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Dignity is said to inhere in the idea of being human. It might then be assumed that the inverse is impossible; that is, that non-human legal persons are incapable of possessing dignity.[1] However satisfying that might be, at least one influential member of the United States Supreme Court, in his recent opinions, has suggested otherwise. Justice Kennedy has relied on the concept of dignity not only to affirm the transcendent value of according equal protection and due process rights to homosexuals,[2] but he also has invoked the concept of dignity to explain why states may not be subjected to certain kinds of lawsuits.[3] Many of those reading this Paper who instinctively will applaud Justice Kennedy's gay rights decisions will just as likely sneer at, if not find offensive, his clothing of the protections afforded corporate interests—including the state—in the garb of "dignity." For such critics, it is indisputably the case that legal entities, unlike natural persons, have no right to rely on claims of "dignity" to underpin whatever assertions of rights they may make.[4] Indeed, for many, the ideas of "rights" and of "cor-

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1. This assertion may be exaggerated. There is of course an emerging claim for the "rights" and "dignity" of animals, especially of the "great apes." Nothing said in this Paper is intended to address the topic of the extension of the idea of dignity or of rights to living organisms other than human beings and the institutions that we have fashioned to meet our needs.

2. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003).

3. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

4. *Cf.* Jeremy Waldron, *The Dignity of Groups*, ACTA JURIDICA 66 (2008) ("Michael Ignatieff said in his Tanner Lectures that dignity goes with individuality and that 'there is no way round the individualism implicit in the idea of dignity.'"); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466–67 (2010) (Stevens, J., concurring in part and dissenting in part) ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established. . . . Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has

porate interests" are antithetical. But beyond the emotive belief in the exclusive attachment of dignity to human beings, what arguments exist for the claim that dignity is or should lie exclusively in the individual human person? Reflecting on this question is the undertaking of this Paper.

I start by trying to tease out the meaning of dignity as it is invoked by those who see it as an elemental human attribute. This requires the exploration of the idea of dignity alongside that of another popularly claimed attribute of humanity: the existence of "human rights." What interactions exist between these ideas, and what does the much more elaborated on concept of human rights tell us about the idea and meaning of dignity? Next, I explore whether the idea of dignity, as contextualized through human rights discourses, necessarily precludes its extension to other subjects of the legal order. Although labor unions, professional associations and corporate entities are obvious subjects for study, my primary interest is in the dominant international political association of our age, the "state." At one level, the state may be viewed as the aggregation of the interests of its members, and the concept of dignity when applied to it may simply be the affirmation in a collective form of an attribute that belongs in fact to the individual human beings that make up the society. But the state also functions as more than the simple aggregation of the interests of its citizens and residents. It is recognized as having an identity that is separate and distinguishable from those of its members. Simply put, it is and has been treated as a legal person in its own right. Does that recognition require that its status be accorded the honor or legitimization value that is commonly associated with the idea of "dignity?"

Finally, I offer some concluding thoughts on the significance of the idea of "state dignity" for the subject matter of this year's Constitutional Law Schmooze: the "public/private" dichotomy in legal discourse.

I. THE MEANINGS OF DIGNITY

Virtually anyone who has thought about the term dignity must, at the outset, own up to its amorphousness.[5] Some of the ambiguities of thought

been impinged upon in the least."). As will be explained below, this skepticism as to the applicability of the attribute of "dignity" beyond the human organism is at the heart of Kantian teachings about dignity.

5. *See, e.g.*, Meir Dan-Cohen, *Introduction: Dignity and Its Discontents*, *in* JEREMY WALDRON, DIGNITY, RANK AND RIGHTS (The Berkeley Tanner Lectures) (2015); *see also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (noting that, as used by the United States Supreme Court, "dignity is not one concept . . . but rather five related concepts").

Here, dignity is in excellent company. Other terms, (and their related derivatives) such as liberty, equality, justice, fairness, due process, democracy, and indeed "rule of law" (to name but a few other examples), all exhibit the sorts of dual imprecisions in thought and language usage that are presented in the text.

and language encapsulated in the undifferentiated use of the word can be lessened, however, by a recognition that the term validly may convey different meanings in different areas of the humanities. It is, for example, a term that conceptually conveys different (even if related) meanings for the ethicist, moral philosopher, and legal philosopher, among others.[6] But it is also a term of common usage among non-specialists. Taking account of the context in which the term is employed goes some way in reducing ambiguities and in endowing the term with substantive communicative value. My interest in this Paper is the application of the term in the field of international law. Moreover, as I shall explain below, its usage in this theatre of law is less descriptive than it is normative and prescriptive.

