UNIVERSITY OF SOUTHAMPTON

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Human Dignity: bringing law down to Earth

by

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Thesis for the degree of Doctor of Philosophy

February 2014

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

Dignity founds The Law: from the centralising dignity of sovereign and parliament; to the particular dignities of The Crown and the Courts; to challenges that The Law fails to respect human dignity. Remembrance revealed through historic experience (in a survey of dignity in UK statute and Case law) and societal reflection (in dignity, jurisprudence and philosophy literature), reveals dignity evolved through Stoic characterisation of dignity as a logically reasoned, ethically considered way to be, to contemporary ideas that challenge the logic and or ethics of an imposed way of being. Much contemporary dignity literature accepts limits to law, working within The Law to try to claim the posited self-indulgent position of sovereign dignity, in claims of rank and rights. I suggest the only dignity to withstand societal scrutiny, in a consistent guiding message recognised through two millennia of Stoic informed wisdom, is that people individually sense, reason and reflect on good ways for themselves and society to be. People, who accept societal limits, but aspire to more. Consistent with this history I suggest a new definition for dignity; 'societally valued worthiness in being' that positively emerges from humans being in dynamic society.

People limited by The Law try to concretise dignity, and law; to pin down particular ways for people and society to be, contained in rules of law. For example, governing law, assumed in sovereign dignity naturally arising in the leadership of people in particular ways of being concretised in autocracies and democratic parliaments; The Law providing the normative guidance of how to conform to that way of being. Yet, in agreement with John Austin, I suggest logical reason and ethical considerations of dignity do not arise exclusively in sovereign roles, but naturally from a positive ferment of command and obedience that challenges, and or necessarily supports, the positions of asserted dignity. I challenge Austin's presumption that sovereign positions are only maintained by coercion, suggesting dignity also arises in societies bound by care and cooperation. I recognise the positive ferment of The Law in governing law, but also in wider contexts of dignity, societally valued worthiness in being, that work independently of The Law. I adopt the work of William Twining

and his distinctions of 'law talk' of The Law and 'talk about' governing law to inform and enhance a re-picturing of a positive Natural Law Continuum.

Finally I adapt Hohfeld's matrix of rights to suggest that incidents of The Law reveal the locus of dignity in The Law's making. The matrix, The New Model of Governing Law, can be used to (re)consider whether a particular position of The Law (still) has dignity; is The Law valued worthy of being in contemporary society. Understanding The Law's dignity, alongside contemporary determinations of dignity, confirms The Law as societally valued, and or illuminates ways and dignity (independent like minds) loci to support, innovate or challenge The Law. Sovereign dignity, and societal law, evolves through the emergence of human dignity in incidents and issues recognised as contained in governing law, within the wider societal determination of Natural Law Continuum.

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HUMAN DIGNITY: BRINGING LAW DOWN TO EARTH

Alice Harrison

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Chapter Outline

Academic Thesis: Declaration of Authorship

I, **Alice Harrison** declare that this thesis and the work presented in it are my own and have been generated by me as the result of my own original research.

Human Dignity: bringing law down to Earth

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;

2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

3. Where I have consulted the published work of others, this is always clearly attributed;

4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;

5. I have acknowledged all main sources of help;

6. None of this work has been published before submission.

Signed:

Date:

Acknowledgements

I feel enormously privileged to have had supervision and guidance from three absolutely incredible Professors on the journey of this thesis. My heart-felt thanks go out to them all. Professor Oren Ben-Dor is a lovely man; who made me look further and closer than I had ever dreamed. Scream if you want to go slower Oren… what a ride! Professor Jonathan Montgomery, who in spite of having his sights on new adventures in pastures new, spent hours working through my scattered ideas as the thesis slowly came into view; again what a lovely guy and thank you. Professor John Borrows from Canada inspired me from the day I stepped into his class room; his work and kindness influence this work in more ways than I have given him credit. True to his Anishnabe (good man) name; John is such a great man. I am also incredibly grateful to Dr. Tom Frost who read an early draft and offered kind helpful and thought criticism at a time when that was just what I needed. The Staff and Students at the University of Southampton have made my thesis experience one of caring collaborative endeavor; belying the idea of human community only bound by coercion.

My thanks go to my inspirational parents Mike and Shirley Cowper Smith; My brothers, Adam, Justin and Jamie, and my lovely family and friends who make my life worth living.
Chris, I love you; thank you for all that you do. I am coming home now…

Chapter 1 - Introduction

The idea underpinning this thesis is given in the title: human dignity; bringing law down to earth. The whole thesis responding to the question: can dignity be meaningfully applied in/to law? The answer is yes; human dignity brings law down to Earth! The hypo-thesis[1] that general aspirational ideas of *dignity* vest in individual *human* thoughts; all *human* beings sense, reason and reflect, to determine what to be (the Stoic root of dignity), which necessarily informs the lives of people in being, *bringing* forth guiding rules, which may include governing *law*, for human beings to live by, on *Earth*. I suggest ideas of dignity are experienced and observed in human being; most explicitly recognised in community, in the pervasive newsworthiness of dignity (evidenced in Chapter One). Ideas are shared in contemporaneous living and passed *down* in the guiding wisdom of our human predecessors. Anyone may be informed, or not, by the general ideas of dignity handed down; including, but not exclusively, the well-rehearsed political freedoms of independent dignity (autonomy) and governing absolutes of commanding (sovereign dignity) or communitarian (egalitarian human dignity) control, vested in government.

The thesis responds to a number of quandaries commonly identified in dignity discourse, and explicitly recognised in and by David Feldman[2] in Chapter Two. It bothered me that Feldman particularly (making these points in the first dignity articles I read) and I subsequently found dignity literature more generally (reviewed in Chapter Three), having recognised dignity was:

1, difficult to define;

2, asserted at multiple levels in/of law;

3, had tension ridden objective/ subjective aspects;

4, distinguished as either historic sovereign dignity
or a modern concept of human dignity;

appeared to accept these issues as limiting parameters on the discussion of dignity. The conclusions often led to the dismissive that dignity could

5, not be meaningfully applied in or to law.

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[1] I thought the hypo (beneath the skin in hypodermic) idea of beneath the thesis from Greek hupothesis '‘ foundation' ', from hupo '‘ under' ' + thesis '‘placing' was particularly apt for a ground roots claim for dignity.
[2] Feldman D., 'Human Dignity as a Legal Value I' (Public Law, Winter 1999) p 682-702; & D., Feldman 'Human Dignity as a Legal Value II' (Public Law, Spring 2000) p 61-76

The theory belied the newsworthiness of dignity and the academic, philosophic, and political scrutiny, dignity enjoys. It was also counter to my own personal experience of dignity in life and law and gave rise to the following questions:

6. Can dignity be adequately defined?

Issues of scope prove evident in all of the dignity quandaries. General allusions to dignity are easily undone by contrary particular incidents, and vice versa; which suggests that dignity can never be adequately defined. Yet when confined to particular contexts dignity can and does take on particular meaning; for example, sovereign dignity, which for many is the premise of UK law.

Chapters one to three provide different frames of reference for dignity. The first introduces the newsworthiness of dignity in a general and uncritical way. It does not pretend to be scholarly or analytic. Rather it makes the point, apparent to the author for many years (including more than ten years spent researching dignity), that on any day dignity can be found pervading recent headline news. The United Nations (UN) Charter[3] and Universal Declaration of Human Rights[4] are also introduced in Chapter One, as generally asserted aspirations to dignity that are widely, if not universally, acknowledged. The Charter and Declaration are important to modern articulations of dignity (also discussed in the literature review in Chapter Three) and I highlight a link between the general newsworthy appeal of dignity in the founding UN documents and non-governmental humanitarian law discussed in different realms of law (in Chapter Six). Chapter Two provides an introduction to the UK Dignity Survey; an original piece of empirical research that surveyed the use of dignity in UK statute and case law (from which examples are drawn throughout the thesis). Chapter Two also introduces the dignity literature review elaborated in Chapter Three, including definitions of dignity.

The early chapters highlight inadequacies in the dignity definitions, compounding the quandaries that are made evidentially more bothersome by the vernacular understanding of dignity in Chapter One; and more explicit but unresolved in the

[3] The United Nations, 'Charter' (signed on 26 June 1945 at the Conference on International Organization, and came into force on 24 October 1945) <www.un.org/en/documents/charter > accessed 11th June 2014
[4] The UN, ' Universal Declaration of Human Rights' (General Assembly of the United Nations adopted on 10 December 1948) < www.un.org/en/documents/udhr/ > accessed 11th June 2014

learned reasoning of Chapters Two and Three. Dignity literature concentrates very informatively on particular incidents of dignity, but struggles with the incommensurability of trying to recognise both particular incidents of dignity and their more general appeal. Often trying to conflate two dignities, but without being able to evidence the general appeal of either particular incident. I offer an alternative definition for dignity of 'societally valued worthiness in being' premised in collective society and evidenced in the ordinary language of being and law. The definition is consistent with contemporary and historic use of dignity evidenced so far in the thesis and does not attempt to particularise a general ideal.

The dignity definition is considered in detail in Chapter Four and used in full throughout the chapter to confirm its adequacy, before (successfully) testing the definition throughout the remainder of the thesis. I offer this definition to deliberately acknowledge the issue of scope. By liberating general ideas from particular incidences of dignity, particular incidents of dignity can be seen to conform more or less to the general idea in different spheres of being and law. I do this in order to specifically recognise the positive aspiration of general ideas of dignity, in the intimate challenges of particular incidents of dignity in being and law. The enormity of the general scope is what it is. Yet, throughout the scope (from general to particular) being, dignity and law, appear inextricably linked.

I realise I have encountered a recognised tension in human thought. A problem that is not exclusive to dignity, but true of any general evaluative idea (which also includes law); that particulars are immediately sensed and general ideas, of self and other, are reasoned to challenge that sense. This plurality in human thought is a fundamental departure from a single general universal idea of dignity and rises (in living community) to challenge the idea of dignity being too difficult (meaningless, stupid and useless in the literature review) to pin-down. If a particular idea has or gains dignity, societally valued worthiness in being, the closeness of that particular idea to the general acceptance of a society for that idea (which may be informed and enhanced by its newsworthiness) provides a proximate basis to challenge any ideas that the particular idea is not valued by society as worthy of being. For example, in national law, a dignity idea may rise either as a direct challenge to an earlier idea pre-

existing in the law, to overcome that position of law; or as a positive challenge to widen the law to include a new idea that society values as worthy of being.

7. What is the significance of dignity asserted at multiple levels in law?

The departure from a general universal idea of dignity acknowledges multiple levels of being, and law, addressing the issue of scope head on. The lack of exclusivity in dignity, and law, is afforded by the fact that most human beings learn in a similar way. Human beings naturally identify with and in different spheres of being, which reveals a multifaceted nature to physical, emotional and spiritual being, drawn from experience and observation in different communities. Debt is acknowledged to: antiquarian recognition of three types of physical, logical and ethical knowledge; sensible reasoning of emotion to reassure belief in the widely valued golden rule or ethic of reciprocity; and the brilliance of Aristotelian experimental design combining the three types of knowledge in both the general and the particular. Having identified multiple spheres or communities of being, the common-sense of the golden rule empowers general dignity ideas that might overarch those communities. Because these ideas are 'societally valued worthiness in being' they require sensible, reasonable, believable consideration. With sufficient power they may be represented in laws (Chapter Five), ordered through different spheres or realms of law (elaborated in Chapter Six).

8. What causes the objective/subjective tension in the aspects of dignity?

The objective/subjective tension in dignity specifically addresses the truths of evaluative ideas. To reiterate, particulars are immediately sensed and general ideas, of self and other, are reasoned to challenge that sense. This engages a deeper philosophical discussion. To avoid oscillation between general and particular extremes one must endeavour to keep both the general subject and the particular object in sight. I suggest that the parameters of being and law are separable, into larger and smaller societies that can recognise general subjective ideas of dignity, against which particular incidents of dignity can be objectified. The judging of the particular objects, against general subjective ideas, of dignity happens in society.

General ideas of dignity represent the positively viewed confluence of ideas observed, shared and experienced in different spheres of being, some of which are reduced to law. Plurality, in what is, and can be, sensibly and reasonably believed, accounts for the elusiveness in general ideas, including ideas of dignity and law. To confuse matters even more this plurality of thought continually changes, evolving through knowledge revealed in different spheres (or communities) of being and contextually variable realms of law to raise even more particular ideas of dignity. Crucially, and this is the point where the thesis necessarily moves over to discussion of law, the confusion leaves human beings who can all experience and observe general ideas, in the position of having to positively choose; to (re)cognise particular incidents of dignity; in what is sensibly and reasonably believed in particular contexts and societies. Human beings have to continually choose between dignity choices, to bring law down to Earth in all realms of law.

