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DIGNITY BY ANY OTHER NAME

Erin Daly*

MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (HARVARD UNIVERSITY PRESS 2018). Pp. 200. PAPERBACK \$15.50.

JEREMY WALDRON, *ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY* (BELKNAP PRESS OF HARVARD UNIVERSITY PRESS 2017). Pp. 280. HARDCOVER \$29.95.

It is a curious thing to read Rosen's and Waldron's recent books together.

Rosen's bears the simple but broad title "Dignity," narrowed not at all by the subtitle "Its History and Meaning." It promises to be a wide-ranging sweep across time and space, and to deliver an answer that will finally give repose to the questions on the minds of many philosophers and lawyers these days: what does dignity actually mean? Why are we all talking about it all of a sudden? And what work can it actually do? If that is the implication from the title of Rosen's book, however, it overpromises: a better subtitle might be: *Understanding Certain Specific Questions about Dignity, from the Catholic and German Perspectives*. In fact, Rosen tells us that the book itself was spawned by a question from his friend, Christopher McCrudden ("the distinguished human rights lawyer"), who asked him "one day over coffee, 'what do philosophers have to say about "dignity"?"' Rosen's answer was "'Er, not very much that I know about—Kant perhaps?'"¹ This vignette not only provides the beginning of the story but the endpoint as well. This is not, it turns out, a world tour or a deep history; rather, in 160 short pages, it provides a very well-constructed three-part philosophic argument that answers a particular mental challenge that Rosen has set for himself: Why, he wonders, should we respect the dead when they don't know if they're being respected?² In solving this puzzle, he develops a certain conception of dignity, one whose roots are firmly in the Kantian and Catholic traditions, and that focuses on the moral duty we owe to ourselves and to others to retain our humanity.

Along the way, Rosen does raise certain important issues—what is the core meaning

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1. MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* ix (2018).

2. *Id.* at 10.

of dignity? How do we balance dignity's universalism with its applications in particular situations and cultural contexts? Is dignity purely a secular concept or purely a religious concept, or is it both? Does human dignity exist before birth, or after death? These are important questions, still debated today, several years after the publication of Rosen's book. It is unfortunate that Rosen didn't have the benefit of the surge in philosophical and legal thinking about dignity rights that has spread throughout the world in the years since.

At times, Rosen seems completely in control of this difficult subject. He identifies four strands in "the conceptual make-up of dignity"—1) rank or status of human beings as human beings, 2) the Kantian intrinsic value of moral law, 3) as measured and self-possessed behavior, and 4) respectful treatment³—which become a bit of a leitmotif of the argument. But of these, the first is outmoded, having been made largely obsolete by the human rights movement's commitment to the recognition of the dignity of all of humanity, and the third and fourth strands may have more to do with decorum than with any serious sense of the word dignity as a legal or philosophic concept. Indeed, at times Rosen seems to treat his own chosen topic as if it is a slight concept of little import. "[W]hat is less dignified than a two-year-old?," he asks. "One could, I suppose, argue that the child has grace. But dignity? Definitely not!"⁴ But this misses the important point of dignity: only in a colloquial sense is it associated with how high we hold our heads or how stoically we bear our burdens. But in a philosophical and legal sense, it is so much more than that. It is not a mere question of strength of character, but the very source of all human rights, and perhaps their very purpose, and their means as well. Dignity is important precisely because every two-year-old has it exactly in the same way, for the same reasons, and to the same degree as does Rosen. The difficult philosophical question is why is that true? And the difficult legal question is how do we think about rights in a way that respects each person's equal dignity, without making a mockery of the obvious differences between Rosen and the two-year-old.