"Dignity" may be invoked symbolically and rhetorically by one who feels subordinated or "put upon" as an assertion of the right to basic regard or show of concern from the more privileged members of society. In this sense, the assertion of "dignity" simply may be intended as a statement of entitlement to "equal worth." But even used rhetorically, the term is hardly empty of substantive content. While for the powerful dignity in the reflexive sense may be symbolic, it is not so for the weak or the disadvantaged.[7] At its core, dignity in this context expresses an absolutist conception of the basic equality of all to whom the attribute attaches. This, at any rate, is the position commonly associated with so-called Kantian moral philosophers and their cohorts in legal philosophy; namely, the proponents of "natural rights" and "natural law."[8] In this framework, the claim of dignity is less about the actual or quantifiable equality of the possessors of the attribute than it is about their inherent sanctity from manipulation for the benefit of others. Human beings, the quintessential addressees of the attribute, are not and cannot be means to an end; at least, not one that is not of their own choosing. They do not exist as instruments to achieve someone else's purpose. In this sense, dignity is less about the equality of persons (although it may be expressive of that equality), than it is about the inviolability of the innate worth of each person.

If the first conception of dignity is metaphysical in character, its second conception is predominantly functional. The claim here is not of the inherent or "innate" embeddedness of dignity in the person, but in its essentiality for the characteristic performance of those activities that are distinctive to the person of the possessor. Thus, the capacity to make decisions (or at least those that should be entitled to respect by others) requires according

6. *Cf. generally* JAMES GRIFFIN, ON HUMAN RIGHTS (2008); Waldron, *supra* note 4.

7. I shall return to this symbolic invocation of dignity towards the end of this Paper. *See infra* Part II.

8. *See, e.g.*, Waldron *supra* note 4; *cf.* Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 54 (1992) ("Liberal theory commits itself instead to *normative individualism*, to the premise that the primary normative unit is the individual, not the state.").

dignity to the decisionmaker. This attribute is at the heart of the principle of self-determination, and it explains the privileging of autonomy and consent within a liberal legal order.[9]

Professor Jeremy Waldron, a prolific writer on matters of legal philosophy, has posited yet a third conceptualization of the idea of dignity. In his formulation, dignity might best be understood as a trait that is associated with "rank." He notes that as a matter of etymology, "dignity" has often been expressed as a badge of nobility, or of offices associated with nobility. But dignity, he contends, is also about "rights."[10] The insight he would have us draw from these seemingly contradictory thrusts of "rank" and "equal rights" on our conception of dignity is that it is an ennobling feature of the human being; one that makes the human being distinctive and on a higher pedestal than other animals, but which leaves all human beings equally but distinctively endowed with rights. Yet, as Professor Waldron argues, it may be that "groups," at least under certain specified conditions, possess or are entitled to a claim of dignity that is independent and separate from the dignity of the individual members of the group.[11]

But do these three conceptions of dignity share anything in common? It would seem evident that regardless of the framework or prism through which the idea of dignity is explored, one cannot stray too far from the paradoxical assertion of the uniqueness of the individual legal identity of each human person, on the one hand, and the demand for according that identity a homogenized treatment that is based on some conception of "equal respect" to all persons alike, on the other. The manner in which this paradox is reconciled tells us quite a bit about the idea of dignity. The uniqueness of the individual as a legal being is advanced as both the basis and the consequence of the law according and respecting her dignity. This asserted uniqueness is also presented as justification for the theoretical nullification of hierarchically-based legal distinctions among human beings. Furthermore, it is worth observing that although the idea of dignity typically is presented as if it were uniformly and equally applicable to all persons, the reality is that the disposition of claims about dignity have practical significance primarily (if not exclusively) for the marginalized or disadvantaged members (or groups of members) of a society. The strong and the powerful may

9. In Part III, I shall take up the tension between the "natural rights" conception of dignity as the exclusive preserve of the individual, and the claim that I make and defend in this Paper, namely that the possession of dignity by the state acts to fulfill the obligation of the state to protect the human rights of those who claim or are entitled to its nationality.

10. See WALDRON, *supra* note 5. *See also* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656–57 (2008) ("The concept of *dignitas hominis* in classical Roman thought largely meant 'status.' Honour and respect should be accorded to someone who was worthy of that honour and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it *dignitas*.").