9. How do modern ideas of human dignity relate to older ideas of dignity?

Attempts to distinguish the modern idea of human dignity from older and yet still evident ideas, for example, of ecclesiastic or sovereign dignity, show a reticence in dignity theory, and jurisprudence more generally, to acknowledge the change in societal value indicated by the changed locus of dignity. The distinction exhibits perfect examples of particular incidents of dignity recognised from general ideas of dignity asserted in different places at different times; but the separation is untenable. In Chapter Seven I revisit the work of John Austin who was influential in separating positive law. First, to reiterate Austin's brilliant recognition of the emergent point of positive law as the meeting point of command and obedience. Second, to challenge the presumption, that emergent law necessarily arises from sovereign command. I suggest that the emergent point of law is arrived at through a positive ferment of societal valuing; a dignity idea arises which by reason of coercion (as Austin believed) cooperation or care is therefore obeyed. I offer a Natural Law Continuum re-joining Austin's positive law, to the objects of law that he famously severed, reconnecting to a whole plethora of ideas that challenge the general ideas and limits of positive law. I argue that in a democratic society in the twenty-first century these ideas can gain dignity; be recognised as, societally valued worthiness in being, and

incorporated in to rules, including governing law. I suggest that dignity has not changed; but values, in who and what, societies deem worthy of dignity have.

10. Can dignity be meaningfully applied to/in law?

From the foregoing, The Law may not be what The Law says it is. General ideas of law are not the same as particular incidents of The Law and particular incidents of The Law are constantly (re)informed and may be challenged. People can challenge the worthiness of The Laws being: by the command of an agreed authority; by way of internal review; and by, externally preferring some other idea in an act of disobedience to The Law. In each challenge the locus of dignity will be evident in The (extant) Laws making. The Law has to be positively (re)cognised, which, depending on the actual societal value of the challenge (or deemed value of the challenger), may simply mean recognised.

However, multiple spheres of being, dignity and law, now recognised in the Natural Law Continuum inform governing law, bringing people from other disciplines to inform The Law of their knowledge experience and expertise. The Natural Law Continuum informs general ideas of dignity and law shared and passed down over time and the reasoning of particular incidents of The Law. Anyone may challenge The Law depending on dignity of their case or cause and existent power to engage in the political or legal process. This includes, but is not limited to, autonomous individuals, egalitarian communitarians and commanding sovereigns who inaccurately lay claim to governing law.

In Chapter Eight I adapt Hohfeld's matrix of rights to recognise the locus of dignity in the making of incidents of The Law. The matrix, called The New Model of Governing Law, can be used to consider whether a particular position of The Law has dignity; i.e. is The Law (still) societally valued worthy of being in contemporary society. Knowledge of The Law's dignity status may confirm The Law as societally valued (and recognise The Law), or illuminate ways to support any innovation or challenge to The Law. In doing so I recognise physical, emotional and spiritual experience can change general perceptions of dignity. I see this as positive; allowing sensible incrementally reasoned changes in belief.

Chapter 2 - The Pervasive Newsworthiness of Dignity

2.1 Introduction

By way of introduction to general ideas of dignity this Chapter provides examples of dignity pervading human life; newsworthy stories of dignity in common vernacular; dignity used in the political expediency of promissory speeches and rallying calls to action; and the noteworthy inclusion of the United Nations (UN) Charter (Charter) [1] and Universal Declaration of Human Rights[2] (Declaration). The founding UN documents thought by many to premise of the modern concept of human dignity. These dignity ideas are deliberately introduced in a general and newsworthy way to explicitly recognise the plurality of views that commonly inform dignity ideas.

2.2 The newsworthiness of dignity

International and national news stories reveal deliberate affronts to human dignity. The elimination of human beings in the murder and genocide of individuals and groups; and the torture of family and group members forced to witness the indifferent murder of loved ones are the most blatant. Lack of corporate responsibility for inhuman treatment, or negligent and environmentally devastating exploitation of people; neighbours and workers, in poor, and by virtue of that less equal countries, afford similarly outrageous stories of carelessly compromised human dignity. The callously brutal and careless acts of knowing irresponsibility are recognised as morally wrong and affront human dignity.

For example, a 'dignity' search in July 2012 included news of the motiveless murders in the Colorado cinema shootings[3]; the conviction of a man for the cold blooded murder of an Indian student in Salford on Boxing Day [4]; massacres in

[1] The United Nations, 'Charter' (signed on 26 June 1945 at the Conference on International Organization, and came into force on 24 October 1945) <www.un.org/en/documents/charter > accessed 11th June 2014
[2] The UN, ' Universal Declaration of Human Rights' (General Assembly of the United Nations adopted on 10 December 1948) < www.un.org/en/documents/udhr/ > accessed 11th June 2014
[3] 'Aurora shootings: James Holmes charged with 142 counts' (BBC World News, 30 July 2012) http://www.bbc.co.uk/news/world-us-canada-19049873 accessed 30th July 2012
[4] Brown J., 'Kiaran Stapleton jailed for life for murder of Indian student Anuj Bidve', (The Independent, 27 July 2012) http://www.independent.co.uk/news/uk/crime/kiaran-stapleton-jailed-for-life-for-murder-of-indian-student-anuj-bidve-7981964.html accessed 30th July 2012

Syria[5]; remembrance of 8,000 Muslim men and boys killed in the Srebrenica[6] and the brutal treatment of Tamils by Sri Lankan soldiers, seen "gloating over a pile of more than 100 Tamil corpses, including dozens of women who have been deliberately stripped of their clothes to expose their breasts and genitals"[7]. When I embarked on this project in 2000, and at various points during my research, an online Google search using the words 'dignity' or 'human dignity' would reveal news stories of deliberate affronts to human dignity. By November 2013 when I attempted to update my search, dignity had become so commodified that a similar search revealed news of an increase in the share price of Dignity; adverts for funeral organisers and various sites concerned with ensuring dignity in care and in dying.

However, throughout the duration of my research the news has been a tragic repetition of genocide[8], motiveless cold blooded murder, massacre and war[9], acknowledged species wide at the international level; and the brutal ill treatment of individuals and groups of human beings at the hands of other human beings. For example, a more focused search in BBC News[10] in November 2013 registered 6643 reports including the word dignity which had in the last week included: a quote from Foreign Secretary William Hague, in Sri Lanka in a speech to the Commonwealth summit that "dealing with the legacy of sexual violence, bringing those responsible to justice, and helping the survivors to rebuild their lives with dignity" is "absolutely critical to reconciliation and long-term stability". A Profile of: Hassan Rouhani, President of Iran talks "… of reform, of working to ease sanctions, of helping to free political prisoners, of guaranteeing civil rights and a return of "dignity to the nation…". A call on the Saudi government to investigate Saudi police in Riyadh clashing with migrant workers "who should be treated with dignity…". A delegation from Iran seeking a nuclear deal were said to negotiate "from a position

[5] 'Syria unrest: 'Massacre leaves 200 dead' in Tremseh' (BBC News, 13 Jul 2012) www.bbc.co.uk/news/world-middle-east-18823303; Syria conflict: US fears Aleppo 'massacre' (BBC News, 27 Jul 2012) www.bbc.co.uk/news/world-middle-east-19008388 accessed 30th July 2012

[6] 'Srebrenica: Mass reburials on 1995 massacre anniversary' (BBC world news, 11th July 2012) http://www.bbc.co.uk/news/world-europe-18795203 accessed 30th July 2012

[7] Taylor J., 'As its President dines with the Queen, Sri Lanka's torture of its Tamils is revealed Footage shows soldiers gloating over naked female corpses in final stages of civil war' (The Independent, 07 June 2012) http://www.independent.co.uk/news/world/asia/as-its-president-dines-with-the-queen-sri-lankas-torture-of-its-tamils-is-revealed-7821152.html accessed 30th July 2012

[8] Reported in Libya and Syria

[9] Including in Iraq and Afghanistan

[10] BBC News, 'Search', (2013) <http://www.bbc.co.uk/search/news/?q=dignity> accessed 13th November 2013 - A copy of the first three pages of the search is included at Appendix 1

of strength and with dignity". A report into a Marine convicted of murdering a badly-wounded insurgent in Afghanistan in breach of the Geneva Convention had a sub heading of 'Dignity and respect'. There was "a furore" in South Africa over 'insulting art student T-shirts "with some saying President Zuma's right to dignity had been violated…". In the UK five disabled people won their case against the government in the court of appeal to keep the Independent Living Fund the loss of which would threaten their "right to live with dignity …". And a disciplinary panel found a Hospital chief nurse had failed "to make sure colleagues provided patient dignity and privacy in the emergency admission unit…".

Newsworthy acts may be reduced to acts of assault, murder and negligence in law, precisely because there is a pre-legal reason to do so. Governing law recognises the need to prohibit acts that affront human dignity. The affront to human dignity is intuitive and immediate. The acts, deliberate or careless, may be known and intended to wrong. The dignity challenge, or outrage, to individual and group sense of human worth, expects to invoke a reasoned societal response to acts that wrong other human beings.

The newsworthiness of human dignity does not stop at murder. News stories of abuse; association, either forced or restricted; asylum; belief, either forced or restricted; care, or lack thereof, where positive care obligations have been undertaken, for example, to care for children, the disabled, elderly, sick, vulnerable, or dead; defamation; discrimination; dying; education; freedom; harassment; honour; ill, negligent, or unfair treatment; relating to all spheres of personal, private and public life have become commonplace. In the general, rather than the individual sphere, the news includes domestic and employment issues; justice; medical care, including medical and bio-ethics, treatment and negligence; privacy; refugee status; slavery; and torture; are all examples of affronted human dignity making regular headline news. The news stories are also topics of law[11], evidenced in a survey I conducted of United Kingdom statute and case law (the UK Dignity Survey[12]) where each of the subjects raised invoked the language of dignity. Again human

[11] The UK Dignity Survey is elaborated in Chapter Three for the moment it suffices to say that each of the categories listed had enough mentions of the word dignity to warrant a separate folder as I conducted an on-line survey, through the Lexis-Nexis Legal database, of every mention of dignity in UK statute and case law.
[12] Excerpts from the UK Dignity Survey (UKDS) included at Appendix 2.

dignity is raised because it has been violated, or it is likely that it will be violated. The dignity news stories are pervasive and newsworthy, because loss of dignity is intuitively felt to be wrong. The inherent (re)evaluation of dignity fuels human reflection to determine the subjects of life (being) and law. The intuitively sensed wrongs (and rights) of outraged (or nourished) dignity drive individual reasoning, compelling groups, and ultimately humans as a species, to reason to determine human dignity. Where law is available as a normative guide and medium for the practical reasoning of commonly understood rights, violations of human dignity may be specifically recognised to help determine reasoned rights in law.

2.3 Dignity asserted in law in promissory speeches and rallying calls to action

Most societies have hierarchic measurements of human worth: braves, chiefs; sovereigns, peasants; portrayed on a spectrum from those revealed as low-life, freeloading criminals, to those who appear to have higher and or more virtuous authority. Dignity assertion upholds the idea of leadership authority in the already authoritative roles, including the institutional roles[13], and rules (laws), of governance[14]. The assertion of dignity is used to establish, normalize and reaffirm societal recognition of dignity, by proposing the value or 'dignity' of people and things (ideas, institutions) in various roles and rules in different spheres of being, including law[15] (and war). Dignity, or lack thereof, is evolved in societal acceptance of and conformity to, recognition of the role or rule in approved or disapproved behaviour. Promises to nourish pre-existing ideas of dignity are advanced in promissory manifestos[16] and may be afforded further support by recognition in

[13] Many leaders seeking to maintain power adopt honorary titles to evoke their supreme authority. The Queen is UK Queen; Adolf Hitler was Führer in Germany; Fidel Castro, the communist ex-president of Cuba was known as the Máximo Líder (Greatest Leader); Iran has a Supreme Leader; Kim Jong-Un is Supreme Leader of North Korea.

[14] Examples include Dignity of Parliament, The House of Commons, other UK influenced Legislative Assemblies; The Dignity of the Court, Court Hierarchy and Rules of the Court, The Courts Duty to Apply and enforce the Law, Contempt of Court and the use of the language of dignity in Court Procedure. Please see UKDS at Appendix 2.

[15] *ibid* UKDS at Appendix 2.

[16] British Prime Ministers constantly engage the common use of dignity to talk about individuals deemed to have behaved with dignity and in reference to care of the vulnerable and needy. Eleven (Truman; Eisenhower, (1st & 2nd); Nixon, (1st & 2nd); Carter; Reagan (1st & 2nd); Bush, G. W. (1st & 2nd); & Obama; http://www.bartleby.com/124 last accessed on the 11th April 2010) of the last sixteen Presidents of the United States of America, sought to promote dignity in their inaugural address. The first three Presidents (Mandela, Mbeki & Zuma) of The Republic of South Africa, which has a constitution premised on human dignity, unsurprisingly all referred to human dignity in their inaugural address http://www.dfa.gov.za/docs/speeches/index.htm#other last accessed November 2011.

prohibitive or protective law[17]. Affronts to existing ideas of dignity, for example, of human, sovereign or state dignity, may result in rallying calls to action in both law and war.