Rosen's book is so pleasantly conversational, one wants to interject and ask questions as the argument evolves, sometimes about his meaning or the direction of his argument and at other times about implications of his argument to current challenges and controversies: if we wonder about the application of dignity to those who don't know they're being benefited, as does Rosen, should we also be concerned about the dignity of future generations (and their entitlement to a planetary climate that would allow them to live)? If dignity ultimately stands for the recognition of the "inner kernel of intrinsic value"⁵ that every human being has, should we consider whether non-humans (such as animals or rivers) are endowed with comparable kernels of worth? More broadly, how do the four strands of dignity relate to current legal and political challenges? Are there other meanings of dignity that would help us resolve some of the questions that courts are continually faced with? For instance, the Constitutional Court of Germany—the court that gets the most attention from Rosen—has wrestled intently with the question of how to set a pension level, or a tax level, or a level of benefits for refugees such that people are able

3. *Id.* at 114.

4. *Id.* at 77.

5. *Id.* at 147.

to live with dignity.⁶ And many other courts around the world have also confronted, and managed, more complex aspects of dignity, such as the balance between free speech and protection of personal dignity of the targets of unwelcome speech, the living conditions of prisoners, the extent to which health care is related to our capacity to live with dignity in society with others, and so on. It is not obvious how these complex but important questions figure into Rosen’s description of the meaning of dignity.

Of course, we shouldn’t criticize a book because it answers some questions but not others; it is always and only for the author himself to define the scope of his book. But the conversational tone of the book—Rosen tells us that his purpose here is to try to persuade us, his readers, of his argument⁷—invites engagement, questioning, and perhaps disputes with the argument, as if we were listening to his lecture and couldn’t wait to ask questions at the end, but when he gets to the end, he simply says “thank you” and walks off the stage. But there is so much more to say!

Thankfully, we have Waldron to give us more. Waldron’s book is far more ambitious and far more wide-ranging. With Waldron, you have a sense that if something he writes does spark a question, he will get to it soon and give it more attention than even you thought it deserved. The book is the result of a series of six Gifford Lectures delivered at the University of Edinburgh in 2015, and it continues to be timely and thoughtful.

Waldron’s book is not, by its title or its own self-definition, about dignity. It is, rather, about basic equality: “the principle that holds that we humans, despite all our differences, are to be regarded as one another’s equals.”⁸ Although he has written extensively and thoughtfully about dignity elsewhere,⁹ in this book, he says he confines his use of human dignity, as he has elsewhere, “to conceptions that attribute a high *and distinctive* status to humans, a status that is supposed to contrast with the moral considerability of non-human animals.”¹⁰ “Human dignity,” he says in contrast with the thesis of basic human equality, “presupposes an equality of worth or standing among humans, but it adds to that an additional stronger thesis—by which I mean a claim that requires further defense—about distinctive human worth.”¹¹

And yet, dignity is undeniably the subtext of Waldron’s investigation: sometimes a complement to basic equality, sometimes in contrast to it, but always there as a constant companion, the understated side-kick who may turn out to have more substance than the main attraction. At the outset, he tells us that he believes “that each human life and the living of each human life has a high worth that is important and equal in the case of each person.”¹² This doesn’t seem particularly elegant to me, but it does provide a decent working definition of human dignity and, in Waldron’s hands, it gets to the core of his

6. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, BVERFGE 125, 175 (Ger.) (concerning the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity); BVerfG, July 18, 2012, GBERFGE 132, 134 (Ger.) (applying a fundamental right to the guarantee of a dignified minimum existence to German and foreign nationals who reside in the Federal Republic of Germany).

7. ROSEN, *supra* note 1, at xv.

8. JEREMY WALDRON, ONE ANOTHER’S EQUALS: THE BASIS OF HUMAN EQUALITY 1 (2017).

9. See, e.g., JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012).

10. WALDRON, *supra* note 8, at 3–4.

11. *Id.* at 4.

12. *Id.* at 2.

inquiry: what justifies this belief?