11. *See* Waldron, *supra* note 4.

assert interest in the theoretical meaning of dignity, but they can and do just as well regardless of the meaning assigned to the term. The term thus has substantive significance only for the weak and disadvantaged. It is purportedly in furtherance of the interest of the latter that dignity operates as a legal concept. Yet, while accepting dignity as serving a functional purpose in mediating legal claims among human beings, for other associational relationships, it has been vigorously contested. With these caveats in mind, let us next explore with some dispassion the standard teachings about "human dignity."

II. ON THE RELATIONSHIPS OF DIGNITY AND OF RIGHTS

Among legal philosophers, the idea of dignity is most commonly invoked in the context of human rights discourses. The relationships, however, are at best under-theorized.[12] One can nonetheless identify three ways in which the interactions may be seen to coexist. In the first, dignity is seen as existing prior to human rights. Dignity furnishes the foundation for rights. To assert that a person has dignity is therefore a claim that a person said to possess dignity is entitled to the recognition or respect of those rights that flow from the possession of dignity.[13] Dignity in this sense is innate in the person. While its recognition and acceptance should be encouraged, that recognition is only declaratory, not constitutive, of dignity. Alternatively, the treatment of the rights (or obligations) of a person by others may be viewed as constitutive of dignity. It is in the extension of rights to a person that society acknowledges or recognizes the possession of dignity by a person.[14] Rights, in this context, exist prior to dignity. Dignity here is the sum total rather than the progenitor of rights. Whether dignity is framed as a declaratory or as a constitutive product of its relationship to rights, that relationship is vertical. A third possibility is that the relationship is horizontal. Here, dignity is simply one among many human rights. Just as there is a "right" to "free speech" or to "equal treatment," there is a "right" to "dignity." As one among many rights, the meaning, scope and contours of dignity

12. This is the uniform conclusion of many who have written on the subject. *See, e.g.*, Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. REV. 65, 66 (2011); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 186 (2011).

13. This appears to be the underlying philosophy for the positivist instruments that ground human rights in the "dignity" of man. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . ."), http://www.un.org/en/documents/udhr/. In somewhat of a paradox, these positivist rights are in fact justified (at least in their universalist and "customary international law" formulations—by allusion to the natural rights grounding of human rights claims.

14. Wittingly or otherwise, this is the implication of a good deal of current scholarship on the subject. *See, e.g.*, Glensy, *supra* note 12, at 65.

can be ascertained or framed in much the same way that those of other rights are framed within specified or particularized legal orders.

Most activists, to the extent that they have given the matter any thought, are probably indifferent as to the relationship that best explains the interactions of dignity and rights. Indeed, most probably would contend that the answer should be contingent on the circumstances of each case, with the deciding criterion being the explanation that best promotes the interests of the human rights bearer. For the advocate, what matters is that dignity and rights share a lot in common. They are each possessed only by natural persons and distinguish their possessors from other legal persons. But one should find this position unsatisfactory, whether as an activist, a scholar or an independent observer. Aside from the imprecision of thought embedded in such an articulation of the relationships between dignity and rights, there are philosophical and practical consequences to the one-sided characterization of positions that are otherwise accepted as being contingent. This is especially so in a world in which the content, if not the idea of rights, remains fluid and highly contested. Let us therefore explore extant associations of the two concepts, and consider whether those relationships provide useful information on how the idea of dignity appropriately might be understood.

The United Nations Universal Declaration of Human Rights ("UDHR" or "Declaration") is uniformly accepted as the primary pillar on which current notions and doctrines of human rights rest. The language of the Declaration suggests that dignity is the root of the tree from which individual claims of human rights spring. Although the UDHR does not itself develop the concept of dignity, it suggests that recognition of the various asserted rights is essential to the full development of the human being, and that human development is an element of human dignity.[15] The capacity to nurture one's capabilities is thus one definition of dignity. Similarly, to the extent current notions of human rights are grounded in historical precedents, the European Enlightenment revolutions—more particularly the French Revolution—tend to be credited as providing the base of modern human rights.[16] The idea of dignity, as embraced by the European Enlightenment, presented it as a precursor to human rights. Indeed, dignity was viewed in much the same light as earlier valued attributes (or "essences") of "true gentleman" such as courage, honor, and chivalry.[17] To be a "noble human being" was to be imbued with the characteristic of dignity. Dignity was thus a marker

15. *See* Maxwell O. Chibundu, *International Human Rights and the International Law Project: The Revolving Door of Academic Discourse and Practitioner Politics*, 24 MD. J. INT'L L. 309, 312–14 (2009).