In common use, reaffirmed in law, dignity has come to encapsulate societal recognition of humanly valued personal goods. For example, in the UK the sovereign, usually on recommendations from Parliament, grants dignities to recognize individual achievements of people who in a public, private or work life sphere are recognizable as showing exemplary dedication in striving for things societally valued as worthy in human being, including outstanding service in: business, charitable, political or public; or achievement in the arts, entertainment, science or sport. Sovereign and Parliament, both recognised in dignity, as representative of legal authority complementary to the being of the UK.

Judges take a similar common, societally recognizable, impression of dignity (worthiness) to ascribe credibility and worth to recognise, or not, the dignity of groups: which include hierarchies, nations, societies, assemblies; and individuals, whether perpetrator or victim, murderer or monarch. Judges have used the language of dignity in both criminal and civil matters[18]. Sensibly advocates use a similar common impression of dignity in court to assert the worthiness of their client(s), or their clients' cause; they attempt to reveal their client in the best, most societally approving, light. And litigants asserting individual or group dignity, appeal to law to gain societal approval, which if approved will be mirrored in the recognition of law[19]. Even incidental references to dignity in the case law; for example, a police statement referring to the delayed questioning of a man found attempting to rape a four year old girl "to restore some of the man's dignity" [20] retain the same positive meaning of human worth to the understanding of the word dignity.

Human dignity is pervasive in national law. For example, in areas of criminal and refugee law (civil) each of the following headings returned several cases in the UK

[17] Please see excerpt from the UK Dignity Survey – Statutes - at Appendix 3.
[18] Please see UKDS at Appendix 2.
[19] *ibid*
[20] Lord Justice Russell in *R v Pullen* [1991] Crim LR 457 Official Transcripts (1990-1997) (CA)

dignity survey: intent and aggravation of the crime[21]; methods of accusation and arrest; the process of trial and committal, including contempt of that process; treatment of witnesses; treatment of prisoners awaiting, and after, committal; corporal punishment and the death penalty; all raise the subject of human dignity and require a determination of human dignity, or worth[22]. Similarly asylum seekers and refugees, who by their refugee or asylum status categorisation start from a position outside the law, seek recognition of their refugee or asylum status on the basis of their human dignity. The consequence of failure to gain recognition leaves the asylum seeker or refugee excluded from and without protection of the law they sought. Where the asylum seeker or refugee is recognised in law, the process of law is engaged. The person becomes both the subject of, and subject to, the process of law. Whether they are desirable to the host nation, or not, their treatment, while waiting for, and after decision, is a repeated and continual determination of human dignity or worth, within the host nation's law. If the application is ultimately refused the asylum seeker/refugee is re-placed in a position with-out the host society's national law.

2.4 Dignity Assertion Intends to Favour The Asserter and Always Did.

Dignity has a history of discrimination recalling the violence of dignity assertion. For centuries dignity was asserted at the expense of other people's dignity, in order to subvert and violate people's dignity; while the inalienability of dignity could still be recognised in the subject or victim. Slavery is an obvious example. In light of dignity's discriminatory history I am arguing for human dignity. However, lest we forget[23], sovereign bondage, colonialism, discrimination and exploitation were[24], and still are wide spread, prioritizing and colonizing individual and group claims to

[21] Lord Devlin in *Rookes v Barnard* [1964] Volume 1 All England Law Reports 367 (UKHL) said at p. 407 that to award aggravated damages "the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride"

[22] Prisoner's rights often argued on Article 3 Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment and Article 5: Right to liberty and security of the European Convention on Human Rights brought into UK law by, and appended to, the Human Rights Act 1998

[23] Lest we forget is a refrain in "Recessional", a poem by Rudyard Kipling at Appendix 4, written for the occasion of Queen Victoria's Diamond Jubilee in 1897, it recognises the transience of human power, within the scheme of Gods overarching power. Lest we forget, is also an Ode of Remembrance, used since World War I in the United Kingdom (UK), Canada, Australia, and New Zealand, to honour those who fall in battle.

[24] Arthur Chaskalson 'Human Dignity as a Constitutional Value' in Kretzmer D. & Klein E. (eds) *The Concept of Human Dignity in Human Rights Discourse* (Brill, 2002) pp. 133-144

dignity and law at the expense of other individuals and groups and their laws. The 'other' individuals and groups were, and are, ignorantly, or deliberately, not recognised as worthy in being, and may be deemed other than human to justify legal persecution and exclusion from law. For example, post-revolutionary documents catalogue the historic discriminatory injuries the revolutionaries sought to overthrow, including, for example, the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and of the Citizen, 1789[25].

However, recognition in the American Declaration of Independence[26] of "usurpations and injustices" perpetrated by the discriminating British Crown, did not prevent new discrimination in the same document; where the native peoples of America were referred to as "Indian savages". Canada's First Nation Peoples, who as trading partners and allies of the British had been recognised and treated as independent nations, in conquest were deemed "savage and culturally impoverished"[27]. Later the British attempted to assimilate Canada's First Nations by imposing a colonising culture, where First Nation's customary laws were subsumed by British Law under the Indian Act[28]. Aboriginal Australians were designated fauna and not recognised as human beings from the writing of the Australian Constitution in 1900 until the constitution was amended in 1967[29]. Many indigenous communities have been empowered in their own countries by the international recognition of the Declaration on the Rights of Indigenous Peoples[30]. The rights will be imperfect to many, but it does provide a platform for recognition to challenge claims of sovereignty and overcome burdens of persecution[31].

Discriminatory sub human and animalistic insults are recognised instruments of legal oppression, as they intentionally de-humanise; Hitler's Germany characterised

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[25] Approved by the National Assembly of France August 26, 1789, 'Declaration of the Rights of Man - 1789' (Lillian Goldman Law Library) <http://avalon.law.yale.edu/18th_century/rightsof.asp> accessed April 2010
[26] Declaration of Congress of the thirteen founding states of the United States of America (USA) 1776 'Declaration of Independence' <www.earlyamerica.com/earlyamerica/.../text.html> accessed April 2010
[27] John Borrows *Canada's Indigenous Constitution* (University of Toronto Press, 2010)
[28] Enacted in 1876 and, although amended, still in force today.
[29] The Australia Constitution written in 1900 was altered following a referendum on the 27th of May 1967. There was a 90.77 per cent vote in favour of the change.
[30] United Nations , 'Declaration on the Rights of Indigenous Peoples' (2007) <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> accessed 11th June 2014
[31] Borrows (n. 27)

those it sought to eliminate as vermin[32] and recent genocides, for example, in Rwanda and Libya, were justified by the Tutsi being referred to as "cockroaches"[33] and Gaddafi, denying Libyan rebels' nationality, referred to them as "germs, rats and scumbags"[34]. Even apparently innocuous slurs, of the king of the castle and the dirty rascal, the rat-race or of human society like herding sheep, suggests some people or some ways of being as superior to others.

2.5 Aspirations for international law and the unification of supra-national law

The turning point for human dignity, and the basis for the modern concept of human dignity, emerged from the circumstance of two World Wars, which occurred during the withdrawal of European empires. Wars were hardly exceptional, national and tribal battles had been fought for centuries. However, the technologically enhanced scale and awareness of the atrocities, along with the timing of these wars, revealed the inevitable and unpredictable destruction of war, affording an opportunity, for an intuitively based reasoned alternative to war, in law[35]. Laws and nations evolve over time, but by 1945 fifty-one nations[36] were sufficiently identifiable as recognisably, legally independent nations to unite as nations under the auspices of the United Nations. Improving communication, both in technological advances and mutual understanding has continued to offer the UN as a space to resolve difference between human beings, individual and national groups, providing practical reasoned agreement, rather than forever resorting to destructive wars, resulting in elimination and destabilising physical subordination.

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[32] Arnold Arluke, Clinton R. Sanders *Regarding Animals (Animals, Culture, & Society)* (Temple University Press, U.S. 1996) p. 162; *The Eternal Jew, Fritz Hippler [1940]* was an anti-Semitic German Nazi propaganda film, presented as a documentary, which portrayed Jews as vermin who needed to be exterminated.

[33] In Rwanda RTLM Hutu Power Radio incited violence toward "Tutsi cockroaches" during the genocide. Immaculée Ilibagiza & Steve Erwin *Left To Tell: One Woman's Story of Surviving the Rwandan Holocaust* (Foreword Dyer W. W.) (Hay House UK, 2007); See also by Nancy Billias, Leonhard Praeg *Creating Destruction: Constructing Images of Violence and Genocide* (At the Interface/Probing the Boundaries, Editions Rodopi B.V. 2011)

[34] Reported widely in the news; originally broadcast on Syrian-based Al-Rai TV on 20 September 2011.

[35] Winston Churchill The World Crisis 1911-1918; The Second World War, (Vol. 1-6 Penguin Classics, 2007)

[36] Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela and Yugoslavia UN, 'Growth in United Nations membership, 1945-present' <http://www.un.org/en/members/growth.shtml> accessed November 2013

2.6 The United Nations, Charter & Declaration

2.6.1 The United Nations

The horrors of two World Wars and the increasing worldwide rejection of colonisation[37], which for centuries had blighted and alienated the world[38], forced the world to recognise the limit of individuals and groups, which included national groups, to control the world. This new awareness of human inter-dependence revealed a need to build trust, to depend on one another. Colonisation and war revealed human beings as human beings greatest ally and greatest threat to being[39]. In the post-war era nations came to recognise two things: first, the earlier disabling and killing of other groups and individuals left a legacy that breeds hostility creating perpetual instability if left unresolved[40]. Second, if we wish to avoid the barbarity of war in future, we need to make space to mediate disagreements of wider species concerns that will otherwise lead to war. An overarching platform was needed where nations could come together and discuss in mutually beneficial agreement how to resolve differences and better share the Earth.

The United Nations (UN) was established to found such a basis for peaceful sharing of Earth; a forum for care, coercion and cooperation in world governance. The founding documents of the UN Charter (Charter)[41] and subsequent Universal Declaration of Human Rights[42] (Declaration) provide the basis for the UN's authority and the assertion of the modern concept of human dignity. Following atrocities committed in the ebb and flow of colonisation and war, nations, many of

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[37] The horror of the Holocaust provided a locus for the United Nations (UN) "outraged dignity", but colonisation showed a similar "disregard and contempt for human rights" resulting in "barbarous acts which outraged the conscience of mankind"; limited "freedom of speech belief and freedom from fear" and had been responsible "for tyranny and oppression" Quotes are from the preamble to the Declaration. See also Chaskalson (n. 24).

[38] The systematic enslavement, removal, exclusion and alienation of First Nations and Aboriginal people, is well documented in our histories. That peoples were subjected to elimination, dehumanising and debasing cultural slurs, forced assimilation, no franchise and subordination of their law to European law in their own country is also well documented in law. See for example John Borrows & Leonard Rotman *Aboriginal legal issues: Cases, Materials & Commentary* (3rd, LexisNexis Canada Inc, 2007) in Canada and Heather McRae & Garth Nettheim *Indigenous Legal Issues: Commentary and Materials*, (4th, Lawbook Co, Jul 2009) in Australia.

[39] The words of the UN Charter and Declaration and history of the foundation and continuing work of the UN illuminate the saying of the words. Much work on the UN focuses on talk of what the UN is or does see David Forsythe, Kelly-Kate Pease, Roger Coate and Thomas Weiss *United Nations and Changing World Politics* (7th, Westview Press, 2013); and takes the 'positive' post-war reason as the UN start point rather than the preceding history which might court responsibility for past actions evidenced in the histories of colonisation.

[40] See 'dignity intended to discriminate' p. 3 above – recognising the instability created by the unresolved legacy of peoples recognised as having been disenfranchised and oppressed by society.

[41] The UN Charter (n. 1)

[42] The UN Declaration (n. 2)

whom were, and still are, trying to deal with the legacy of colonisation[43], came together to form the UN[44]. In the founding documents of the UN, the preambles to the Charter and Declaration, "The peoples of the [original] United Nations"[45] reaffirm "their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women"[46].

2.6.2 The Charter and Declaration

The UN is the incredible stabilising achievement of the twentieth century. From the opening words of the UN Charter international post-war faith recognised the tyranny of hierarchic oppression, re-placing sovereign/state dignity by prioritising human dignity as the base unit of the UN aspiration and law in "we the peoples of the United Nations"[47]. This marked and important difference recognises the interdependence motive of the UN to acknowledge and overarch national identity[48]. Individuals and groups, including national groups, became part of an asserted collective human species society, in which each individual and group have a stake and enjoy independence from[49].

