012) 16 *International Journal of Human Rights* 577
- Bates J, 'Human Dignity – An Empty Phrase in Search of Meaning?' (2005) *JR* 165
- Bates J, A landlord's liability for the acts of its tenants: back to where we started - *X v Hounslow LBC revisited* (2009) 12 *Journal of Housing Law* 86
- Beatson J, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008)
- Beddard R and Hill D, *Economic, Social and Cultural Rights: Progress and Achievement* (Macmillan, 1992)
- Bedford D, "'MS v United Kingdom" : Article 3 of the ECHR, Detention and Mental Health' (2013) 1 *EHRLR* 72
- Berlin I, *Liberty: Incorporating Four Essays on Liberty* (Ian Harris tr, OUP 2002)
- Betten L, *The Human Rights Act 1998: What it Means: the Incorporation of the European Convention on Human Rights into the Legal Order of the United Kingdom* (Martinus Nijhoff, 1999)
- Beylveld D and Brownsword R, *Human Dignity in Bioethics and Biolaw* (OUP 2002)
- Biggs H, *Euthanasia, Death with Dignity and the Law* (Hart, 2001)
- Bingham T, *The Rule of Law* (Allen Lane, 2010)
- Bloch E, *Natural Law and Human Dignity* (MIT Press, 1986)
- Bloustein E, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *NYU L. Rev.* 962
- Boucher D and Kelly P, *Political Thinkers: From Socrates to the Present* (OUP, 2003)
- Bowman J, *Stoicism, Enkrasia and Happiness: How Stoic Philosophy Can Bring Happiness* (iUniverse 2011)
- Braidotti R, 'Affirmation versus Vulnerability: On Contemporary Ethical Debates' in Constantin V. Boundas, *Gilles Deleuze: The Intensive Reduction* (Continuum International Publishing, 2009)
- 'Lines of Flight + Suicide' in Parr
- 'The Ethics of Becoming Imperceptible' in Constantin Boundas, *Deleuze and Philosophy* (Edinburgh University Press, 2006)
- Brammar A, 'Safeguarding and the elusive, inclusive vulnerable adult' in Jonathan Herring et al, *Vulnerabilities, Care and Family Law* (Routledge, 2013) Ch 13, 12;
- Bratza N, 'The Relationship Between the UK Courts and Strasbourg' (2011) *European Human Rights Law Review* 505
- Brems E, 'Indirect Protection of Social Rights by the European Court of Human Rights' in Daphne Barak Erez et al (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2011) 138.
- Brown A, *Personal Responsibility: Why it Matters* (Continuum 2009)
- Brownsword R (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014)
- 'Human Dignity, Human Rights, and Simply Trying to do the Right Thing' in Christopher McCrudden, *Understanding Human Dignity* (OUP 2013)
- Bush M, *European Nobility: Rich noble, poor noble* (Manchester University Press 1988)

- Cameron E, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in Christopher McCrudden *Understanding Human Dignity* (OUP 2013)
- Campbell T, Ewing K and Tomkins A, *Sceptical Essays on Human Rights* (Oxford, 2001)
- Cane P, *Responsibility in Law and Morality* (Hart, 2002)
- *Atiyah's Accidents, Compensation and the Law* (8th Edn, CUP 2013)
- Carozza P, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 EJIL 931
- 'Human Rights, Human Dignity, and Human Experience' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013)
- Clayton R, "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human rights Act 1998" [2004] P.L. 33
- Clements L, 'Disability, *dignity* and the *Cri de Coeur*' (2011) 6 EHRLR 675
- and Janet Read, *Disabled People and European Human Rights: A review of the implications of the 1998 Human Rights Act for disabled children and adults in the UK* (Policy Press 2003)
- and Thompson P, *Community Care and the Law* (Legal Action Group 2011)
- Cohen G, *Self-ownership, Freedom and Equality* (Cambridge; Cambridge University Press, 1995)
- Cohn M and Grimm D, 'Human Dignity as a Constitutional Doctrine' in Mark Tusnet et al, *Routledge Handbook of Constitutional Law* (Routledge 2013)
- Colebrook C, *Gilles Deleuze* (Routledge 2001)
- *Deleuze: A Guide for the Perplexed* (Continuum 2006)
- 'Experimentation' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2010)
- Colombat A, "November 4, 1995: Deleuze's death as an event" (1996) 29 *Man and World* 235
- Conaghan J, 'Gendered Harms and the Law of Tort: Remediating Harassment' (1996) 16 *Oxford Journal of Legal Studies* 407
- 'Tort Law and Feminist Critique', in M. D. A. Freeman, *Current Legal Problems* (OUP 2003) 175
- and Mansell W, *The Wrongs of Tort* (Pluto 1999)
- Coyle S, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (Ashgate, 2007)
- Craig P, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) PL 467
- Daly E, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Pennsylvania Press 2012)
- Davies M, *Are Persons Property? legal debates about property and personality* (Ashgate 2001)
- Deleuze G, *Spinoza: Practical Philosophy* (City Light 1988); Baruch Spinoza, *Ethics* (trs by G.H.R. Parkinson, OUP 2008)
- and Guattari F, *A Thousand Plateaus: Capitalism and Schizophrenia* (Continuum 2004)
- and Guattari F, *What is Philosophy?* (trs Hugh Tomlinson, Graham Burchill, Verso 1994)