16. *Id.* at 312 & n.3.

17. *See, e.g.*, Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 2009 U. TORONTO L.J. 417, 433–34; McCrudden, *supra* note 10, at 659–60.

of (or "placeholder" for) such ennobling and uniquely human attributes as respect and respectability, honor, courage, and above all else, reason. Unlike "rights," dignity was not a claim of entitlement, but an assertion of worth.

This seemingly shared paternity of dignity and of rights should not automatically be seen as reflecting a causal relationship between the two ideas, but to the extent one seeks to draw one, these histories suggest that the concept of dignity furnished a political underpinning for a positivist regime of rights. The French Revolution, like other Enlightenment revolutions, marked the final transformation of feudal and monarchic societies into bourgeois liberal states. While the "natural law" regime underpinning feudal, monarchic or religious states had been based on concepts of "divine rights" and "divine justice," the positivist laws of the liberal state looked to mortal beings and their institutions for its justifications and rationalizations. The idea of "dignity" played a significant role in the transformation of feudal principalities into the modern European state system. The political transformation of societies that rested on feudal, monarchic and religious institutions into the modern state system dominated by secular, technocratic and liberal values paralleled a philosophical development that asserted the superiority of governance by the wide swath of mortal beings, however flawed, over a narrow cadre of divinely appointed rulers. "Dignity," presented as a core attribute of the mortal being, facilitated the adjustment of a divine authority-based conception of natural law into one that looked to "reason" and "morality" for its grounding in jurisprudence. In the early modern state, the idea of "reason" becomes infinitely malleable, and could thus do the work of bridging the move from natural law to legal positivism. In time, as positivism gained sway, liberal societies could dispense with the idea of human dignity, and simply focus on the functional benefits of a rule-based state system, of legislation and of rights.

The nineteenth-century acceptance of legal positivism as the dominant philosophy of law and governance was undermined in the twentieth century by the excesses of corporatist and nationalist governments in the interwar years and the atrocities of World War II. As had been the case in the immediate aftermath of the Enlightenment revolutions, the rebuilders of the post-World War II order saw in the idea of dignity a humane grounding for the specific positivist regimes of law that they hoped would check the abuses of governmental power. It is doubtful, however, that these proponents of rights saw dignity as an independent force or check on power.[18] Where En-

18. It is noteworthy that although asserted as a foundational element of the post-World War II human rights regime, the concept of dignity appeared to play no significant role in the liberal legalist discourses of such well known legal philosophers as H.L.A. Hart, Lon Fuller, or Hans Kelsen, and became an element of Professor Ronald Dworkin's writings quite late in his illustrious academic career. *See* RONALD DWORKIN, PRINCIPLES FOR A NEW POLITICAL DEBATE (2008). Indeed, it is not a stretch to assert that it was not until the collapse (or at least imminent

lightenment thinkers may have genuinely believed in the idea of dignity as the source of reason, a half century of positivist thought had surely undermined such optimism. But as positivism in the twentieth century reached further and further into all nooks and crannies of societal relationships, a counter-reaction was perhaps unavoidable. This came in the form of reassertions of the efficacy of natural law as the preferred philosophy for explaining and justifying the institutions of social governance. The new proponents of natural law and natural rights did not directly challenge the substance of positivist-based rights claims, but instead suggested that the framing of those claims were better presented and supported by appeal to reason, natural rights and the dignity of the human being. In a world increasingly made smaller by the technologies of transportation, communication and information, natural law offered a Universalist perspective that positivism could compete with only by denying the conditions and particularities of the rulemaking society. As even positivists asserted the "universality" of rights, the need to anchor such claims in a feature or attribute that could be said, with some level of indisputability, to be "universal" became obvious. "Dignity" was a ready-made handmaiden.

The shared relationship between dignity and human rights thus can be seen as much as the product of contingent historical developments as of any demonstrable causal linkages. Indeed, as Professor Waldron has contended, the relationship of dignity and of rights can be viewed just as readily as the statement of differentiated status between human beings and non-human beings as it is of the absolute worth of the human being.[19] Contingent as these relationships may be, that the idea of dignity as expressive of equality greatly informed the course of the French Revolution and of modern human rights claims cannot be doubted. That it is an elemental component of the human being is simply a statement that all human beings, regardless of their status, social position, resource endowments or membership in the family of powerful groups are, at a basic level, "equal." To borrow from the Enlightenment philosophers, persons cannot and should not be viewed as objects or means that are subject to manipulation by others, whatever might be the worthiness of the ends sought to be achieved through such manipulation. Rather, the idea of dignity designates its possessor as a self-accomplished person with the potential to elevate her personality for a proper end. This definition of dignity, of course, did not necessarily mean that only human beings are capable of existing as ends in themselves, nor that other entities should be subject to manipulation. Yet current views of dignity isolate and treat the attribute exclusively as that of being human. To understand why

collapse) of the Communist governments of Eastern Europe that dignity begins to play a significant analytical role in legal thought within modern liberal societies.