The intent in the Charter is clear; to unify nations "to save succeeding generations from the scourge of war, which …has brought untold sorrow to mankind"[50], recognition for and of our common humanity. The UN may have started out utopian and arrogant[51]; under-represented[52] and under-representative[53], but it

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[43] For example, The School of Advanced Study held a conference called London Debates 2010: How does Europe in the 21st Century address the legacy of colonialism? 13 – 15 May 2010.
[44] The UN Charter (n. 1)
[45] The UN was formed by 51 countries; the current membership, as of 2011 is 193 see Appendix 5 http://www.un.org/en/members/growth.shtml last accessed on 5th January 2013
[46] The UN Charter (n. 1)
[47] *ibid*
[48] *cf* of earlier declarations, for example, of the USA Declaration of Independence (n. 26) which chose the collective of "one people" to "dissolve the political bands which have connected them with another" and the French Declaration of the Rights of Man (n. 25) which recognised "representatives of the French people" before each declaration went on to declare "the separate and equal station to which the laws of nature and of nature's God entitle them"(USA) and that "men are born and remain free and equal in rights" (French).
[49] These terms are supported by Ronald Dworkin in 'Democracy as Integration' 'Equality, Democracy and Constitution' [1989-1990] Alta. L. Rev. 324, 337
[50] *ibid*
[51] UN membership was tied to adoption of the declaration. "It was presumptuous and shamelessly ethnocentric for the UDHR to refer to itself as the "common standard of achievement for all peoples and all nations" when "most African and Asian states were absent from the United Nations because they were European colonies" Makau W. Mutua 'The Ideology Of Human Rights' (Spring 1996) vol. 36,Virginia Journal of International Law, p. 589 and that "… like piracy, human rights may allow for a "universal" entitlement without necessarily guaranteeing that any one nation or group of nations will feel motivated, or have the interest, to do something about it" Anthony D'Amato 'The Concept Of Human Rights In International Law' (October, 1982) vol. 82 Columbia Law Review, p1110.

harnessed the mechanism of law to recognise and mediate the inclusivity of its normative intent. Intent made clear by the words of Eleanor Roosevelt, as she submitted the Declaration for review before the General Assembly[54]: "We stand today at the threshold of a great event both in the life of the United Nations and in the life of Mankind. This declaration may well become the international *Magna Carta* for all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation in 1789 [of the French Declaration of the Rights of Man], the adoption of the Bill of Rights by the people of the U.S., and the adoption of comparable declarations at different times in other countries"[55]. When questioned on the inclusion of human dignity Roosevelt is reported to have said "in order to emphasize that every human being is worthy of respect … it was meant to explain why human beings have rights to begin with"[56].

In the Charter "The peoples of the United Nations" further "determined"[57] "to reaffirm 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"[58]. The tried and tested mechanism of law was deliberately engaged to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"[59]. The UN Charter also had further ambitions "to promote social progress and better standards of life in larger freedom"[60].

The Declaration, building on the Charter, 'recognizes' in the first and 'reaffirms' in the fifth paragraph of its preamble that: "inherent dignity and … equal and inalienable rights of all members of the human family is the foundation of freedom,

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[52] Many nations were absence from early participation in the UN, excluded by colonial oppression.
[53] The drafting committee was composed of eight persons, from Australia, Chile, China, France, Lebanon, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America. see also Mutua n. 51 Many Indigenous peoples across the world were denied franchise in their own countries e.g. Australia and Canada see Borrows J. & Rotman L. and McRae H. & Nettheim G., (n. 38).
[54] Wife of President Franklin D. Roosevelt and 'without doubt, the most influential member of the UN's Commission on Human Rights' http://www.udhr.org/history/Biographies/bioer.htm accessed April 2010
[55] 'Eleanor Roosevelt addresses the United Nations on the ratification of the Universal Declaration of Human Rights' (Uploaded on You Tube, 2 Dec 2008) <http://www.youtube.com/watch?v=2rDoS7XErcw>
[56] Mary Ann Glendon . *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001) p. 146.
[57] The UN Declaration (n. 2).
[58] The UN Charter (n. 1).
[59] *ibid*
[60] *ibid*

justice and peace in the world"[61]. Dignity, equality and inalienability, are asserted as the pre-requisites, to "freedom, justice and peace in the world". Inherent dignity is set up to be cherished as common to all members of the human family. The preamble outlines the Declaration's background; mistakes to be remembered, "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind"[62], before aspiring to "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear" [63]. The mechanism of governance is chosen; "human rights should be protected by the rule of law" [64] to avoid the need for "rebellion against tyranny and oppression"[65]. It is posited as an opportunity to get on: "to promote the development of friendly relations between nations" and to encourage "the promotion of universal respect for and observance of human rights and fundamental freedoms". The Declaration is not law; it is internationally recognised consensus on human choices between law and war.

The 'reaffirmation' of fundamental human rights, dignity, worth and equality, was not a reference to the pre-existing reality or law; it was, as it states, a "faith". International recognition of the shared human tragedy of war led to an international impression, or faith, in an agreed aspiration and mechanism of communication through law, to move on and avoid future wars. "Human dignity" was chosen as the fundamental signifier of human worth, to provide foundation for the mechanics of law. The language of dignity had proved historically successful in Western law, dignity providing an assumed authority in law that could now be recognised as vesting in individual human beings. Dignity had a history of both establishing and upholding the dignity or worth of sovereign individuals and groups, including representative parliamentary groups, in law. Further as the locus of law shifted from

[61] The UN Declaration (n. 2).
[62] *ibid*
[63] *ibid*
[64] *ibid*
[65] *ibid*

a defeated sovereign to a new regime; dignity, the valuation of societal worthiness, aided transition of sovereignty from one individual or group to another[66].

The assertion of human dignity re-placed dignity to individual members of the human family, complementarily within the artificial sphere of governing sovereign nation states, overarched by a reassuring artifice of the UN recognising the common humanity of human being. The monumental shift from sovereign/state dignity to human dignity was a deliberate attempt to normalise the sense of human dignity. The declared intent of the uniting of nations in the UN was to pre-empt world domination by a single sovereign authority or unbridled nation power. Human dignity provided the locus of authority to reserve world sovereignty "in the equal rights of men and women and of nations large and small" to "The peoples of the United Nations"[67].

Proactive positing of human dignity by the UN introduced a pre-reasoned argument for legal recognition, enabling individuals and groups (in countries that had internalised the Declaration and Charter) to confidently challenge discriminatory attitudes toward race and equality across the post-colonial world and to change national laws[68]. Membership of the UN has grown. The UN may not be perfect; it is dominated by powerful nations and dependant nations may be forced into subservience, but the pre-reasoned non-discriminatory reasoning and transparently declared intent of the UN was worthy, and its worthiness is undiminished. After sixty-seven years the UN invites contributions from all members with open forums for discussion[69]. One can hope that the 193[70] nations who participate choose to do so of their own volition. The Declaration, which has been translated into more than 375 languages and dialects, is the most internationally recognised and persuasive

[66] E.g. The transfer of law in the succession of monarchs; the declaration, transfer and cessation of powers transferred from a monarch to a sovereign people; the upholding of new Commonwealth courts and cessation of legal jurisdiction in the unravelling of Colonisation. Please see UKDS at Appendix 2
[67] UN Charter (n. 1).
[68] E.g. Commitment to the UN forced previously colonising nations to reconsider their internal race relations and former colonies, including Australia and Canada, to first give franchise to and then recognise the pre-existence of native populations of indigenous people.
[69] Although again dominant nations (the green room?), serving up policy as a fait accompli is unacceptable.
[70] UN Growth (n. 43).

human rights declaration in the world[71] supporting the political aspiration in the appeal of its common newsworthiness.

The aspirations and normative laws established by the UN continue to innovate and progressively change. The UN should be proud of its positive successes, acknowledged by those privileged to live in peace, who are the recognisable beneficiaries of the UN's positively aspiring leap of faith. However, the UN should be mindful of its humanitarian anti-war purpose. War free beneficiaries are neglecting the duty to all nations if they fail to maintain the nourishing humanitarian endeavour of recognising human dignity. If people and nations want to avoid the intuitive sense of outraged wrongs the "inherent dignity and … equal and inalienable rights of all members of the human family" [72] must continue to be recognised as the foundation of freedom, justice and peace in the world"[73] and remain paramount in international dealings. As recognised in the retaliatory motive of every act of rebellion, revolution or war, those privileged in peace cannot, and should not, be complacent and expect without peaceful effort to take peace for granted.

Shocking reports from continuing wars: of parents forced to witness their child's heart being hacked from its body and even forced to eat their child's flesh[74]; of deliberate withholding of access to justice[75] or information leading to the anguish of not knowing of the fate of disappeared loved ones[76]; of torture, including rape torture, gang rape or a father forced to mount his daughter[77]; all are, post-UN founding acts which suggest more action is required. Once again, these acts are recognised as affronts to human dignity, because, quite apart from being illegal, they are intuitively felt to be wrong[78]. The acts are recognised and known to be wrong because they violate human dignity; the acts deliberately intended to degrade their victim and to violate and debase the self-worth of their human subject. The

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[71] *ibid* - With over 300 signatories the most internationally recognised example of human rights assertion.
[72] The UN Declaration (n. 2).
[73] *ibid*
[74] Personal account from a Kosovan refugee
[75] Potentially engaging articles 5 & 6 of the European Convention on Human Rights (ECHR)
[76] *ibid* articles 2, 3, 5 of the ECHR see *Varnava and others v Turkey* - [2008] ECHR 16064/90 10 January 2008
[77] An account given at a talk by an activist from Burma, Plymouth University 2000
[78] The shared pain of human bodies in pain brings to mind Elaine Scarry. *The Body in Pain: The Making and Unmaking of the World* (OUP, 1985)

International Criminal Court Elements of Crimes defines outrages upon personal dignity, when a war crime, including: 1. the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. 2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity[79].

Reports of the deliberate ill-treatment[80] of prisoners: including the infliction of pain[81], sensory deprivation and or overload, stress positions, sleep deprivation, forced nudity[82], strip searches[83], imposed shaving contrary to religious belief[84], cramped overcrowded conditions[85], poor hygiene and inadequate medical treatment[86], similarly scream from page or screen of careless or intentional undermining of human dignity[87]. The examples given come from over 111 successful case brought before the European Court of Human Rights (ECtHR) under Article 3 of the European Convention on Human Rights (ECHR) by ill-treated prisoners. Internationally recognised prohibitions against degradation of human dignity, including 'inhuman and degrading treatment'; may engage supra-national and national legal scrutiny. Legal action begins with an act carelessly or coercively intended to demean. The affront to dignity and outrage at the wrong seeks recognition of the wrong; the recognition of newsworthiness and of law recognises the wrong. The newsworthiness of legally recognised wrongs engages the collective psyches in general political discussion reminding governments of their international commitments to not to dehumanise and degrade their fellow man.

The legal process recognises, and subsequently punishes for, acts we intuitively know affront dignity. For example, Article 3 of the European Convention on

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[79] Customary International Humanitarian Law, 'Practice Relating to Rule 90. Torture and Cruel, Inhuman or Degrading Treatment' (International Committee of the Red Cross) < ttp://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule90_sectionb > accessed November 2013

[80] The court also found a breach of Article 13, as the Attorney General had not taken criminal proceedings against the officers who had subjected the applicant to ill treatment.

[81] *Egmez v Cyprus* (App. No. 30873/96) - [2000] ECHR 30873/96

[82] Douglas A. Pryer *The Fight for the High Ground: The U. S. Army and Interrogation During Operation Iraqi Freedom I*, May 2003-April 2004 U.S. Army Command and General Staff College Foundation. Press p. 27

[83] *Iwanczuk v Poland* (Application no 25196/94) [2001] ECHR 25196/94

[84] *Yankov v Bulgaria* (Application 39084/97) (2003) 15 BHRC 592, [2003] ECHR 39084/97 ECtHR 2003

[85] *Vlasov v Russia* (App no 78146/01) - [2008] ECHR 78146/01 12 June 2008

[86] *Kudla v Poland*[2000] ECHR 30210/96 (No violation of Art)

[87] These incidences all appear in the UK Dignity Survey in cases brought under Art 3 of the ECHR in the ECtHR

Human Rights[88] (ECHR): in the often cited Court ruling in *Peers v Greece* explicitly recognises that conditions that "diminish the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance"[89] amount to degrading treatment and breach of Article 3. "Outrages upon personal dignity, in particular humiliating and degrading treatment"[90] are also prohibited in international humanitarian law, which is nationally incorporated in UK law in the Geneva Conventions Act 1957 and the International Criminal Court Act 2001. The law of declaration and statute concretised further in the repeated rhetoric of dignity claims.