- *Bergsonism* (trs Hugh Tomlinson and Barbara Habberjam, Zone Books, 1991)
- *Difference and Repetition* (Columbia University Press 1994).
- *Empiricism and Subjectivity: An Essay on Hume's Theory of Human Nature* (1991, Columbia University Press)
- *Expressionism in Philosophy: Spinoza* (Mit Press 1990)
- *L'Abécédaire de Gilles Deleuze avec Claire Parnet* 'G as in Gauche' in Paul Patton, 'Deleuze and Democracy' (2005) 4 *Contemporary Political Theory* 400
- Dewald J, *The European Nobility 1400-1800* (CUP 1996)
- Dicey AV, *An Introduction to The Law of the Constitution* (10th ed, Palgrave, 1959)
- Dickson B, *Human Rights and the United Kingdom Supreme Court* (OUP 2013)
- Dixon R and Nussbaum M, 'Abortion, Dignity and a Capabilities Approach', in B Baines, D Barek-Erez and T Kahana, *Feminist Constitutionalism* (CUP, 2011)
- Domasio A, *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* (Harcourt 2003). See also
- Donchin Anna, 'Autonomy, Interdependence, and Assisted Suicide: Respecting Boundaries/Crossing Lines' (2000) 14 *Bioethics* 187
- Duff R, *Trials and Punishments* (1991 CUP)
- Dunn M, Clare I, and Holland A, 'To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy' (2008) 28 *Leg Studies* 234
- and Herring J, 'Safeguarding children and adults: Much of a muchness?' (2011) *Child and Family Law Quarterly* 528.
- 'When are adult safeguarding interventions justified?' in Jonathan Herring et al, *Vulnerabilities, Care and Family Law* (Routledge, 2013)
- Dupré C, *Importing the law in post-communist transitions: the Hungarian Constitutional Court and the right to human dignity* (Hart 2003)
- 'Human dignity and the withdrawal of medical treatment: missed opportunity?' (2006) *EHRLR* 678
- 'Article 1 of the European Union Charter of Fundamental Rights' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014).
- 'Unlocking human dignity: towards a theory for the 21st century' (2009) *EHRLR* 190
- 'Dignity, Democracy and Civilisation' (2012) 33 *Liverpool Law Review* 263
- 'Constructing the Meaning of Human Dignity' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013)
- 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19 *European Public Law* 319
- Dworkin R, *Law's Empire* (Hart 2010).
- *The Philosophy of Law* (Oxford University Press, 1977)
- 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65 *Fordham L. Rev.* 1249
- *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins 1993)
- *Sovereign Virtue: the Theory and Practice of Equality* (Harvard University, 2000)
- *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press 2006)

- *Justice in Robes* (Belknap: Harvard University Press 2008)
- *Justice for Hedgehogs* (Belknap: Harvard University Press 2011)
- Dyzenhaus D, 'Form and Substance in the Rule of Law' in C. Forsyth, *Judicial Review & the Constitution*, (Oxford: Hart Publishing, 2000)
- Eberle E, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33 *Liverpool Law Rev* 201
- Edwards K, 'Judicial Deference Under the Human Rights Act' (2002) *MLR* 859
- 'R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department - a case of "mountainish inhumanity"?' [2006] *Journal of Social Security Law* 169
- Edwards R, 'Generosity and the Human Rights Act: The Right Interpretation?' [1999] *PL* 400
- Feldman D, *Civil Liberties and Human Rights in England and Wales* (OUP 2002)
- 'Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberty' (1994) 47 *CLP*
- "The Developing Scope of Article 8 of the European Convention on Human Rights" [1997] 3 *EHRLR* 265
- 'Human dignity as a legal value: Part 1' (1999) *PL* 682
- 'Human dignity as a legal value: Part 2' (2000) *PL* 61
- Fenwick H, *Civil Liberties and Human Rights* (Routledge, 4th edn, 2007)
- Fineman M, *The Autonomy Myth: A Theory of Dependency* (New Press 2004)
- 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (2000) 8 *American University Journal of Gender, Social Policy & the Law* 13
- 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1
- "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility (2012) 20 *Elder Law Journal* 101
- Finnis J, *Natural Law and Natural Rights* (Clarendon, 1980)
- *Human Rights and Common Good: Collected Essays* (OUP 2011)
- Fletcher G, 'In God's Image: The Religious Imperative of Equality under Law' (1999) 99 *Columbia Law Review* 1608
- Forsyth C, *Judicial Review & the Constitution*, (Oxford: Hart Publishing, 2000)
- Foster C, *Human Dignity in Bioethics and Law* (Hart 2011).
- Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008)
- *Discrimination Law* (OUP, 2011) 24.
- Fuller L, *Anatomy of the Law* (Penguin 1968)
- 'A Reply to Professors Cohen and Dworkin' 10 (1965) *Villanova Law Review* 655
- *Morality of Law* (Yale University Press 1969)
- Gadamer HG, *Truth and Method* (Garrett Barden and John Cumming trs, Sheed and Ward 1975)
- *Hermeneutics, Religion and Ethics* (Yale, Joel Weinsheimer trs, 1999)
- *Philosophical Hermeneutics* (University of California Press, trs David. E. Linge, 2008).
- Garrett D, 'Spinoza's ethical theory' in Don Garrett et al, *The Cambridge Companion to Spinoza* (CUP, 1996)