19. *See* WALDRON, *supra* note 5.

this is so requires tracing the history of the political development of the idea of human rights in the post-1970s era.

III. RELATING THE DIGNITY AND HUMAN RIGHTS OF NATURAL PERSONS TO THE RIGHTS AND DIGNITY OF THE STATE

What has been said so far should make evident why it matters, both academically and practically, to properly situate the relationship of the idea of dignity to that of rights. If dignity serves primarily as a legitimating confirmation for human rights, it is reasonable to ask whether that function exists (or reasonably should be expected to exist) outside the field of human rights. More specifically, does imbuing the state with the attribute of "dignity" act as an impediment to the promotion or enhancement of the protections afforded by human rights? The answers to these questions transcend legal philosophy. Given the continuing role of the state in shaping international interactions, and especially in the generation and protection of positive rights, it should be evident that, to the extent dignity is in fact a legitimating instrument for the distribution of rights, its applicability to the state remains an issue of current interest. It is to this issue that we next turn.

If European Enlightenment history provides a useful starting point for the anchoring of human rights in human dignity, it provides a no less convenient historical basis for exploring the linkages among the ideas of state dignity and of the rights of the state.[20] The idea of statehood was, at its inception in Europe, commonly associated with the concept of dignity. The European state was a challenger and successor to the imperial and religious order that had first been knitted under Roman rule. As God's representatives on Earth, the proclaimed inherent dignity of the offices of the monarch, the Pope, and their viceroys was taken as a given. That dignity was assumed to exist in the bourgeois (i.e., "middle-class-based") state even when leadership was transferred from inherited and clerical lines to secularly appointed and elected ministers. In Enlightenment thinking, that dignity which had been grounded in the divinity of God's appointed representatives, was now justified by the trumpeted "sovereignty" of the people. Just as dignity was said to inhere in the "personhood" of the individual, the decisions of the whole of the people sanctioned the possession of dignity by the state.

The dignity of the state, thus justified, was neither a mere abstraction nor a simple exercise of intellectual thought. As with human beings, the idea of dignity furnished the grounding for the very powerful idea in international law of the existence of some minimum basic equality of status

20. As a parenthetical, one might add "responsibilities" of the state. Indeed, as I shall argue below, endowing the state with dignity is especially significant in an age where it has become a common refrain to assert that there are no rights without responsibilities. *See infra* Part IV.

among "sovereign states."[21] The idea of the dignity of states thus provided principled arguments for, among other substantial claims of the state, the following: the right not to be subjected to lawsuits or otherwise made accountable for its decisions, even when those result in injuries to citizens, subjects, and non-citizens alike (i.e., the doctrine of "immunity"); the right to exclusive control over the regulation of activities within the state, and to punish wrongful conduct occurring in the state; the right of "diplomatic" representation on behalf of persons on whom it bestows its nationality; and the right to the unalloyed and uncontested loyalty of nationals. The state could and did send its citizens to war in the service of asserted "national interests," and it asserted the right to organize its internal affairs in whatever way it saw fit, and to do so free of interference from other states. It mattered then whether an entity was deemed a state; for to be seen as such was to inherit the rights just enumerated. At the heart of those rights was the recognized autonomy of the state as an actor, and that autonomy was underpinned by the accepted (indeed revered) dignity of the state. Not even the mass killings and atrocities of the two world wars of the twentieth century (both of which were acknowledged to be rooted in the excesses of state-driven nationalism) undermined the veneration of the state and its claim to dignity.