2.7 International humanitarian law

International humanitarian law was not founded by governments. Humanitarian law is now based on the Geneva Conventions, but these follow a non-governmental humane initiative to recount the immediate impression of the horror, outrage to dignity, of the human cost of war and the newsworthiness of that horror[91]. Following a battle in Solferino in 1859, Henry Durrant published a graphic account of the aftermath of battle. Durrant is considered by many to be the father of modern humanitarianism and saw the importance of publicising the human cost of war[92]. Durrant suggested the founding of a neutral and impartial organization to protect and assist those wounded in war, which led to the founding of the International Committee of the Red Cross. Voluntary relief societies were also established to care for the injured, in the formation of National Red Cross and Red Crescent Societies. Durrant also proposed an international principle created to serve as the basis for these societies, an idea that developed into the Geneva Conventions, which have now existed for more than sixty years. The International Committee of the Red Cross remains committed to the ethos of its founding

[88] The Convention was drafted in 1950 by the recently formed Council of Europe, the convention entered into force on 3 September 1953.
[89] *Peers v Greece* (2001) 10 BHRC 364 European Court Of Human Rights (Second Section)
[90] Also contained in International Criminal Court Act 2001 schedule 8 Genocide, Crimes Against Humanity and War Crimes: Articles 6 to 9
[91] *International Committee of Red Cross* http://www.icrc.org/web/eng/siteeng0.nsf/html/ihl accessed July 2011
[92] 'A Memory of Solferino' *International Committee of the Red Cross* http://www.icrc.org/eng/resources/documents/feature/solferino-feature-240609.htm accessed July 2011

members; all people are to be treated equally, regardless of what side they had fought on, "tutti fratelli" (all brothers)[93].

The Geneva Conventions are still overseen by the nationally independent International Committee of the Red Cross[94] and contain important rules limiting the barbarity of war. The rules were consolidated in 1957[95] and now also incorporate the language of the UN, stating under the General Provisions[96] that they protect against "outrages upon personal dignity, in particular, humiliating and degrading treatment"[97] with further references to personal dignity in relation to practices of apartheid …[and] other inhuman and degrading treatment… based on racial discrimination;[98]" and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault[99]. The International Committee of the Red Cross remains a respected and powerful non-governmental organisation (NGO), which like other NGO's seeks to hold governments to account in national and international law.

2.8 Human dignity in national and international law

The importance of bringing the idea of human dignity into the narrative of national and international law cannot be overstated. The declared international aspiration[100] has seen human dignity concretised in the core international human rights

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[93] 'History of the International Committee of the Red Cross' *International Committee of the Red Cross* http://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm accessed July 2011

[94] The Red Cross is an independent, neutral organization ensuring humanitarian protection and assistance for victims of war and other situations of violence www.icrc.org/web/eng/siteeng0.nsf/html/home!Open accessed July 2011

[95] The Geneva Convention 1949 Conventions & Additional Protocols: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Convention I-IV Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Annex I (to the Protocol I) : Regulations concerning identification (as amended on 30 November 1993); Annex I (to the Protocol I) : Regulations concerning identification (as of 6 June 1977); Annex II (to the Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005; *International Committee of the Red Cross* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions accessed 26th July 2011

[96] Schedules 1 – 5, Article 3 (1)(c) The consolidated Geneva Conventions Act 1957

[97] International Criminal Court Act op. cit., n. 55

[98] Schedule 5 Article 85(4) The consolidated Geneva Conventions Act 1957

[99] Part II—Humane Article 4 (2)(e) The consolidated Geneva Conventions Act 1957 - Fundamental guarantees

[100] E.g. UN Declaration (n. 2)

instruments[101] of the UN and is used in the aspirational spirit and day to day practice of supra-national human rights conventions[102]. Recognised incidences of human dignity rights violation have been incorporated into national laws[103] and provide a basis for wider common understanding, and perhaps greater integration of law, for example, in Europe[104]. Human dignity has also been constitutionalised[105] and is used in speeches[106] and national soft law guidance[107].

The founding UN documents, outlined above, clearly outline the motive and intentions of the nations who united in an endeavour towards peace. The assertion of international human dignity, intentionally introduced a novel idea to both international and national law; the general idea of the dignity of all human beings, rather than the particular idea of one individual's dignity or one group's dignity. Human dignity was admitted as a novel political innovation; a leap of political faith that introduced a human oriented idea of dignity, 'human dignity', to the narrative of national, supra-national and international law.

However, like the national and international newsworthiness of human dignity atrocities and evidence of the pervasiveness of human dignity in national laws, the

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[101] There are nine core international human rights treaties: ICERD International Convention on the Elimination of All Forms of Racial Discrimination 21 Dec 1965; ICCPR International Covenant on Civil and Political Rights 16 Dec 1966; ICESCR International Covenant on Economic, Social and Cultural Rights 16 Dec 1966; CEDAW Convention on the Elimination of All Forms of Discrimination against Women 18 Dec 1979; CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 Dec 1984; CRC Convention on the Rights of the Child 20 Nov 1989; ICRMW International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 18 Dec 1990; International Convention for the Protection of All Persons from Enforced Disappearance 20 Dec 2006; CRPD Convention on the Rights of Persons with Disabilities 13 Dec 2006 *Office of the United Nations High Commissioner for Human Rights* http://www2.ohchr.org/english/law/ last accessed 5th January 2013

[102] E.g. The European Convention (adopted in 1950) & Court of Human Rights (sitting since 1959) involves 47 member states *Council of Europe* www.echr.coe.int/; The American Convention on Human Rights "Pact of San Jose, Costa Rica" dated 11/22/69 involves 34 Countries, with 19 signatories *Inter-American Commission on Human Rights* http://www.cidh.org/basicos/english/Basic1.%20Intro.htm. The African (Banjul) Charter on Human and Peoples' Rights (entered into force 21 October 1986) involves 53 countries and has 18 signatories *African Commission on Human and Peoples' Rights* http://www.achpr.org/ accessed 5th January 2013.

[103] E.g. Art.1 the *Grundgesetz* 1949*,* the Basic Law or Constitution of Germany; In the UK in the Common law ruling supporting 'aggravated damages' in *Rookes v. Barnard And Others* (see n.19); 'harassment' s.26 of the Equality Act 2010 and any legislation based on the core UN human rights instruments, for example, the Human Rights Act 1998

[104] E.g. The Charter of Fundamental Rights of the European Union (2010/C 83/02) including in the Preamble; Section 1 which is entitled Dignity, and includes Art. 1. Human dignity is inviolable. It must be respected and protected. Art. 25. The right of the elderly to lead a life of dignity and independence and to participate in social and cultural life; Art. 31. Fair and just working conditions which respect his or her health, safety and dignity.

[105] For example, in Germany and South Africa

[106] See (n. 14).

[107] E.g. The government supported Dignity at Work Partnership and Dignity in Care Campaign.

examples of human dignity in UN aspirations and concretisations of international law and international humanitarian law are instances of prior recognition of affronts to human dignity. The immediate impressions of the brutality of war focus attention on the suffering of human kind. The outraged post-war reaction took positive steps to avoid human suffering by avoiding war in the future. The recognition of human dignity brought the oppressive discriminatory tendency of narrower spheres of sovereign and state dignity into sharp relief, and in a moment of unavoidable clarity, saw the human victims of law. The incorporation of human dignity as the basis of International Human Rights Law and International Human Law to avoid future wars appeals to common sense. I accept some see dignity as an extra-legal concept, but suggest the recognised outrage to human dignity determines the right and wrong of law and is therefore clearly applicable in and to law.

Wars in the world rage on; with corporations and nations lining up to supply equipment, supervision, media coverage, security for battle and aid for the aftermath[108]. Colonisation by nations has waned, arguably as a result of the creation of the UN, but discrimination, exploitation and oppression, are still pervasive, newsworthy and wide spread. Nations, and their resident corporations, still seem to be missing the wisdom recognised in the UN foundation; as they greedily and selfishly, pursue economic goals at the expense of other human beings. Despite the international recognition of the importance of human dignity and clear recognition of the intention and need to respect human dignity, human dignity appears to be easily ignored, overlooked, sidetracked and subsumed. Meanwhile dignity and human dignity continue to be widely asserted and used as common valuations of human worth, which are easily understood in life, war and law.

2.9 Chapter conclusion

From the foregoing evidence dignity appears to be deeply ingrained in the public psyche and, evidenced through more than five hundred years of repeated assertion in UK statute and case law[109], appears naturally at home in law[110]. For thousands of

[108] Samantha Power *A Problem from Hell: America and the Age of Genocide* (3rd, Harper Perennial, 2003); Andrew Hurrell . *On Global Order – Power, Values, and the Constitution of International Society* (OUP, 2007)
[109] Please see UKDS at Appendix 2

years dignity has been repeatedly asserted in Western societies[111]. The concept of dignity sufficiently recognizable in the international arena to be specifically recognised an intentional measure of apparent human worth. Yet, dignity remains ephemeral, elusive, hard to grasp and impossible to pin down. If I started with basic quandaries this chapter just raises more questions: Does dignity have or hold any legal or extra-legal meaning? What is the point of dignity/human dignity assertion and or recognition? Does dignity, and following on from this law, exist? Can dignity or law be created? Or are both dignity and law highly contentious? What, if anything, does dignity add to the language of rights?

What is consistently shown throughout the chapter is that general ideas of dignity are usually positive; assertions deliberately shared to signify the worthiness of the claim. For example, the claim of states uniting under a general overarching umbrella of dignity in the co-operative endeavour of the UN aspiring to promote and protect human dignity; or even more locally scoped groups of parliamentary or monarchic sovereign dignity, which also enjoy positive billing; and peoples and groups uniting across and within geographic boundaries drawing strength from the newsworthiness of deliberate persecution[112] and discrimination[113]. The positive nature of dignity is a claim that runs through this entire thesis, evidenced, rightly or wrongly, in every incident of dignity. This claim is not that all assertions of dignity are good, or freely recognised. Nonetheless it leads to the suggestion in Chapter Five that when ideas of dignity gain sufficient currency in the public domain this may lead to concretisation and normalisation of the ideas in law.

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[110] Jeremy Waldron makes a similar point in 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' (Public Law & Legal Theory Research Paper Series No. 09-50 Berkeley, 2009) available at SSRN: http://ssrn.com/abstract=1461220.

[111] Please see the Dignity Literature Review in Chapter Three.

[112] Please the International humanitarian law and Geneva Conventions that resulted from it at 2.7 above.

[113] Please see at 2.2. above the bottom of p. 3 for a of list persecutions and discriminations from the UK Dignity Survey (appendix 2) see also the nine core UN international human rights treaties (n.102)

Chapter Three - In pursuit of Dignity

Introduction to the dignity quandary; Questions raised in response to Feldman; a Methodology; Chapter Outline; and Literature Review.

Here the dignity quandary alluded to in the introduction is outlined more fully. Two articles written by David Feldman at the turn of the Twenty-First Century highlight the quandaries, repeated in much of the dignity literature subsequently reviewed, without being considered. The methodology explains how I approached the dignity topic with a rigorous scholarly analytic critique: not forgetting the general pervasive newsworthiness of dignity in Chapter One; I introduce an original empirical survey of the manner in which the word dignity is used in UK case and statute law and a comprehensive review of dignity and other jurisprudential literature. The chapter also contains a chapter outline.

3.1 Dignity in pursuit of Rights –

An encounter with Feldman introducing the dignity quandary

At the turn of the century David Feldman encountered many of the problem set out at the end of Chapter One in two thoughtful articles[1] considering 'Human Dignity as a Legal Value'. The Human Rights Act 1998 and Scotland Act 1998, were about to come into force incorporating the European Convention on Human Rights (ECHR) into UK law, with the benefit of a substantial body of European Court of Human Rights (ECtHR) case law[2]. Feldman followed an established and often repeated pattern, which considered the position of dignity in international and supra-national human-rights instruments and national constitutional law, before exploring how English law might indirectly protect human dignity. As Feldman's articles were particularly geared to the potential impact of the new Acts, much of the narrative concentrated on areas included in the Introduction above, where the ECtHR had suggested human dignity had been engaged.

[1] David Feldman 'Human Dignity as a Legal Value I' (Public Law, Winter 1999) p 682-702; & D., Feldman 'Human Dignity as a Legal Value II' (Public Law, Spring 2000) p 61-76

[2] Geoff Hoon, Parliamentary Secretary, Lord Chancellors Department during Parliamentary debate – HC Deb Vol 313 3rd June 1998

Feldman started from a 'powerful sense' of dignity being 'central to a valuable human life' and followed that 'feeling' to human dignity's 'reflection' in incidences of human dignity in preambles to human rights documents (including those already outlined) and to the late twentieth century articulations of dignity and human dignity in the constitutional documents of France, Germany, Hungary, Israel and South Africa[3]. Feldman stated 'few people would argue that dignity, in the abstract, is unimportant' but suggested dignity's relationship to fundamental rights was unclear and that it was 'still more difficult to pin down the meaning of dignity'[4]. Feldman's articles identified many tensions in dignity that still challenge and reverberate around dignity discussions: that life often places us in very undignified situations; that human dignity appears to operate on three levels; that dignity is both objective and subjective in nature; and that because of dignity's reflectively subjective nature, dignity cannot be pursued or used, only 'lived, fostered, enhanced and admired'[5]. The tensions in dignity led Feldman to suggest dignity had a 'perplexing capacity… to pull in several directions'[6], 'that speaking of human dignity is a way of expressing moral problems rather than a technique for resolving them'[7]. After a careful critique of important dignity cases, Feldman concluded that while human dignity is generally considered to be a good thing, it has no meaningful application as a right[8].