- Gatens M, *Imaginary Bodies: Ethics, Power and Corporality* (Routledge 1996)
- Gearty C, *Principles of Human Rights Adjudication* (OUP 2004)
- and Mantouvalou V, *Debating Social Rights* (Hart 2011).
- 'Socio-economic rights, basic needs and human dignity: A perspective from law's front line' in Christopher McCrudden, *Understanding Human Dignity* (OUP 2013)
- George R, 'In Defence of Dissent: R (McDonald) v Royal Borough of Kensington and Chelsea' [2011] ELJ 409
- Gewirth A, *Human Rights: Essays on Justifications and Applications* (University of Chicago Press, 1982)
- Gilbert P (eds), *Compassion: Conceptualisation, Research and Use in Psychotherapy* (Routledge 2005)
- Goldsworthy J, *Interpretation in Democratic Societies* (Ashgate, 2002)
- *Interpreting Constitutions* (Oxford University Press, 2006)
- Goodin R and Parker D, 'Symposium on Martha Nussbaum's Political Philosophy' (2000) 1 *Ethics* 5
- Grover S, 'A Response to Bagaric and Allan's "The Vacuous Concept of Dignity"' (2009) 12 *International Journal of Human Rights* 615
- Habermas J, *Between Facts and Norms: Contributions to a discourse Theory of Law and Democracy* (trs William Rehg, Polity Press, 1996)
- 'The Concept of Human Dignity and The Realistic Utopia of Human Rights' (2010) 41 *Metaphysics* 464
- Hale B, 'Dignity' (2009) 31 *Journal of Social Welfare & Family Law* 101
- 'Dignity' (Ethel Benjamin Commemorative Address, New Zealand, 2010).
- 'What Can the Human Rights Act Do for my Mental Health?' (2005) 17 *Child and Family Law Quarterly* 295
- 'Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 (1) *Human Rights Law Review* 65;
- Hardt M, *Gilles Deleuze: An Apprentice in Philosophy* (University of Minnesota Press, 1993)
- Harees L, *The Mirage of Dignity on the Highways of Human 'Progress'* (Authorhouse, 2012)
- Harris G, *Human Dignity and Vulnerability: Strength and Quality of Character* (University of California Press 2007)
- Hart HLA, *Law, Liberty and Morality* (Oxford University Press, 1963)
- Henley K, 'Protestant Hermeneutic and the Rule of Law: Gadamer and Dworkin' (1990) 3 *Ratio Juris* 14
- Hennette-Vauchez S, 'A human dignitas? Remnants of the ancient legal concept in dignitary jurisprudence (2011) *International Journal of Constitutional Law* 32.
- Hepple B, *Equality: the New Legal Framework* (Hart 2011)
- Herring J, *Medical Law and Ethics* (OUP 2012)
- 'Entering the Fog: On the Borderlines of Mental Capacity' 83 (2008) *Indiana Law Journal* 1619 [Emphasis Added].
- Hershovitz S, *Exploring Law's Empire: the Jurisprudence of Ronald Dworkin* (Oxford, 2006)
- Hickman T, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2006] *Public Law* 306.

- Hobbes T, *Leviathan* (A.P Martinich and Brian Battiste ed, Broadview 2010)
- Hollenbach D, 'Human Dignity: Experience and History, Practical Reason and Faith' in Christopher McCrudden, *Understanding Human Dignity* (OUP 2013)
- Holmes O, *The Common Law* (Lawbook Exchange 1881)
- Hunt M, *Using Human Rights Law in English Courts* (Hart 1997)
- Hutchinson A, *The Evolution and the Common Law* (CUP 2005)
- Irvine W, *A Guide to the Good Life: The Ancient Art of Stoic Joy* (OUP 2008) 228.
- Jackson V, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana Law Review* 15
- Jayawickrama N, *The Judicial Application of Human Rights Law* (CUP 2002)
- Jones J, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 *Liverpool Law Review* 281
- Jowell J, 'Equality as a Constitutional Principle' (1994) 7 *CLP* 1
- Kant I, *Immanuel Kant: Groundwork of the Metaphysics of Morals: A German-English Edition* (Cambridge University Press 2011)
- *Kant: Political Writings* (CUP 1991)
- *Lectures on Ethics* (Peter Heath trs, CUP 1997)
- Kass L, *Life, Liberty and Human Dignity* (Encounter Books 2013)
- 'Defending Human Dignity' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (US Independent Agencies and Commissions, 2008)
- Kateb G, *Human Dignity* (HUP, 2011);
- Kavanagh A, 'The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998' (2004) 24 *O.J.L.S.* 259
- Kemmerer A, 'Dignified Disiciplinarity: Towards a Transdisciplinary Understanding of Human Dignity'
- Keown J, 'Euthanasia, ethics, and public policy: an argument against legalisation' (CUP 2002)
- Khaitan T, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2011) *Oxford Journal of Legal Studies* 1.
- Kizner M, *Spinoza on Human Freedom: Reason, Autonomy and the Good Life* (CUP 2011)
- Klug F, 'A Bill of Rights: Do We Need One or Do we already have one?' [2007] *PL* 701
- Koch I, *Human Rights as Indivisible Rights* (Martinus Nijhoff 2009) 296;
- Kothari J, 'Social Rights Litigation in India: Developments of the Last Decade' in Dephne Barak Erez et al (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2011) Ch 8.
- Kramnick I, *The Enlightenment Reader* (Penguin 1995)
- Larkin S, 'How to Make Sense of the HRA 1998: The Ises and Oughts of the British Constitution' (2000) *OJLS* 399
- Lawson A, 'Disability, degradation and dignity: the role of Article 3 of the European Convention on Human Rights' [2005] 56(4) *NILQ* 462
- Lee P and George R, 'The Nature and Basis of Human Dignity' (2008) 21 *Ratio Juris* 173