Indeed, the principle of self-determination was enshrined in the constitutive document of the post-World War II legal order, the Charter of the United Nations Organization.[22] Nothing in the pronouncements of the Universal Declaration of Human Rights suggested that the crafters of the declaration envisioned any inconsistency in the United Nation's Charter's acceptance (indeed promotion) of the sovereignty and dignity of the state, on the one hand, and the Declaration's "recognition of the inherent dignity and of the inalienable rights of all members of the human family," on the other. That the rights of the individual could be secured only through the acceptance and recognition of the especial role of the state was made manifest in the enshrining of those rights through the positive adoption of human rights treaties under international law. Those treaties obligated states to guarantee and extend to individuals within the territory of the state, and subject to the jurisdiction of the state, explicitly specified human rights.[23] International human rights did not and thus could not operate on the indi-

21. For a nuanced evaluation and critique of the idea of sovereign equality, see GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (2004).

22. *See* U.N. Charter art. 1, ¶ 2.

23. *See, e.g.*, The International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/63/6 (Dec. 16, 1966); The International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/63/6 (Dec. 16, 1966); The United Nations Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/51/18 (Dec. 21, 1965).

vidual except through state action, and investing the state with dignity was and remains essential to the state discharging its solemn and fundamental obligations under international law.

Two centuries after the French Revolution, and half a century after the UDHR, it became quite common to decouple claims of the "dignity" and "rights" of the individual from those of the state. The basic view among proponents of the decoupling appeared to be that the international state system, as it had functioned during the Cold War, was antagonistic to the promotion of human rights.[24] By invoking the "equal sovereignty of states," went the argument, repressive and "illiberal" states felt free to violate the human rights of their citizens, and to remain insulated from accountability to those citizens and to international society at large. Denying "illiberal" states the legitimating concept of dignity and sovereignty, went the claim, would substantially promote the human rights of the citizens of those states. Rights, under this account, derives from the dignity of the person, and promoting dignity not only ensures the protection of the individual, but ultimately (as Kant was read to have contended), would ensure perpetual peace, at least among "democratic societies." Divorcing the rights and dignity of the individual from the claims of the state thus served two purposes. At the moral level, it explained the need for differentiating between these two claims of dignity, and at the functional level, it provided an explanation for a positive separation of the concepts of the human rights of the individual (a social good) from the dignity of the state (a disposable social cost).

These arguments were aided by seemingly incontrovertible facts of the international order as it neared the end of the twentieth century. In the first place, there could be no denying the rot in which the international system found itself. A generation after the conclusion of World War II, the initial and admirable enthusiasm of the founders of the United Nations project for a world order based on saving humanity from the "scourge of war," "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," the promotion of justice under law, and of a more progressive social order,[25] all seemed stymied by an incorrigible ideological conflict between the West and the East. The swing role in that conflict was often played by the leaders of the newly emerging states of the so-called "third world." Several leaders of these new states, appealing to their societies' colonial pasts and histories of economic exploitations, sought to use state power—often coer-

24. *See, e.g.*, TESÓN, *supra* note 8, at 54 (a "liberal theory of international law" should commit itself to "*normative individualism*, to the premise that the primary normative unit is the individual, not the state"); *see also* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999) (suggesting that the efforts of human rights proponents to undermine the legitimacy of the state, however well-intentioned, may have disadvantages for the intended beneficiaries of human rights).

25. *See* U.N. Charter Preamble, ¶ 2.

cively—to rapidly make up for the economic underperformance of their communities. Internally, emulating what appeared to them to be the successful industrialization and economic policies of the Eastern Bloc, leaders of the new states engaged in centralized planning that often entailed intrusive state intervention in the private lives of their citizens. Of particular interest for the subject of this Paper were the means that they employed to override internal dissent. Opponents were arbitrarily imprisoned, often denied basic trial rights, and sometimes murdered outright. Externally, many of these leaders, in seeming alignment with the Eastern Bloc, challenged the dominant international status quo which, despite the split into camps, remained firmly within the grip of the much more economically and militarily advanced West.

The unexpected and comprehensive collapse of the champion of the Eastern camp, the Soviet Union, not only validated the post-World War II position of the West, but also provided a new lease on life for recreating the international system entirely in the West's preferred image. Seemingly now offered was the opportunity for a new enlightenment era that would aggressively create on the international stage the middle-class and liberal values, politics and economics that were only hinted at or inchoately theorized during the formative years of classical liberalism. This neoliberalism would emphasize for the international community of states those values and institutions that classical liberalism had engendered for the domestic development of the European state system: "democracy," "the rule of law," "free markets" and of course "human rights." These would be promoted not simply as ideals of national self-governance, but also as practical working universal institutions for all human beings regardless of their culture or nationality. These institutions did not simply confirm the dignity and rights of the individual, but they were seen as essential to checking state power. To do so, the state—or more accurately, the "non-liberal state"—had to be coerced (through shaming, if possible, but economic sanctions and military force, when necessary and worth the cost) into the recognition of and compliance with these universal neoliberal values. Denying that the state possessed "dignity" was seen as one argument in the quiver of neoliberalism; and a relatively inexpensive cost to intellectual coherence at that.