I agreed with much in Feldman's articles. I too found the idea of dignity as a fundamental right superficially appealing but ultimately unconvincing. Feldman's cautions of human dignity in an unattractive haughty sense of self-assured dignity, or wielded as a double-edged sword in the hands of law-makers and judges, made me positively uncomfortable. Yet, I could not agree with Feldman's conclusion, which resigned us to a truism of an abstract general notion of dignity which one might aspire to, coupled to an intangible, ephemeral notion of dignity that often eludes the aspiree. Feldman is right; 'relying on the inherent dignity of the human

[3] Feldman1999 (n.1) p. 682
[4] *Ibid*; see also Rosalind English, 'Defining "dignity" – nailing jelly to the wall?' (UK Human Rights Blog, 2012) <http://ukhumanrightsblog.com/2012/08/08/defining-dignity-nailing-jelly-to-the-wall/>accessed January 2014
[5] Feldman 1999 (n.1) p. 687
[6] *ibid* p. 685
[7] *ibid* p. 688
[8] I spoke to Feldman in 2010 and 2011, he confirmed that he was still of the same view, and possibly even more strongly.

person as a foundation for rights is different from conferring a right to dignity'[9]. Yet, the inherently human judgment of dignity, underpins every idea and impression of justice, including of rights asserted or conferred. Ambiguity in dignity assertion and conferment does not necessarily support Feldman's claim that dignity lacks clarity and languidly flip flops between being claimed as a right objectified in law or dismissed as too elusive and vague to have meaningful application in law.

I agree that it makes 'little or no sense to talk of a right to dignity'; however, my reason for agreement is that the evaluation of dignity necessarily precedes any assertion or conferment of a right. Before declaration of a right, dignity has already been determined. My departure from Feldman is not on the 'powerful sense' of dignity as a guiding principle, but on the misrepresentation of dignity in legal theory; dignity either asserted as automatically right worthy, or challenged as 'elusive', 'vague', 'stupid'[10] and 'useless'[11]. Evidence abounds that dignity may not be equal, good, fair, just or right; yet there is a 'powerful', I would add common and inherent, practically reasoned 'sense' of dignity, evidently underpinning every right and most spheres or objects of law in the history of human experience (being)[12].

The suggestion I am making, that dignity is fundamental to law, is already excluded from a legal theory that starts by seeking human dignity as an object for protection through human rights and fundamental freedoms within the law. Feldman and I appear to be talking at cross purposes; he is talking about a right to human dignity as and I am talking about human dignity as the evaluative aspirational foundation to law. The positive aspirational notion of dignity that Feldman outlined loses none of its potentiality in being sought but not attained. Like many ideas to which human beings aspire; goodness, greatness, good health, happiness, love, wealth; we are driven by, or led to them, with no fore knowledge of successful attainment.

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[9] Feldman (n.1) p. 689

[10] Steven Pinker 'The Stupidity of Dignity' (The New Republic, 2008) <http://www.newrepublic.com/article/the-stupidity-dignity> accessed January 2014

[11] Ruth Macklin 'Dignity is a Useless Concept' (British Medical Journal, 2003 Vol. 327) <http://www.bmj.com/content/327/7429/1419> accessed January 2014

[12] There are spheres of law where right or wrong does not matter and ordered consistency is the purpose of law, for example, the sequencing of traffic lights or side of the road on which we drive.

Early in his first article Feldman dismissed any connection between the dignity of states and the notion of dignity in human rights[13]. Yet dignity, both asserted and conferred, appears to deliberately draw strength from positive assertion and rely on the developmental history of dignity in law (evident in the research of Feldman's articles). Assertion of sovereign, state and even law's dignity, in executive, legislature and judicator[14] provide evidential foreground to the modern use of dignity in law. The valuation of worthiness and power asserted in the concept of dignity depends on its history and can only be pursued in the light of this tradition.

Feldman offered his own example of sovereign state dignity in the case of the extradition proceedings against former Chilean President Pinochet Ugarte[15]. Lord Millett explaining that immunity from suit or prosecution of a serving head of state *ratione personae* flows from status as 'the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs'. Feldman was concerned by the problematic tension that here 'human dignity and state dignity collide'[16]. However, I think that is precisely the point of dignity 'as a way of expressing moral problems'[17]. Dignity assertion allows people to react through law to respond to conflicted moral dilemmas and in some instances to challenge and evolve the law.

The difficulty of pinning 'down the meaning of dignity'[18] identifies an undeniably elusive tension in dignity. Dignity appears to be an essentially contested concept; dignity the value and valuer of dignity assertion. Yet the idea of dignity is one we cannot avoid or exclude. The 'powerful sense' of dignity as a guiding principle 'central to a valuable human life' is, and needs to be, discussed. Dignity cannot be ignored because the subject is too difficult or life places human beings in situations that are undignified. There is no question that life is sometimes undignified. Yet dignity identifies many occasions in the evolution of life and law where human

[13] Feldman 1999 (n.1) p. 683
[14] Please see 'The Law And Institutions Of Law' in the UKDS at Appendix 2;
[15] *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 3),* [1999] All ER (D) 325 HL
[16] Feldman 1999 (n.1) p. 683
[17] *ibid* p. 684
[18] *ibid*

beings are in undignified situations that law could do something about; for example, international, oppression and exclusion of peoples, and supra-national and national, discrimination and welfare law.

Feldman helpfully suggested three levels of dignity: the first, attaching to the dignity of the whole human species; the second, to the dignity of groups within the human species; and the third, to the dignity of individual human beings; providing a taxonomy of dignity already identified and arguably applied in and to law. These spheres appear to be a useful starting point for considering dignity.

From Feldman's articles it is abundantly clear that dignity can be asserted as a right, or fact, of law. If the dignity is, in fact, acknowledged and or still supported in law, dignity will, in fact, be recognised as a privileged right. Here Feldman suggests the word dignity adds little to the right. Of course, Feldman is right! When a right is acknowledged, dignity adds little to the right. However, it is also clear that the dignity asserted is no longer elusive. The coincidence of the indeterminacy of dignity and the uncertainty of law appears to identify the crucial right and wrong of dignity determination; the foundation point of law. Dignity appears to recognise the evolving sense of being, which provides the locus for challenge and critique that first, brings the law into being; and subsequently informs and maintains, or not, the being of law. The aspirees to dignity assert dignity to ask for recognition of a right in law. The search for recognition of law provides a clear indication that they do not, in fact, have a right in law. The failure of human dignity assertion may not be that dignity is elusive or ephemeral, but that in the incident case the individual or groups assertion of dignity has not been recognised in law.

As Feldman rightly suggests dignity is something we can all "foster, enhance, live and admire"[19]. It seems intuitively wrong to play down human dignity. If we can aspire to, then why should we not also pursue dignity? Many leading advocates of human dignity suggest that this is precisely what we should do[20]. Feldman's

[19] Feldman 1999 (n.1) p. 687

[20] For example, Edward Stourton chaired a debate from the "Understanding Human Dignity" conference organised by the Catholic Bishops Conference of England and Wales and Queen's Belfast entitled 'In Pursuit of Dignity' with a panel of Fr David Hollenbach a Jesuit and Professor of Human Rights and International Justice at Boston College in the United States; Denise Reaume, Professor of Law at Toronto University; Chris McCrudden, Professor of Human Rights and Equality Law at Queen's Belfast and Jeremy Waldron BBC

assumption that human dignity "can be neither pursued nor used" is undermined by his own caution of the existence of an unattractive haughty sense of self-assured human dignity in the self-interested assertion of superior dignity.

A distinction is often made between dignity and human dignity. The claim that I am making in (human) dignity being fundamental to law is that all particular incidents of dignity are general evaluations of dignity made in human community. Egalitarian ideals are momentously aspirational[21] and I am personally very sympathetic to equal recognition for individual human dignity, but this is not my claim. The distinction in human (dignity) begs the question; human or what? This appears to suggest that earlier claims, for example, of ecclesiastic, noble, royal or sovereign dignity, were not human claims? I am not sure that this is particularly realistic or helpful. I do think the distinction is often used to highlight a boundary between a particular incident of dignity, desirable or not, and general ideas of human dignity.

Further, I think it is wrong to ignore the very obvious, legally endorsed, recognition of dignity, in noble status and high rank that exists in the UK. Some of which may not, in fact, be meritorious. Historically, dignity certainly was pursued, used and bought[22] by those who sought the favour of the sovereign; where the nod of a king could make you an earl[23]. Some in UK society still enjoy the residual benefits of historic assertions of dignity; the most obvious being the royal family and hereditary peers.

Dignity, as a value laden idea, demonstrates that if the potential is realisable, the dignity may be both pursued and used; both for the good of the dignity and or their society. For example, as legally recognised UK sovereign the Queen's dignity is realisable and usable. The Queen and her heir(s) have royal dignity. They use their

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Radio 4, In Pursuit of Dignity' (18th August 2012) <http://www.bbc.co.uk/programmes/b01lv26v> accessed January 2014

[21] Jeremy Waldron discussed the momentousness of dignity as he supported an egalitarian concept of dignity in a series lecture on Human Dignity at Oxford University, spring 2013 that he kindly allowed me to attend

[22] And arguably still may be - the term 'Cash for Honours' was coined by some in the British media during a political scandal in 2009-10 concerning the connection between political donations and the award of life peerages in the UK.

[23] An Earl was an associate of the King and could be created without any formal charter Giles Jacob, Sir Thomas Edlyne Tomlins *The law-dictionary: explaining the rise, progress, and present state, of the English law*; Volume 1 A. Strahan, (Google eBook, 1809) <http://books.google.co.uk/books/about/The_law_dictionary.html ?id=KJ2ZAAAAIAAJ>accessed 4th August 2011.

status to pursue their own desires, as well as, support and endorse charities, companies and societies they consider worthy[24]. Government positions of high authority or office are honoured with dignities, for example, law lords, military commanders and politicians. Outstanding achievement or commitment to or in public or private service may be societally recognised, (for example, the bi-annual 'honours list' recognises academics, artists, charitable acts, entertainers, entrepreneurs, fund raisers, politicians, scientists and sports persons) and rewarded with national accolades. In the UK the 'honours list' accolades are called dignities and the awardees are recognised, temporarily at least, as worthy of society's respect.

Most would agree with Feldman that the various levels and objective subjective aspects of dignity make dignity challenging and difficult, but does that mean dignity cannot be pursued, used or meaningfully applied? The problematic tension between past and present assertions of dignity/human dignity requires further explanation. The levels of dignity and subjective objective aspects of dignity seem natural in law and appear precisely at the point of dignity's assertion in law. Dignity appears to be at the crux of law's contestation; where the intangible, ephemeral nature of dignity is realised, or not, in law. Human dignity, rather than some other dignity, appears to be regularly asserted, recognised or not; possibly empowered in law's determination to enable human beings to aspire, live, foster, enhance and admire humans in being.

Where human dignity is not recognised in law, we, the citizens of the many nations who were, and are, signatories to numerous human rights documents purporting to protect human dignity, deserve a better, more honest, answer than that dignity is too elusive to be meaningfully applied in law. In searching for recognition in law the assertion of human dignity; often from a position of extreme vulnerability, appears to serve the purpose of gaining the appellant recognition at law. The appellant does not expect to be judge or jury of their cause and will often be at the mercy of law's accepted, dignity determining, role. That individual assertions of human dignity may not be realised in law, is not the fault of dignity; it is the fault of society or of law. Society appears to either recognise, or not, the human dignity assertion. Law either coincides, or not, with the human dignity assertion. For better or worse society and

[24] The Duke of Edinburgh award scheme; the Prince's (Charles) Trust

law overarch individual human being. Dignity appears to be realised and recognised in the (in)determinacy of law, caught on contestable boundaries between competing levels of dignity and different spheres of law and this needs further investigation.