- Lefebvre A, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008).
- 'The Time of Law' in Claire Colebrook (eds), *Deleuze and Law: Forensic Futures* (Palgrave, 2009)
- *Human Rights as a Way of Life: On Bergson's Political Philosophy* (Stanford University Press 2013)
- Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007)
- 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509
- Levi E, *An Introduction to Legal Reasoning* (Chicago Press 2013)
- Lewis J, 'The European Ceiling on Human Rights' [2007] Public Law 720.
- Locke J, *An Essay Concerning Human Understanding* (bk 4, ch IX, para 12).
- *Second Treatise* (ed, C.B. Macpherson, Cambridge, 1980)
- *The Second Treatise of Government and A Letter Concerning Toleration* (Courier Dover 2012)
- Lord B, *Spinoza's Ethics* (Edinburgh University Press 2010)
- Lorraine T, *Deleuze and Guattari's Immanent Ethics: Theory, Subjectivity and Duration* (SUNY 2011)
- Lubban D, 'The Rule of Law and Human Dignity: Reexamining Fuller's Canons' (2010) 2 Hague J. on Rule of Law 29.
- Lucas P, *Ethics and Self-Knowledge: Respect for Self-Interpreting Agents* (Springer 2011)
- Macklin R, 'Dignity is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy' (2003) British Medical Journal 327
- MacPherson C, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 2010)
- Manderson D, *Proximity, Levinas, and the Soul of Law* (McGill-Queen's Press 2006)
- Marella M, 'A New Perspective on Human Dignity: European Contract Law, Social Dignity and the Retreat of the Welfare State' in Stefan Grundmann, *Constitutional Values and European Contract Law* (Kluwer Law International 2008)
- Marmor A, *Interpretation and Legal Theory* (Hart Publishing 2005)
- McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655
- 'Introduction' in *Understanding Human Dignity* (British Academy, 2013)
- McGhee A, 'Finding a way through the Ethical and Legal Maze: Withdrawal of Medical Treatment and Euthanasia' (2005) Medical Law Review 357
- McIvor C, 'The Positive Duty of the Police to Protect Life' (2008) Professional Negligence 27
- 'The Hill Principle, the human Rights Act 1998 and the House of Lords' (2010) 69 (1) Cambridge Law Journal 133
- Megarry R, *A Second Miscellany-at-Law* (Stevens, 1973),
- Meyer M, 'Kant's Concept of Dignity and Modern Political Thought' (1987) 8 History of European Ideas 319.
- 'Dignity, Rights, and Self-Control' [1989] 99 *Ethics* 520
- Mill J, *On Liberty and Utilitarianism* (Bantam, 1993)

- Moeckli D, Shah S, Sivakumaran S, *International Human Rights Law* (OUP, 2013)
- Möllers C. 'Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law' (2009) 42 *Israel Law Review* 416
- Montgomery J, *Health Care Law* (Oxford 2003)
- Moon G and Allen R, 'Dignity discourse in discrimination law: a better route to equality?' (2006) *EHRLR* 610.
- Morsink J, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999)
- Mowbray A, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004)
- Mulgan R, 'Was Aristotle an "Aristotelian Social Democrat"?' (2000) 1 *Ethics* 79
- Mullender R, 'Negligence Law, the Welfare State, and "Our Moral Life"' (2009) 25 *Journal of Professional Negligence* 187;
- 'Negligence, neighbourliness, and the welfare state' (2009) 68 *Cambridge Law Journal* 507
- 'Negligence, Public Bodies, and Ruthlessness' (2009) 72 *Modern Law Review* 961.
- Munby J, 'What Price Dignity?' (Lag Community Care Conference: Protecting Liberties, July 2010);
- 'Dignity, Happiness and Human Rights' (2011) *Elder Law Journal* 32
- 'Protecting the rights of vulnerable and incapacitous adults – the role of the courts: an example of judicial law making' [2014] *Children and Family Law Quarterly* 63;
- 'Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?' (2012) 7 *Brunswick Mental Health Care Review* 18
- Neal M, 'Not gods but animals: human dignity and vulnerable subjecthood' (2012) 23 *Liverpool Law Review* 177
- 'Respect for human dignity as substantive basic norm' (2014) 10 *International Journal of Law in Context* 26
- Nedelsky J, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011)
- Nicol D, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] *PL* 438; T.R. Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' [2005] *Public Law* 306
- Nozick R, *Anarchy, State and Utopia* (New York: Basic 1974)
- Nussbaum M, *Sex and Social Justice* (Oxford University Press 1999)
- 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (US Independent Agencies and Commissions 2008)
- 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' (1992) 20 *Political Theory* 202
- *The fragility of goodness: Luck and ethics in Greek tragedy and philosophy* (CUP 2001)
- *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2001)
- *Upheavals of Thought: The Intelligence of Emotions* (CUP 2003)

- *Hiding From Humanity* (Princeton University Press, 2004).
- *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press: Harvard University 2006)
- 'Non-Relative Virtues: An Aristotelian Approach' in James Sterba, *Ethics: The Big Questions* (Wiley 2009)
- *Creating Capabilities: The Human Development Approach* (Belknap Press: HUP 2011)
- *Political Emotions* (HUP 2013)
- O'Connell R. 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6 *ICON* 267
- Okin S, *Justice, Gender and the Family* (Basic Books 2008)
- Olssen M, *Liberalism, Neoliberalism and Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education* (Routledge 2009)
- 'Why Martha Nussbaum Should become a Foucauldian' in Hans-Uwe Otto (eds), *Education, Welfare and the Capabilities Approach: A European Perspective* (Barbara Burdich, 2010)
- O'Mahony C, 'There is No Such Thing as a Right to Dignity' (2012) 10 *International Journal of Constitutional Law* 551
- Palmer E, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Oxford: Hart 2007)
- 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 4 *Erasmus Law Review* 397
- Parker C and Clements L, 'The UN Convention on the Rights of Persons with Disabilities: a New Right to Independent Living?' [2008] 4 *EHRLR* 508
- Pateman C, *The Sexual Contract* (Stanford University Press 1988)
- 'Self-Ownership and Property in the Person: Democratization and the Tale of Two Concepts' (2002) 10 *The Journal of Political Philosophy* 20
- Patrick L and George R, 'The Nature and Basis of Human Dignity' (2008) 20 *Ratio Juris* 173
- Patton P, *Deleuze and the Political* (Routledge, 2000)
- 'Deleuze and Democracy' (2005) 4 *Contemporary Political Theory* 400
- , *Deleuzian Concepts: Philosophy, Colonization, Politics* (Stanford University Press 2010)
- 'Deleuze's Political Philosophy' in Danial Smith, *The Cambridge Companion to Deleuze* (Cambridge University Press, 2012)
- Pearson K, *Germinal Life: The Difference and Repetition of Deleuze* (Routledge 1999)
- Peroni L and Timmer A, 'Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056.
- Phillipson G and Williams A, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *Modern Law Review* 878.
- Pinker S, 'The Stupidity of Dignity' (2008) *The New Republic* 28
- Post R, 'Dignity, Autonomy, and Democracy' Inaugural Richard Daub Lecture at J. W. Goethe Universität, Frankfurt M, November 1999