Thus, as the twentieth century drew to its close, the international legal order confronted a dilemma. On the one hand, nation-states (or more accurately, the disadvantaged nation-states of the third world), relying on the classical liberal position of the interrelated character of autonomy, self-determination and dignity, asserted the right to frame their national development preferences and policies independently of their past rulers. They invoked and appealed to the dignity of the state as a shield from outsiders questioning their chosen paths to progress and modernity. Commentators in the West, enlivened by the post-Cold War triumph of the neoliberal order over the competing ideologies of socialism and communism, contended that

states, however laudatory the goal of national development might be, were not free to violate the human rights of their nationals, and certainly not in reliance on the doctrine of the dignity of the state. And so we come to the crux of the current debate: are claims of the dignity of the state in fact antithetical to the state's obligation to promote human rights under international law? Even if they are not, are there good reasons why the idea of dignity, at least as a jurisprudential concept, must be exclusively individual, or at least as a minimum, denied to the state?

IV. DIGNITY AND THE STATE

As a preliminary matter, it is not obvious why an argument of a state's obligation to respect the human rights of its citizens negates a state's claim to dignity. Even if one assumes that the denial of a state's claim to dignity may function as an effective "shaming" tool, it does not follow that a blanket denial of dignity to the state is thereby called for. Like any tool, its effectiveness should depend on the particulars of the problem to be solved. If the last twenty-five years of the post-Cold War order teaches us anything about the place of human rights in the international legal order, it is that its violations—even egregious ones—are hardly the preserve of "illiberal" societies. But that according dignity to the state can coexist with respect for human rights does not itself affirmatively explain why states are entitled to dignity. It is to this affirmative claim that I now turn.

The affirmative argument for according to states the respect that flows from dignity can of course seek to rest on the past.[26] While the past and tradition cannot be discounted in matters of legal philosophy, they are to this writer, however, an inadequate ground on which to rest the argument. For one thing, today's international legal norms do not presume the divine origins of law, nor in fact that the authority of law rests on some generalized notion of "reason" or of "morality." The idea of state dignity must be founded on less mystical—and preferably more practical—considerations. Ideas of the equality of states, of respect for the decisions of a state arrived at through the internally generated self-determination processes of that state, and of the autonomy of a people to make decisions free from the coercive influences of others, all argue in favor of the acceptance of the dignity of the state, just as readily as they do for recognizing and cherishing the dignity of the individual human person. These arguments can of course be framed as essentially derivative; that is, they may represent the aggregation in the state of the reasons for according dignity to the individual. If a state affords an efficient mechanism for aggregating the values and interests that inhere in the dignity of the individual that may well be a sufficient reason, but I think more can be said in favor of viewing the dignity of the state as

26. *See supra* Part III.

distinct from the aggregation of the dignity of its citizens, officials and residents.[27]

Most crucial for according dignity to the state is the necessity to recognize and buttress the authority of the state to act responsibly on behalf of its nationals. Regardless of utopian assertions about the shared solidarity of humankind, it requires an unacceptably obtuse level of unrealism to ignore the continuing and vital role that states play in shaping the life chances of each and every person on the globe. Whether one wishes it or not, where one is born, or the society into whose membership one is admitted, is perhaps the most significant right that is possessed by any person. This factor, more than any other, determines the individual's educational opportunities, right to health care, shelter, travel, access to the legal system, and capacity to influence the society's governance, prosperity and overall welfare. For any given individual, these rights are not abstractions, and they can rarely be shaped other than by the collective interactions of those who are members of the political community that is the state. Neither the individual, nor outsiders, however well-meaning their intentions, can significantly determine the welfare either of the individual or of the polity independently of the state of one's nationality. Statehood is thus a uniquely shared enterprise of its members. The authority of the state to discharge the responsibilities that are thereby imposed on it depends in no small measure on the recognition and acceptance of its status; and inherent in that status is that the state possesses a vital and distinctive personality, one that confers on it no lesser personality than that which inheres in the personality of other states. The respect that flows from that recognition, the acceptance of the equal and validated worth of the state, and above all, the shared sense by the members of the political community of that basic acceptance constitute, at their core, the idea of dignity.