3.1.2 Questions raised in response to Feldman

Feldman recognised a number of issues and tensions in dignity that human right interests and language left unresolved. My curiosity piqued; I decided to investigate further. The newsworthy common sense language of dignity made me wonder:

1. **Can dignity be adequately defined?**

Feldman's three levels of appear to have resonance with dignity asserted in law, but:

2. **What is the significance of dignity asserted at multiple levels in law?**

The objective subjective tension Feldman explicitly recognised in dignity, appears to be at the elusive crux of legal determination and requires further elucidation:

3. **What causes the objective/subjective tension in the aspects of dignity?**

The worthy hierarchic common sense of dignity in law made me question Feldman's 'nothing to do' denial of any connection between 'the dignity of States' and 'dignity as it operates in human-rights or constitutional law'[25] begging the question:

4. **How does the modern idea of human dignity relate to older ideas of dignity?**

Finally if we want to 'live, foster, enhance and admire' dignity we have to 'live, foster, enhance and admire' dignity; it does not matter that it is challenging or difficult. This leads to the last question:

5. **Can dignity be meaningfully applied to/in law?**

3.2 Methodology

I initially read Feldman's articles in 2000 as part of my research for a post-graduate law dissertation considering 'Human Dignity as a Legal Concept'. The dissertation

[25] Feldman 1999 (n.1) p. 683

provided the impetus for this thesis and led to the formulation of a three pronged approach; the 'combined research strategy' I adopted to consider the value of dignity and its application to and in law:

- **The UK Dignity Survey**[26] - First, guided by the pervasive newsworthiness of dignity evidenced in high profile cases, I conducted a survey cataloguing the use of the word dignity in UK law. I wanted to see how dignity had been used and whether it had been used differently over time. I was particularly mindful of how historic assertion/conferment of dignity relates to modern assertions of dignity.

- **The Dignity Literature Review** - Second, I undertook a literature review of contemporary writers on dignity. This led me to the philosophical roots of assertion/conferment of dignity and to broader jurisprudential theory.

- **Experience of Dignity/Being** - Third, having come to law school following years of experience of international business and independent travel I started with a picture of law from outside the discipline. I was already minded to consider a broad approach to law that might include individual, group, species and beyond and I was happy to recognise and embrace other systems of law.

3.2.1 The UK Dignity Survey

I spent the first three years (and a considerable part of the next two) of research cataloguing every incident of dignity used in UK statute and case law identified using the LexisNexis legal database. I used a general search for every statute and case law report that mentioned the word dignity. I often spent ten to fourteen hours a day cataloguing uses of the word dignity. I had injured my back and as I could not sit comfortably for periods of more than about thirty minutes I could do little else than read at the time. I read each statute or case to determine how and in what context the word 'dignity' had been used. I surveyed from the fifteen hundreds to the 31st December 2010. Eventually, in the interests of actually writing a thesis, I

[26] Harrison - The UK Dignity Survey – (UKDS) a catalogued survey of every mention of dignity in UK statute and case law conducted through the Lexis-Nexis Legal database 2007 – 2012 at Appendix 2.

had to leave the presentation of this catalogue for a future project. However, the work is done and I have included excerpts from the catalogue throughout the thesis.

The earliest mentions of dignity in both UK common and statute law related exclusively to royal and ecclesiastic dignity, which continued to return incidents of dignity to the end of the survey. From 1950 dignity was increasingly rooted in the human dignity associated with the UN assertions of human dignity. The case of *Rookes v. Barnard And Others* [1964] 1 Lloyd's Rep 28 also produced a number of results as Lord Devlin stated that to award aggravated damages "the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride"[27].

Popular themes of dignity revealed in the survey include: royal, noble, ecclesiastic, hierarchic or sovereign dignity; autonomy issues, including dying and treatment with dignity; affronts to dignity, including genocide, inhuman and degrading treatment, harassment, aggravated damages, equality and discrimination. Latterly there is significant overlap between the Common Law and European civil law, as much UK statute and case law is now influenced by the European Union (EU) and includes determinations of the European Courts of Justice (ECJ) and European Court of Human Rights (ECtHR). With many cases brought on the basis of the European Convention on Human Rights under Articles 2, 3, 5, 6, 8, 9 & 14. These dignity themes are used as examples to support further discussion throughout the thesis.

3.2.1.2 Cautions about the dignity survey

The initial dignity search revealed around one hundred mentions of the word dignity in statute and around three thousand in case law. In the last ten years the number of cases grew significantly and in the three years, as I progressed with the survey, I found it was no longer possible to find all the cases in one simple search. Later it was necessary to break the search up in to time periods, which is in itself illuminating: From the earliest mention in the survey from 1561 to 1950 there were

[27] *Rookes v Barnard* [1964] Volume 1 All England Law Reports 367 (UKHL)

665 cases almost exclusively of ecclesiastic, noble, royal and sovereign dignity. Between 1950-2000 the 1386 cases still include a limited number of ecclesiastic and noble cases, all (re)drawing the parameters of ecclesiastic and noble life, (through internal review and external challenge). Royal dignity concerns either similar redrawing of royal boundaries or royal has become synonymous with sovereign dignity. However, increasingly the case law (and statute) reflected legal consideration and popular challenge engaging the importance of human dignity in the collective public psyche evidenced in the dignity aspirations of the founding of the United Nations. From 2000 to the end of 2010 (the cut off point for the survey) the vast majority of the 3067 cases reflect the move from limited discussions of sovereign dignity to the legal consideration and popular challenge of internationally and nationally recognised human dignity[28]. A simple search[29] in February 2014 revealed 1160 hits since the end of the survey.

The survey may be negatively skewed by the use of statutes or case names rather than the affront to dignity to identify the legal issue; the case name synonymous with the affront; for example, statutes on genocide and harassment and the cases of *Rookes v. Barnard and Others*[30] or Diane Pretty[31]. The search is evidently positively skewed by the efficiency of modern law reporting and the exaggerated picture of dignity's use, where popular cases, which spark wide legal and public interest, often return repetitious results. An extreme example of this exaggerated picture is the case of Diane Pretty, which returned 19 results. Nonetheless, the number of cases has steadily increased since the UN Declaration and, as a result of decisions in the ECtHR, has risen dramatically in recent years. The UK case law survey includes some European case law, but it is limited to the case law identified by dignity in a UK oriented LexisNexis survey. Examples from the UK Dignity Survey evidence a number of points in the thesis

[28] *ibid*
[29] On the 22nd February 2014
[30] [1964] 1 Lloyd's Rep 28
[31] *Regina (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* - [2002] 1 AC 800 (HL); R *(on the application of Pretty) v Director of Public Prosecutions and anor* [2001] EWHC Admin 788 (QB) [2001] All ER (D) 251 (Oct)

3.2.2 The Dignity Literature Review –
Law in pursuit of Dignity in pursuit of Law

For the literature review I started with electronic resources, including Heinonline, Lexis-Nexis and Westlaw, for articles and to identify books on human dignity. I also searched in bookshops and libraries. I attended several public lectures and conferences where I thought human dignity might be discussed[32]. I studied undergraduate jurisprudence and introductory philosophy. I tutored Contract Law, Legal Systems and Reasoning, lectured/tutored in Discrimination and Employment Law. I discovered a number of people writing about human dignity, including Dupré[33], Foster[34], Kateb[35] Khaitan[36], McCrudden[37], Rosen[38] and Waldron[39], many of whom I have met in person, who were repeatedly referred to in a mountain of literature. The pattern of writing among all those writing on dignity became very familiar, with repeated tracing of the political philosophical history underpinning dignity, and human dignity, with different authors drawing variously on writer who have influenced the evolution of dignity from antiquity to the present day.

McCrudden provides a useful, up to date, systematic and comprehensive history of dignity. Many other influential and prolific writers on human dignity have collaborated with McCrudden contributing to a book 'Understanding Human Dignity' edited by McCrudden and released in November 2013[40]. McCrudden recognised twentieth/twenty-first century assertions of human dignity as the "culmination of a significant historical evolution", identifying six overlapping,

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[32] Included in the Bibliography
[33] Catherine Dupré 'Unlocking human dignity: towards a theory for the 21st century' (European Human Rights Law Review, 2009) pp 190-205 I have discussed dignity with Dr Catherine Dupré at a number of conferences.
[34] Charles Foster *Human Dignity in Bioethics and Law* (Hart Publishing, 2011). I visited Dr Charles Foster in Oxford to discuss dignity and was also able to attend a colloquium he contributed to at Oxford in 2012.
[35] George Kateb *Human Dignity* (Harvard University Press, 2011)
[36] Tarunabh Khaitan, Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea (March 25, 2011). Oxford Journal of Legal Studies, pp. 1–19, 2011 Available at SSRN: http://ssrn.com/abstract=1813925 Again I have discussed dignity with Dr Tarunabh Khaitan on a number of occasions, including, by his invitation, a colloquium he contributed to at the University of Essex in 2013.
[37] Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (Legal Research Paper Series No 24, University of Oxford, 2008) Available at SSRN: http://ssrn.com/abstract=1162024 & Christopher McCrudden 'Human Dignity' (University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No 10/ April 2006) Available [online] Social Science Research Network http://papers.ssrn.com/Abstract=899687
[38] Michael Rosen *Dignity: Its History and Meaning* (Harvard University Press, 2012)
[39] Jeremy Waldron (n.21). Please see bibliography for a list of Waldron articles referred to.
[40] Christopher McCrudden Editor *Understanding Human Dignity* (OUP/British Academy, 2013)

schools of thought (the numbering system later abandoned) suggesting that dignity had developed "as a Western-philosophical-cum-political concept since Roman times"[41]. The various contributory schools of thought demonstrate both the longevity of pervasiveness of the notion of dignity as an idea of human worth and a timeline for the evolution of dignity as a normative ideal of equal human worth: McCrudden's six schools were as follows:

1. The notion of *dignitas hominis* in classical Roman thought, related to status or rank;

2. A broader *dignitas* idea, also rooted in classic Roman thought, of "the dignity of human beings as human beings". Dignity not dependant on any within human species determined status, but instead enjoying a privileged position, as being hierarchically superior to other animals or being made in the image of God;

3. The idea of the dignity of human beings as rational beings, capable of reason and masters of their own fate;

4. A more communitarian basis to the idea of dignity, with greater emphasis on community, equality and fraternity in reasoning human fate.

5. Dignity empowering social movements;

6. Dignity as central to Catholic social doctrine.

The literature review provided a fascinating insight into, and much food for thought on, dignity, which includes a history of dignity's political and philosophical evolution. The schools of dignity thought evolved through a shared history. The philosophical roots of dignity entwined in Western Philosophic thought drawn from Aristotle[42], the Stoics[43], Cicero[44], Aquinas[45], Grotius[46], Spinoza[47], Hobbes[48],

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[41] McCrudden (2006) (n. 38) p. 3
[42] Aristotle., *Physics* (Bostock D. & Waterfield R. tr, OUP, 2008)
[43] See Chapter Three and John Sellars *Stoicism* (Acumen Publishing Ltd, 2006)
[44] H. Cancik 'Dignity of Man and *Persona* in Stoic Anthropology: some remarks on Cicero', in Kretzmer D. and Klien E. (eds) *The Concept of Human Dignity in Human Rights Discourse*, (Kluwer Law International, 2002) pp. 19-39
[45] *Ibid* and Thomas Aquinas *Selected Philosophical Writings* (McDermott T. tr, OUP, 2008)
[46] Hugo Grotius 'De Jure Belli ac Pacis (1612)' in Finnis J., *Natural Law and Natural Rights* (OUP, 1980)
[47] Baruch Spinoza *Ethics* (White W. H. and Stirling A.H. tr, Wordsworth Editions, 2001)

Locke[49], Paine[50], Rousseau[51], Hume[52] Kant[53], and Maritain[54], among many others, with different writers giving more, or less, weight to particular aspects or ideas about dignity. Each name added a distinctive tone to a continuing reflection on how to be; raised in the language, or voice, of dignity. I also recognise there are unseen influences on the meandering streams of dignity thought. The idea of dignity cannot be restricted to the few people who choose to write about it. I am ever mindful of the common sense and practical reasoning engaged in the evolution of dignity, which the reliance on written text inadequately reflects.

Taking the schools identified by McCrudden I framed my literature review on a reordered and consolidated view of the schools. I considered how the schools of thought continue to evolve as still overlapping, sometimes competing, tenets of the contemporary dignity debate. To avoid repetition of McCrudden's work, with others writing in a similar vein, I drew on McCrudden as guide, but diverted to other writers where they had chosen to concentrate attention on a particular area of dignity thought. In this way I recognised an expanding dignity picture, with rich subtly coloured hues and areas of very intricate detail.

I decided to call the sub-sections streams rather than schools, because I wanted to keep in mind the fluidity that Feldman had identified in the ephemeral nature of dignity. I believe the scoping of dignity is crucial to the general understanding of dignity and explaining how particular incidents of dignity might be applied in law. As I conducted the literature review I found McCrudden's schools naturally consolidated into three Dignity Streams and my hunch about the fluidity of dignity was realised: The three Streams of dignity evolved, to run naturally and non-exclusively into a conceptual confluence in the merging and separation of streams of

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[48] Thomas Hobbes *Leviathan* (1651) (Macpherson C. B. ed, 1968, reprinted in Penguin Classics, 1985)
[49] John Locke *The Second Treatise Of Government (1689): And A Letter Concerning Toleration* (Dover Thrift Editions, 2002)
[50] Thomas Paine *Rights of Man, Common Sense, and Other Political Writings* (Philp M. ed, OUP, 2008)
[51] Jean-Jacques Rousseau *The Social Contract (1762)* (Betts C. tr, OUP, 2008)
[52] David Hume, *A Treatise of Human Nature* ((1739) Mossner E. C. ed, reprinted Penguin Classics, 1985).
[53] Immanuel Kant *The Moral Law: Groundwork of the Metaphysics of Morals* (Paton H. J. tr, Routledge Classics, 2005)
[54] Jacques Maritain *The Person and the Common Good 1947* (Fitzgerald J. J. tr, University of Notre Dame Press, 1966)

knowledge; recognised in Western philosophical division of three types of knowledge: body, mind and spirit or *physics, logic* and *ethics*[55].