- Pound R, *The Spirit of the Common Law* (Transaction Publishers 1925).
 — *Interpretations of Legal History* (CUP, 2013)
- Rao N, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183
- Ravven H, 'Spinoza and the Education of Desire' (2003) 2 *Neuropsychanalysis* 218.
 — 'Spinoza's Anticipation of Contemporary Affective Neuroscience' (2003) 2 *Consciousness and Emotion* 4
- Rawls J, *A Theory of Justice* (5th Ed, HUP 2003)
 — *Political Liberalism* (Columbia, 2005)
- Raz J, *The Authority of Law: Essays on Law and. Morality* (Oxford 1979)
 — *The Morality of Freedom* (OUP, 1986)
- Richardson J, *Selves, Persons and Individuals: Philosophical Perspectives On Women And Legal Obligations* (Ashgate 2004)
 — *The Classic Social Contractarians: Critical Perspectives from Contemporary Feminist Philosophy and Law* (Ashgate 2009)
- Riley S, 'Observing the Breach: Dignity and the Limits of Political Theology' (2008) 19 *Law and Critique* 115
 — 'Human Dignity: Comparative and Conceptual Debates' (2010) 6 *International Journal of Law in Context* 117
 — 'Dignity as the Absence of the Bestial: A Genealogy' (2013) 14 *Journal for Cultural Research* 143
- Roberts M, 'Time, human being and mental health care: an introduction to Gilles Deleuze' (2005) 6 *Nursing Philosophy* 161
 — 'Gilles Deleuze: psychiatry, subjectivity, and the passive synthesis of time' (2006) 7 *Nursing Philosophy* 191
- Rogan M, 'Prisoners' rights and the separation of powers: comparing approaches in Ireland, Scotland and England and Wales' (2012) *Public Law* 415
- Rosen M, *Human Dignity: Its History and Meaning* (Harvard University Press 2012)
 — 'Dignity: The Case Against' in McCrudden, *Understanding Human Dignity*
- Rousseau J, *The Social Contract* (Cosimo 2008)
- Scanlon T, *What we Owe to Each Other* (2000 HUP)
- Schachter O, 'Human Dignity as a Normative Concept' (1983) 77 *The American Journal of International Law* 848.
- Scott R, 'Dignite/Dignidade: Organising against Threats to Dignity in Societies After Slavery' in Christopher McCrudden, *Understanding Human Dignity* (OUP, 2013)
- Sedmak C, 'Human dignity, interiority, and poverty' in C McCrudden (eds), *Understanding Human Dignity* (n 23).
- Sen A, *The Idea of Justice* (Belknap Press: HUP, 2009)
 — 'Freedom of Choice: Concepts and Content' (1988) 32 *European Economic Review* 269
- Sensen O, *Kant on Moral Autonomy* (Cambridge University Press, 2013)
 — 'Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms' (2011) 10 *European Journal of Political Theory* 71
- Shultziner D and Carmi G, 'Human Dignity in National Constitutions: Functions, Promises and Dangers' (2014) 6 *The American Journal Of Comparative Law* 461
- Simmonds N, *Law as a Moral Idea* (Oxford, 2010)

- Slaughter AM, 'A Typology of Transjudicial Communication' (1994) 29 U Richmond L Rev 99
- Smith D, *Essays on Deleuze* (Edinburgh University Press 2012)
- Smith J, 'A Taste For Life (On Some Suicides in Deleuze and Spinoza)' (2010) 10 Parhessia 75.
- Spencer K, 'Same Sex Couples and the Right to Marry – European Perspectives' (2010) Cambridge Law Review 155
- Spinoza B, *Ethics* (New York: Hafner 1949)
 —— *A Theologico Political Treatise* (Cosimo, 2007)
- Stagoll C, 'Becoming' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005)
- Starmer K, 'Positive Obligations under the Convention' in Jeffrey Jowell et al (eds), *Understanding Human Rights Principles* (Hart 2001)
- Stapleton J, 'Duty of Care Factors: A Selection from the Judicial Menu', in Peter Cane and Jane Stapleton (eds), *The Law of Obligations* (Clarendon Press 1998)
- Steele J, 'Duty of Care and Ethic of Care: Irreconcilable Difference' in Janice Richardson and Erika Rackley, *Feminist Perspectives on Tort Law* (2012 Routledge)
- Stychin C, 'The vulnerable subject of negligence law' (2012) 8 International Journal of Law in Context 337
- Surin K, 'Spinoza, Baruch' in Adrian Parr, *The Deleuze Dictionary* (Columbia University Press, 2005)
- Sweeney J, The human rights of failed asylum seekers in the United Kingdom (2008) PL 277
- Talbot P (eds), *Key Concepts in Learning Disabilities* (Sage 2010)
- Talbott W, *Human Rights and Human Well-Being* (OUP, 2010)
- Thompson J, 'Being in Time: Ethics and Temporal Vulnerability' in Catriona Mackenzie et al (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2013)
- Timmer A, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman & Anna Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)
- Treasure G, *The Making of Modern Europe, 1648-1780* (Routledge 2003)
- Tremblay L, 'The legitimacy of judicial review: the limits of dialogue between courts and legislatures' (2005) ICON 617
- Tuck R, *Natural Rights Theories: their Origin and Development* (Cambridge University Press, 1979)
- Van Parijs P, *Real Freedom for All* (Clarendon Press 1995)
- Waddington L, 'Unravelling the Knot: Article 8, private life, positive duties and disability: rewriting Sentges v. Netherlands' in Eva Brems, *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP, 2003)
- Waldron J (eds), *Theories of Rights* (OUP 1984)
 —— 'A Right-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 214
 —— 'Dignity and Citizenship' in McCrudden, *Understanding Human Dignity*
 —— 'Dignity and Rank for the memory of Gregory Vlastos (1907-1991)' (2007) 2 Archives Européennes de Sociologie 201
 —— 'How Law Protects Dignity' (2012) 71(1) Cambridge Law Journal 200