Waldron discounts the place of dignity in his thinking: he says he considers dignity part of a cluster of terms, along with basic equality, equal worth, and Dworkin's "equal concern and respect"¹³ that together constitute "a powerful body of principle" whose axes are both horizontal (entailing equality across all human persons, including the profoundly disabled, the amoral, and the immoral) and vertical (entailing a distinction between all humans at the top of the axis and all non-humans down the line).¹⁴ In later chapters, he uses the terms "continuous equality," (continuous, "because it denies the existence of major discontinuities in the human realm"¹⁵) and "distinctive equality" (which "says that not only are humans one another's equals in the continuous sense, but also they are one another's equals on a basis that does actually differentiate them from animals."¹⁶).

But all of this maps directly on to the modern, global understanding of human dignity, a conclusion put into relief when Waldron and Rosen are read in tandem. What Rosen calls an intrinsic kernel of worth that resides in each person and what Waldron calls distinctive equality sound like a simple understanding of human dignity as it has been recognized in law over the last seventy years: the recognition of the inherent equal worth of every person, everywhere.

This understanding of dignity, which is rooted in the Universal Declaration of Human Rights (UDHR), is now recognized in more than ten international human rights instruments, in the foundational documents of the European Union, the Organization of American States, and the African Union, and in more than five-sixths of all national constitutions.¹⁷ Out of this positive law has emerged a vast global jurisprudence of dignity from courts around the world, particularly in the last twenty years: courts in Argentina, Botswana, Brazil, Canada, Colombia, France, Germany, Hong Kong, India, Ireland, Italy, Israel, Kenya, Malawi, Mexico, Nepal, Pakistan, Peru, and South Africa, among other countries as well as regional courts, have decided scores and in some countries hundreds of cases recognizing the foundational significance of human dignity as a guarantor of the equal worth of every human being. These cases arise out of an astonishing range of factual settings and raise claims concerning rights of association, freedom of speech, non-discrimination rights, electoral rights, and rights relating to housing, education, pension, health, working conditions, a healthy environment and protection against climate change, prison conditions, procedural due process, sexual and gender identity, family unity, travel, and more.¹⁸ Although neither the codified nor the decisional law establishes a clear definition of human dignity, the overlapping consensus is exactly what Waldron calls distinctive equality: first, we must recognize what makes all human beings one another's

13. *Id.* at 3.

14. *Id.*

15. WALDRON, *supra* note 8, at 30.

16. *Id.* at 31.

17. See, e.g., James R. May & Erin Daly, *Point of View: Why Dignity Rights Matter*, 2 EUR. HUM. RTS. L. REV. 129 (2019); see Database of National Constitutions with Dignity Provisions (2019), <https://docs.google.com/spreadsheets/d/1qTzxpKXyvnE3PTpj7PD8YwRF1IEsIQhzGMBNd3eWvxg/edit?usp=sharing> (last visited Oct. 9, 2019).

18. See ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (Rogers M. Smith & Mary L. Dudziak eds., 2013); ERIN DALY & JAMES R. MAY, GLOBAL DIGNITY RIGHTS CASEBOOK (W. S. Hein, forthcoming 2020).

equals, despite differences within the human race in physical, mental, and moral capacities, inclinations, and accomplishments, and second, we must recognize that, despite these differences within humanity, members of “the human family,” as the UDHR says,¹⁹ are entitled to recognition of their worth in a way that distinguishes them from all beings who are not members of this distinctive family.

Waldron gives us a few more clues to suggest that he is really interested in dignity wrapped up in equality’s clothes: He acknowledges that distinctive equality “is often associated with the phrase ‘human dignity’” and that, “[f]or what it is worth, I personally am a strong believer in distinctive equality.”²⁰ And he uses the terms descriptive and “positive evaluative” or “normative” or “prescriptive” to describe different ways we might think about our judgments about equality. Like courage, basic equality can partake of both: we observe equality and we believe it is good.²¹ From all of this (and many other references to dignity throughout the book), we can only conclude that he is a strong believer in human dignity both as a descriptive and prescriptive concept²² but that, nonetheless, he would rather leave dignity in the role of the sidekick and focus on equality, the star of the show. And to be clear, my purpose in focusing attention on the confluence of dignity and equality is not to suggest that they are identical or interchangeable qualities or concepts. They are not. But simply to say that the particular way in which Waldron is talking about equality (i.e. distinctive equality that treats all humans and only humans as one another’s equals) maps perfectly on to the way that courts and others have been talking about human dignity.²³ It is a cost of intellectual disciplinism that philosophers like Rosen and Waldron don’t take enough account of philosopher-jurists like Albie Sachs, Aharon Barak, Syed Mansoor Ali Shah, or the judges of the Colombian and German constitutional courts who have developed a deeply theorized and coherent jurisprudence of dignity.²⁴