Instinctively, the argument against according dignity to the state seems supportable on the ground that since its legal personality is based on a "fiction," it is necessarily artificial. This assumes of course that dignity can only attach to natural persons. Like most instinctive arguments, it embodies some tautology. We might break out of that tautology by pointing out that conferring legal personality on the state does not and need not necessarily make it less of an artificial creation. States may represent practical realities, or "facts on the ground," and may well precede the creation of law. If the state is a subject of legal rules, there is no obvious reason why its compliance with those rules cannot or should not be backed up by the validation

27. Compare the assertion above with Waldron, *supra* note 4, at 75 (suggesting that group identification of some kinds may be accorded the recognition of having dignity). While positing that racial identification may provide an instance of such a recognition, Waldron conspicuously does not discuss the case of the state or of nationality, even though the treatment of dignity in the South African Constitution was the focal point of his lecture.

that dignity confers. In any event, while several modern states are indisputably products of arbitrary and sometimes whimsical decisionmaking, it is equally the case that even those states (as virtually all nation states) strive to become organic entities. They seek to inculcate in their citizens strong bonds and affinities that transcend the merely utilitarian. In this, they are aided by the exclusive identification of other states with their nationals.

Whatever may be the rhetoric of "our common humanity," the reality is that most contemporary human beings have national states of primary allegiance. They respond affectively to the claims of the state, showing pride when it succeeds, and feeling disconsolate when it fails. This reflexive relationship often means that the identity of the individual, her status, and her dignity may be closely intertwined with that of the state, but it also suggests that far from the state deriving its identity from the aggregation of the rights and interests of its citizens, it is in fact the citizen who derives—at least in part—her identity and welfare from the state. It is the dignity of the state that confers respect for the individual, rather than the other way around. Of course, the two may never be distinguishable entirely, but may actually function in a reinforcing relationship; but the point is that a state's claim to worth, to equal respect, or even to a high rank among the groups of states is not simply the product of the entitlement of individual citizens, or even the collective aggregation of those entitlements, but reflects the accrued and independent identity of the state. In a real sense, then, the personality of the state is a living, changing and organic item. A state acquires a readily configurable identity, and dignity functions to accord some breathing space for the organization, manipulation and reorganization of that identity.

What has been said about the creation of the identity of the individual, as in part, a product of her affiliation to the state can of course just as readily be said about the identity of the state as the aggregation and, ultimately, fusion of the sovereignties of the individuals who comprise the state. To deny that the state has dignity may thus amount in no small measure to the diminution of the claim of the dignity possessed by the individual members—citizens, nationals or residents—of the state. Indeed, this is one of the real consequences of the current world order in which, despite claims of the inherent dignity of all persons, an individual's nationality has been offered up as legal justification (or lack of such justification) for extra-judicial killings, indefinite detentions, and similar governmental actions in which, ordinarily, one's nationality would not have been thought to be relevant to the privilege, immunity or disability of the individual.

V. CONCLUSION

The broad topic of this Constitutional Law Schmooze is on "The Public and the Private." In the legal academy, the phrase is most commonly deployed in the context of specifying spheres of the operation of the legal

rules that apportion rights and responsibilities.[28] The traditional view that there were in fact bastions in which public rules reigned supreme, and those in which private relationships and attachments were insulated from scrutiny, has in recent years been shown to be at best unintelligible, and at worst, misleadingly destructive of a society's governance structures and social relationships. How well these criticisms can or will withstand today's intrusive technologies of surveillance and communication may properly be doubted, but what can hardly be disputed is that the effort by human rights proponents to disparage the idea that dignity may be as intrinsic to the identity and person of the state as it is to the individual is demonstrably in opposition to the liberal ethos that supposedly underpins human rights norms. Remarkably, then, while domestic law proponents of neoliberalism argued for breaking down the dichotomy of the public and the private, they insisted, even as they relied on natural law doctrines to promote the human rights of the individual, that as public entities, states were not endowed with certain attributes that are said to be quintessentially private in nature. Dignity was posited as one such attribute. But whatever may be the satisfaction of slapping down those states that we deem to be "illiberal," is it really the case that the attribute of dignity should be viewed as alien to their legal personality? Marxist analysis was flawed in anticipating a utopia in which the state withered away. Neoliberalism is no less mistaken when it posits the atavistic individual whose claim for dignity can be respected independently of those ties and affiliations that nationality and statehood confer on him and her.

28. *See, e.g.*, Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQ. L. 1 (2014).