- ‘Participation: The Right of Rights’ (1998) 98 Proceedings of the Aristotelian Society 307
- *Dignity, Rank and Rights* (OUP 2012).
- *Law and Disagreement* (Oxford: Clarendon Press, 1999)
- *The Dignity of Legislation* (Cambridge University Press, 1999)
- Wicks E, ‘The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties’ (2012) 14 Human Rights Law Review 199,
- Williams J, ‘Public Law Protection of Vulnerable Adults: The Debate Continues, So Does the Abuse’ (2002) 2 Journal of Social Work 293
- Witting C, ‘Physical Damage in Negligence’ 61(1) The Cambridge Law Journal 189
- Wolff J and De-Shalit A, *Disadvantage* (OUP 2007)
- Woolman S, ‘Dignity’ in Stuart Woolman and T Roux (eds), *Constitutional Law of South Africa* (Kenwyn 2002) 36
- Young K, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 Yale Journal of International Law 113

Working and Conference Papers

- Hale B, ‘Dignity’ (Ethel Benjamin Commemorative Address, New Zealand, 2010)
- Munby J, ‘Safeguarding, Capacity and The Law’, A talk by Sir James Munby, President of the Family Division, at the National Spring Safeguarding Adults Conference of the Local Government Association ‘Leading Adult Safeguarding’ in London on Tuesday 12 March 2013.
- Neal M, “Human Dignity and Emotion in the Healthcare Law Context” Invited paper delivered during a Two-Day Colloquium on The Emotional Dynamics of Law and Legal Discourse, Queen’s University Belfast, 25th and 26th March 2013
- Palmer E, Written Evidence in Joint Committee on Human Rights, A Bill of Rights for the UK?: Twenty-ninth Report of Session 2007-08, Vol. 2, Ev 157
- Waldron J, ‘Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley’ (September 1, 2009) Public Law & Legal Theory Research Paper Series <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220> accessed 18 November 2013;
- ‘Dignity, Rights and Responsibilities’ (2009) Public Law & Legal Theory Research Paper Series
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1710759 accessed 18 November 2013
- Waldron J, ‘The Image of God: Rights, Reason, and Order’ (2010) Public Law & Legal Theory Research Paper Series 218
- Waldron J, ‘The Image of God: Rights, Reason, and Order’ (2010) Public Law & Legal Theory Research Paper Series <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718054> accessed 18 November 2013
- ‘The Image of God: Rights, Reason, and Order’ Public Law & Legal Theory Research Paper Series (Dec, 2010)

Case Law

A Local Authority v TZ [2014] EWHC 973 (COP)
A v Secretary of State for the Home Department (No 2) [2005] UKHL 71
Aintree University Hospitals NHS Foundation Trust v James [2013] EWCA Civ 65
Airedale N.H.S. Trust v Bland [1993] AC 789
Airey v Ireland [1979] 2 EHRR 305
An NHS Trust v MB [2006] EWHC 507
Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406
AT & Ors v Dulghieru & Anor [2009] EWHC 225
Bellinger v Bellinger [2003] UKHL 21
Bensaid v UK (2001) ECHR 82
Botta v Italy (1998) 26 EHRR 241
Breslin v McKevitt [2011] NICA 33
British Railways Board v Herrington [1972] AC 877
Budina v Russia [2009] ECHR 45603/05
 BVerfGE 45, 187 (229)
 BVerwG, 15 December 1981, (1982) *Neue Juristische Wochenschrift* 664; BVerwG, 30 January 1990, (1990) *Juristen Zeitung* 382
C v A Local Authority [2011] EWHC 1539
C.A.S. and C.S. v. Romania (2005) (26692/05)
Campbell v Mirror Group Newspapers [2004] UKHL 22
Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22
Cassell & Co. Ltd. v. Bloom [1972] AC 1027
CC v KK [2012] EWHC 2136 (COP)
Chapman v United Kingdom (2001) 33 EHRR 18
Charter of Rights and Freedoms Law v. Canada (Minister of Employment and Immigration) (1999) 1 SCR 497
Cheshire West and Chester Council v P [2014] UKSC 19
Chester v Afshar [2004] UKHL 41
 Constitutional Court of South Africa, 9 Oct. 2002, Case CCT31/01, *Jordan v. the State*
Constitutional de Lasala -v- de Lasala [1980] AC 546
Cooper v Wandsworth Board of Works (1863) 14 CB 108
Cossey v United Kingdom (1991) 13 EHRR 622
Costello-Roberts v United Kingdom (1993) 19 EHRR 112
DL v A Local Authority [2013] Fam. 1.
Dudgeon v. the United Kingdom
Dybeku v. Albania (2007) E.C.H.R 1109
Eldridge v. British Columbia (Attorney General) [1997] 2 SCR. 624
Epping Forest DC v Mason [2002] EWHC 1532
Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22
Francis Coralie v. Union Territory of Delhi, Air 1982 SC 746.
Ghaidan v Godin-Mendoza [2004] UKHL 30
Goodwin v United Kingdom (1996) EHRR 123