Nonetheless, Waldron’s book makes reference to an array of philosophers, past and present, who have sought to understand these same questions. Some of this is well trodden ground, although even here, his insights are often fresh and thoughtful. Perhaps the most challenging part of his argument comes in the last lecture, when he considers the question (posed most provocatively by Peter Singer) of why people who are profoundly disabled should be recognized as the equals of those who are not. Waldron’s response is, in part, that “those whose lives are lived within the ordinary range of human functioning have a basis for also recognizing as their brothers and sisters in human dignity those who have these more complicated features of consummated fragility and human misfortune.”²⁵

Another response to the conundrum may simply be that specieism matters. We can think of this in two ways, one philosophic and one pragmatic (or intrinsic and extrinsic) but both suggested in earlier sections of the book. The intrinsic reason emerges out of

19. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

20. WALDRON, *supra* note 8, at 31.

21. *Id.* at 64–65.

22. *Id.* at 41.

23. This also reflects the definition of dignity provided in the American Bar Association’s recent affirmation “that human dignity—the inherent, equal, and inalienable worth of every person—is foundational to a just rule of law.” Res. 113B, A.B.A. H.D. (2019).

24. *See* WALDRON, *supra* note 8, at 152–55 (discussing Barak’s judgment in the torture case).

25. *Id.* at 251.

Waldron's focus on love. Love is not an abstract quality like moral reasoning. Love is profound and emotive and defining. And I would guess that most people who have ever given birth or adopted a baby experience a love for their child that is not dependent on their child showing a capacity for moral reasoning or personal autonomy but that has everything to do with that child simply being a human being. (Many pregnant women experience nightmares of giving birth to a fish or some other non-human being, and it is not a happy dream!). We may be hardwired to love another human being simply by virtue of that being's humanity, in a way that includes humans of *all* shapes and sizes and potentialities but is far from the love we might feel for even the cleverest and most loyal dog.

The other reason for accepting basic equality among all humans is more pragmatic. The opposite, is what Waldron calls "sortal status"—that is, categorizing legal subjects on the basis of what sort of person they are.²⁶ This is not, Waldron tells us, a good thing: it is the basis of racism, sexism, and every other form of discrimination and oppression most of us would now reject.²⁷ But understanding *why* sorting people is wrong is the key to understanding why distinctive equality is right. The problem with sorting is that someone has to do it—someone has to decide which human beings are worthy and which are not—or, as Waldron might say, where the limits of the range properly are: where is the line between abled, disabled, and profoundly disabled (and there is no universally accepted god who can accept this responsibility). Faced with this question, the drafters of the Universal Declaration of Human Rights, in the ruins of the Holocaust, resoundingly rejected this possibility. If there is no one who can be entrusted with drawing lines among human beings, then no lines can be drawn; the only conclusion is that *all* members of the human family are born equal in dignity and rights and thus are one another's equals.

But Waldron is not trying to persuade us of a particular argument, but to lead us in a long and challenging hike in the intellectual woods of his mind. Along the way, we must consider whether pure "reason, moral agency, personal autonomy, and the capacity to love,"²⁸ individually or in combination, warrants treating all humans and only humans as one another's equals. At the end of the day, however, Waldron frankly admits that he has no clear answer to the conundrum of distinctive or basic equality. But that is ok—we had a very interesting time exploring.

26. *Id.* at 7.

27. *Id.*

28. *Id.* at 217.