Government of the Republic of South Africa and Others v Grootboom and Others (2000) (II) BCLR 1169 (CC)
Grainger plc v Nicholson [2010] IRLR 4
Greek case [ECommHR, 1969] 186
Guerra v Italy (1998) 26 EHRR 357
Hall v Bull [2013] UKSC 73
HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31
Hedley Byrne & Co. Ltd. v. Heller & Partners [1964] AC 467
Hegarty v Enforcement of Judgments Office [2013] NICA 56 [8]
Hill v Chief Constable of South Yorkshire Police [1987] UKHL 12
Hirst v the United Kingdom (No 2) [2005] ECHR 681
Hounga v Allen & Anor [2014] UKSC 47
HRH The Prince of Wales v Associated Newspapers Ltd (No 3) [2006] EWCA Civ
Hutcheson v News Group Newspapers Ltd [2011] EWCA Civ 808
Ibrahim Mohammed Tahir Salih, Behnam Rahmani v The Secretary of State for the Home Department [2003] EWHC 2273 (Admin)
International Federation for Human Rights (FIDH) v. France, Collective Complaint no. 14/2003, 8 Sept 2004
Ireland v. United Kingdom (5310/71) [1978] ECHR 1
Kaye v Robertson and Another [1991] F.S.R. 62
Keenan v United Kingdom (2001) 33 EHRR 913
Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 445-46 (Conn. 2008)
KN (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 1430
Kudla v Poland (2000) 35 EHRR 198
L (Vulnerable Adults with Capacity: Court's Jurisdiction), Re [2010] EWHC 2675
Larioshina v Russia [2002] ECHR 56869/00
Lewis v Secretary of State for Health [2008] EWHC 2196
Lopez Ostra v Spain 16798/90 [1994] ECHR 46
M (Adult Patient) (Minimally Conscious State: Withdrawal of Treatment), Re [2011] EWHC 2443 (Fam)
M.S. v United Kingdom (2012) 55 EHRR 23
Manley v. Commissioner of Police of the Metropolis [2006] EWCA Civ 879;
Richardson v Howie [2004] EWCA Civ 1137
Marzari v Italy (1999) 28 EHRR CD 175
McDonald v United Kingdom [2014] ECHR 492
McFarlane v Tayside Health Authority (2002) 2 AC 114
MD (Ivory Coast) v Secretary of State for the Home Department [2011] EWCA Civ 989
Mosley v News Group Newspapers Ltd [2008] EWHC 687
Mosley v News Group Newspapers [2008] EWHC 1777
Muller and Others v Switzerland [1988] [ECHR] (Application Number 10757/84) (1988) 13 EHRR 212
Murray v Express Newspapers Plc [2008] EWCA Civ 446
N.F. v Italy (2002) EHRR 106

N.S v Secretary of State for the Home Department (C-411/10)
Niemietz v. Germany (1993) 16 EHRR 97
O'Rourke v United Kingdom Applc No 39022/97 26th June 2001
Parkinson v St James and Seacroft University Hospital NHS Trust (2002) QB 284
Peck v. the United Kingdom (2003) 36 EHRR 41
Peers v Greece (2001) 33 EHRR 51
Pentiacova v Moldova (2005) 40 EHRR SE 23, 218
Phelps v Hillingdon [2001] 2 AC 619
Pretty v DPP [2001] UKHL 61
Pretty v the United Kingdom (2002) 35 EHRR 1
Price v United Kingdom (2002) 34 EHRR 53
Purdy v DPP [2009] UKHL 45;
R (Burke) v the General Medical Council [2005] EWCA Civ 1003
R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293
R (Haidar Ali Hussein) v The Secretary of State for Defence [2014] EWCA Civ 1087
R (On the Application of A, B, X and Y) v East Sussex County Council (No 2) [2003] EWHC 167
R (on the application of B) v Secretary of State for Justice [2009] EWHC 2220
R (on the application of Bernard) v Enfield LBC [2002] EWHC 2282
R (On the Application of Burke) v General Medical Council [2004] EWHC 1879
R (on the application of DB) v Secretary of State for the Home Department [2006] EWHC 659
R (On the Application of Gurung) v Ministry of Defence [2002] EWHC 2463
R (On the application of Limbuela) v Secretary of State for the Home Department [2005] UKHL 66
R (on the application of McDonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33
R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent) R (on the application of AM) (AP) (Respondent) v The Director of Public Prosecutions [2014] UKSC 38
R (on the application of Razgar) v Secretary of State for the Home Department (No.2) [2004] 2 A.C. 368,
R (on the application of Rostami) v Secretary of State for the Home Department [2013] EWHC 1494
R (On the application of S, D and T v the Secretary of State for the Home Department) [2003] EWHC 1941
R v (Othman) v Secretary of State for Work and Pensions [2001] EWHC Admin 1022
R v Kapp (2008) SCC 41
R v R (Rape: Marital Exemption) [1992] 1 A.C. 599
R v Secretary of State for Education and Employment, ex parte Williamson [2005] 2 AC 246
R v Secretary of State for Social Security, ex parte JCWI [1997] 1 WLR 275
R v Somerset County Council, ex parte Fewings (1995) 1 All ER 513
R. (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL

R. (on the application of EW (Eritrea)) v Secretary of State for the Home Department [2009] EWHC 2957

R. (on the application of Hall) v University College London Hospitals NHS Foundation Trust [2013] EWHC 198

R. (on the application of Maughan) v Leicester City Council [2004] EWHC 1429 (Admin)

R. (on the application of Munjaz) v Mersey Care NHS Trust [2005] UKHL 5

R. (on the application of Q) v Secretary of State for the Home Department [2003] EWCA Civ 364

R. (on the application of Refugee Action) v Secretary of State for the Home Department [2014] EWHC 1033

R. (on the application of Rostami) v Secretary of State for the Home Department [2013] EWHC 1494

R. (on the application of S) v Secretary of State for the Home Department [2010] EWHC 705

R. (on the application of Salih) v Secretary of State for the Home Department [2003] EWHC 2273

R. (on the application of SC) v Salford City Council [2007] EWHC 3276

R. (on the application of Tracey) v Cambridge University Hospital NHS Foundation Trust [2012] EWHC 3670

R. v Wandsworth LBC Ex p. O [2000] 1 W.L.R. 2539;

R. v. Lincolnshire C.C. and Wealden D.C., ex p. Atkinson, Wales and Stratford [1996] 8 Admin LR 529

Re A and C (Equality and Human Rights Commission Intervening) [2010] EWHC 978 (Fam), [2010] 2 FLR 1363 [

Re MM (an adult) [2007] EWHC 2003

Re S (A Child) [2005] 1 AC 593

Re S [Hospital Order: Court's Jurisdiction] [1996] Fam 1

Re SK (proposed plaintiff) (an adult) [2004] EWHC 3202

Re: GC [2008] EWHC 3402 (Fam)

Re: SA (Vulnerable adult with capacity: marriage) [2005] EWHC 2942

Rees v Darlington Memorial Hospital NHS Trust [2003] UKHL 52

Rees v. United Kingdom (1987) 9 EHRR 56

Regina v Secretary of State for the Home Department, Ex parte Pierson [1998] AC 539

Regina v Secretary of State for the Home Department, Ex parte Simms [2000] 2 AC 115

Ribitsch v. Austria (18896/91) [1995] ECHR 55

Rowlands v Chief Constable of Merseyside Police [2006] EWCA Civ 1773

RT (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38

S (Minors) (Child Abduction: Child's Views: Non Convention Country), Re [2005] NIFam 1

S.W. v The United Kingdom (1995) 21 EHRR 363

Schmerber v. California 384 U.S. 757 (1966) 767

Secretary of State for Work and Pensions (Appellant) v. M [2006] UKHL 11

Selmouni v France [1999] ECHR 66
Selmouni v France [1999] ECHR 66
Sheffield and Horsham v. United Kingdom (1999) 27 EHRR 163
Sheffield and Horsham v. United Kingdom (1999) 27 EHRR 163
Stovin v Wise [1996] AC 923, *Smith v Chief Constable of Sussex* [2008] UKHL 50
Thomas v Nursing and Midwifery Council [2006] EWHC 3389
Tyrer v United Kingdom [1978] ECHR 2
Venables v News Group Newspapers Ltd [2001] EWHC 32
Vinter and Others v the United Kingdom [2012] ECHR 61
Wainwright v the United Kingdom [2007] 44 EHRR 40
Westminster City Council v Sykes [2014] EWHC B9
X and Y v Hounslow [2009] EWCA Civ 286
Van Kück v Germany (App no 35968/97) 2003.
Z and Others v the United Kingdom [2001] ECHR 333

Websites

Federico Zuolo, Sen's Capability Theory: Spinoza beyond Aristotle
<http://cfs.unipv.it/sen/papers/Zuolo.pdf> <Accessed 13th February 2013>.

Deleuze G, 'Ontologie-Ethique' (21/12/1980)
 <<http://www.webdeleuze.com/php/texte.php?cle=190&groupe=Spinoza&langue=2>>
 Accessed 19 March 2013

Reports

Care Quality Commission (2012), Time to Listen in NHS hospitals: Dignity and nutrition inspection programme 2012<http://www.cqc.org.uk/sites/default/files/media/documents/time_to_listen_-_nhs_hospitals_main_report_tag.pdf> Accessed 29 October 2013.

Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' 18 December 2012
<http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> accessed June 22nd 2014

Commission on Improving Dignity in Care (2012) *Delivering Dignity: Securing dignity in care for older people in hospitals and care homes*, NHS Confederation, Local Government Association and Age UK

Department of Health, The transfer of frail older NHS patients to other long stay setting (HSC 1998/048)

Diagnostic and Statistical Manual of Mental Disorders (4th ed., text revision, American Psychiatric Association, 2000)

Gill B, Meltzer H, Hinds K and Petticrew M (1996) OPCS Surveys of Psychiatric Morbidity in Great Britain, Report 7: Psychiatric morbidity among homeless people, HMSO: London

International Federation of the Red Cross and Red Crescent Societies, 'Think Differently: Humanitarian Impacts of the Economic Crisis in Europe' IFRC economic crisis report (Geneva, 2013) <http://www.ifrc.org/PageFiles/134339/1260300-Economic%20crisis%20Report_EN_LR.pdf> Accessed April 10, 2014.

Joint Committee on Human Rights, Legislative Scrutiny: Mental Health Bill: Fourth Report of Session 2006-07 (HL Paper 40, HC 288, 2007)

Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Comm No 247, 1997)

Parliamentary and Health Service Ombudsman, Care and Compassion? Report of the Health Service Ombudsman on ten investigations into NHS care of Older People (Stationary Office, 2011)

Report of the Mid Staffordshire NHS Foundation Trust (2013)

UPIAS *Fundamental Principles of Disability* (1975) <<http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf>> accessed Oct 30th 2013.

Warnock Report, 'The Report of the Committee of Enquiry into the Education of Handicapped Children and Young People' (1978, Cmnd 7212, para 1.7).

Working Paper 116 "Rape within Marriage" completed on 17 September 1990

World Health Organisation, 'WHO Guidelines on the Pharmacological treatment of Persisting Pain in Children with Medical Illnesses' <http://whqlibdoc.who.int/publications/2012/9789241548120_Guidelines.pdf> Accessed April 12th 2013.

World Health Organisation, *Health Principles of Housing* (Geneva, Switzerland 1989).

International Instruments

Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings (ETS No. 168)

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings Oviedo, 4.IV.1997.

Convention on the Elimination of All Forms of Discrimination Against Women 18 December 1979, United Nations, Treaty Series, vol. 1249.1979.

Convention on the Rights of Persons with Disabilities 24 January 2007, A/RES/61/10

Convention on the Rights of the Child 20 November 1989, United Nations, Treaty Series, vol. 1577 1989.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L303/16.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163

Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L 1001/1.

Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180/96.

Directive 98/44/EC 1998 on the legal protection of biotechnological inventions
European Union Charter of Fundamental Rights of the European Union (2000/C 364/01)

International Covenant on Economic, Social and Cultural Rights (1966-12-16)

Domestic Instruments

Mental Health Act 2007

Mental Capacity Act 2005.

Human Rights Act 1998

Care Act 2014

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

Protection from Harassment Act 1997

Equality Act 2010