3.2.2.1 Dignity Stream One - Writers in Dignity Stream One build on McCrudden's first school of thought. The idea of dignity as rank; evolved from the notion of *dignitas hominis* in classical Roman thought, good, righteous, virtuous behaviour and upright demeanour largely related to identifiable status or rank[56]. In Dignity Stream One theorists prioritise the embodiment of dignity; personifying dignity. People become the object of dignity. For example, Waldron suggests identifiable people, equally ranked, in dignity and law[57].

3.2.2.2. Dignity Stream Two - complements Dignity Stream One with practical human reason, or *logic*, as the basis of dignity. McCrudden's third and fourth schools of thought combine to embrace Social Contract ideas from the Enlightenment period in Western philosophy[58]; political discussion of how societies are governed. The dignity of human beings, as reasoning beings, ranges from those capable of reason claiming liberal mastery of their own autonomous dignity; to those willingly[59] or coercively[60] minded to subsume individual dignity to the good of their community. Human reason creates objects of dignity, in institutions, instruments, objects and people that can be recognised in law[61]; for which the UK dignity Survey provides numerous examples; the dignity of constitutions, courts, rights, laws, nations, parliaments, sovereigns and texts[62].

3.2.2.3 Dignity Stream Three - The third Dignity Stream, again complementing the other two Dignity Streams, expands the broader idea of *dignitas* "dignity of human beings *as human beings*"[63]. While streams one and two embody and reason dignity within human being, the third stream explicitly over-arches human being with metaphysical or transcendent ideas of dignity, engaging intuitive or spiritual

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[55] Suggested by Aristotle (n. 42)
[56] McCrudden (2006) (n. 38) p. 3
[57] Jeremy Waldron 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' (Public Law & Legal Theory Research Paper Series No. 09-50 Berkeley, 2009) available at SSRN: http://ssrn.com/abstract=1461220
[58] Please see n. 46 - 50 above
[59] Rousseau (n. 51)
[60] Hobbes (n. 48)
[61] McCrudden (n. 37 & 38); Dupré (n. 33) and again, Waldron (n. 39
[62] Please see UKDS at Appendix 2
[63] McCrudden (2006) (n. 38) p. 3

sense in human being. Stream three recognises the potentiality beyond the dignity already recognised in/by individual, group and species.

McCrudden's two remaining schools of thought: 5. dignity empowering social movements; and 6. dignity as central to Catholic social doctrine; appear to provide examples for the other Dignity Streams. Each provides evidence overlapping between the different schools of thought and working examples of how normative ideals of dignity might be asserted to recognise dignity. School 5, uses a transcendent social agenda to engage the reasoning now consolidated in Dignity Stream Two empowering social movements to claim the equality of rank assumed in Dignity Stream One. School 6, uses meta-physical religious doctrine to over-arch the reasoning of Dignity Stream Two and the equality of rank assumed in Dignity Stream One. However, the reasoning of Dignity Stream Two is quickly re-joined in the justification of spirit and the equality of rank re-assumed in the community of spirit.

3.2.2.4 The Unsatisfactory Outcome of the Dignity Literature Review

The Dignity Literature Review was fascinating and insightful; I discuss parts in more detail in Chapter Three. I have included a detailed outline of the Dignity Literature Review here in the methodology, as writing on human dignity in law I would have been negligent had I not covered this ground. I learnt a great deal from the dignity philosophers and theorists; their thoughtful critique informs my work. Dignity is a niche idea and many of the theorists recognised as dignitarian are known to one another. Individual dignitarians are often repeatedly referred to and they provide unavoidable foreground to dignity's current role in law. I recognise the shared influences, confluences and limits in the political and philosophical history of dignity, and that this may afford different outcomes in different spheres; where dignity may be reduced to people or things as dignity objects of law.

However, the Dignity Literature Review was quite frustrating; compounding the dignity questions instead of addressing them. The dignity jurisprudence appeared happy to overlook the questions of whether dignity can be adequately defined; the significance of dignity asserted at multiple levels in law; the relationship between the modern ideas of human dignity and older ideas of dignity; and the cause of objective

/subjective tensions in the aspects of dignity. Undeniably the literature does recognise that dignity can be objectified and in that way meaningfully applied in/to law, but it does so as normative assertions of already recognised rights. Here I agree with Feldman: I am not sure that dignity adds anything; in fact, I think that dignity may be a distraction from the already legally familiar language of human rights.

The interesting questions raised in response to Feldman remain unanswered. Suggesting dignity necessarily flows from existing dignity appears to be correct, but that does not recognise new or emerging dignity or delve deeply enough to into existing assertions of dignity, that may be deliberately or ignorantly oppressive and ripe for dignity challenge. The uncritical acceptance of existing parameters of dignity, and law, appears to miss the challenging point of pre-law dignity assertion/recognition. Particularly since the changed emphasis placed on *human*, over sovereign or state, by the legal political objects of the UN foundation. I think dignity can reveal how and why dignity comes into being; not just recognise how dignity might be maintained. I am not suggesting the Streams of the Dignity Literature Review are unimportant or wrong; I am suggesting that they do not resolve the tensions recognised by Feldman.

3.3 Experience of Being – Dignity in pursuit of Law in pursuit of Dignity

I cannot forget and do not want to exclude my associative order. The wisdom I learnt from my parents as a child to be 'true to oneself' and to 'treat others as one would like to be treated oneself' and my life experience at work and play underpins my understanding of human dignity and human being. I now recognise my parent's wisdom as 'the golden rule[64], or 'ethic of reciprocity'; a maxim of most ancient and modern religions[65] and codes of ethics[66]. The golden rule links many philosophers,

[64] Antony Flew (ed) "golden rule" *A Dictionary of Philosophy* (Pan Books, The MacMillan Press London, 1979) p. 134
This dictionary of philosophy contains the following under the entry for "golden rule": "The maxim 'Treat others how you wish to be treated'. Various expressions of this fundamental moral rule are to be found in tenets of most religions and creeds through the ages, testifying to its universal applicability".
[65] Greg M. Epstein *Good Without God: What a Billion Nonreligious People Do Believe* (HarperCollins New York 2010) p.115
[66] Simon Blackburn *Ethics: A Very Short Introduction* (OUP, 2001) p. 101

including Aristotle[67], Aquinas[68], Hobbes[69] and Kant[70] and many contemporary writers on dignity, morality[71] and law[72].

I have the experience of learning, living and working in an unequal, unfair, unjust world, where subsumed societal power belies the extravagant assertions of equal, fair, just or moral, being, dignity or law. I recognise this statement as running over the boundaries of public, private and work life divisions[73]. I went to a school where most of my class mates recognised their lot, as modestly paid manual workers, many aspiring to go down a coal mine (men) or work in a box factory (women); both of which were incidentally subsequently closed devastating the local communities.

I know many people today, young and old, whose outlook is similarly limited; divisions between rich and poor getting wider[74] and the promise of further/higher education no guarantee of changing their lot. I have lived and worked in many different companies, institutions and places, as owner, manager and labourer. I cannot think of a single public, private or work life environment that was not hierarchically structured, or where every person did not know their place and limits; privileged or not, equally aware of their unequal, unfair, unjust lot.

I do not understand how people can talk about equality, fairness and justice in law, in societies, and a world, where some people live in, and die as a result of, poverty, while others save diamonds[75]. Where some people have no choice about the way they live or sort of oppression they live under, limited, for example, by lack of ability, education, health or wealth; while others talk of liberal autonomy or communitarian bliss. Some people are so desperate they are willing to beg, become criminal, disable, disempower or relocate themselves, in order to survive and or

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[67] Aristotle (n. 42)
[68] Aquinas (n. 45)
[69] Hobbes (n. 48)
[70] Kant (n. 53)
[71] Including Stephen Darwell who neatly encapsulates the idea as second person personal in Stephen Darwell (2009) *The Second-Person Standpoint: Morality, Respect and Accountability*, Harvard UP;
[72] Including Finnis J., *Natural Law and Natural Rights* (OUP, 1980) p 107-8
[73] Recognised by Dupré (n. 33) as an important recognition for dignity
[74] BBC News, 'Rich-poor divide 'wider than 40 years ago' ' (27 January 2010) <http://news.bbc.co.uk/1/hi/8481534.stm> accessed November 2013
[75] In these times of austerity and recession there were no shortage of bidders for jewels sold for a record $200m in a Sotheby's auction that netted $83m for a diamond ring BBC News, 'Pink Star diamond fetches record $83m at auction' (13th November 2013) <http://www.bbc.co.uk/news/business-24934297> accessed November 2013

flourish; for example, because they are discriminated against for their inequality and difference. And yet, despite the inequality, unfairness and injustice of the world, people in all spheres of being and law recognise something in the inherent universality of the assertion/recognition of dignity.

3.4 Answering the Feldman Inspired Questions

The combined research strategy, and particularly the Dignity Literature Review, raises a suggestion for the first Feldman inspired question: Can dignity be adequately defined? I suggest that it can; I offer 'societally valued worthiness in being' as a definition for dignity. The definition is consistent with historic and contemporary uses of dignity in the combined research strategy. The definition will be repeated throughout Chapter Four and tested for its adequacy throughout the thesis.

In Chapter Three (The Ephemerality of Dignity in Being) I consider the second dignity questions, discussing the significance of dignity asserted at multiple levels of being. I embrace the philosophical roots of dignity evidenced in the combined research strategy, guided by references in footnotes and bibliographies to wider jurisprudential and philosophic literature. My reading was further guided by supervisory advice and materials recommended by academic colleagues and friends.

The ethical overlap with authors in the Dignity Literature Review, included Aristotle[76], the Stoics[77], Cicero[78], Aquinas[79], Grotius[80], Spinoza[81], Hume[82], Kant[83], and Maritain[84]. I use the philosophical picture of dignity, like a Sorcerer's apprentice, to elaborate multiple spheres of dignity from general ideas to particular incidences of what it is to be human. The philosophy of virtue ethics offers ideas intended to guide how one might become a good human being and complements my rational for dignity assertion, offering self-conscious practical guidance of care and co-operation, rather than coercive insistence, on how one might be.

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[76] Aristotle (n. 42)
[77] The Stoics (n. 43)
[78] Cicero (n. 44)
[79] Aquinas (n. 45)
[80] Grotius (n. 46)
[81] Spinoza (n. 47)
[82] Hume (n. 52)
[83] Kant (n. 53)
[84] Maritain (n. 54)

In Chapter Four; Dignity, Societally Valued Worthiness in Being, I consider the being, societally, worthiness and valued of my definition. I use the multiple spheres of 'being' identified in Chapter Three to recognise natural 'societal', political and spiritual groupings of human being. Spinoza and Hume help to recognise the desire motivation for 'worthiness' and to consider the objective/subjective tension in the (third question) aspects of dignity. I incorporate human traits into an Aristotelian experimental design outlining the desires that motivate dignity assertion.

The research strategy, and particularly the UK Dignity Survey, provides evidence of a strong correlation between modern ideas of human dignity and older assertions of dignity. Dignity was asserted and conferred to garner societal recognition[85]; it still is. This provides an initial answer to the fourth dignity question: How does the modern idea of human dignity relate to older ideas of dignity? The discriminating history of sovereign human beings empowered by having their dignity asserted in, and recognised by law, appears to be a crucial part of the legal tradition of human dignity. Just as sovereign dignity was fundamental to sovereign law, underpinning sovereign rights; human dignity is fundamental to human law, underpinning human rights. Societies, who do not recognise human dignity, undermine the human basis for 'human' rights and there are plenty of contemporary and historic examples of societies that undervalue human dignity. Societies who orient their law towards something other than human dignity, for example, to a particular culture, institution, political or religious belief, or maximization of wealth, lose the immediate human connection in and to human dignity. The culture, institution, political or religious belief, or accrual of wealth, is able to trump human beings to determine the law they live. The answer will be further elaborated in Chapter Four.

The multiple spheres of being and corresponding levels of law, now recognised as essentially contested value based concepts, are discussed in relation to Gallee to value dignity and law. I challenge the idea of law as concretised or frozen suggesting being, dignity and law are essentially contested and should be celebrated for their dynamic potential in Chapter Five (The Elusivity of Dignity in Law).

[85] The discussion continues in Chapter 3 – 5; Dignity Literature Review at Appendix 6

The final Feldman inspired question: Can dignity be meaningful applied in/to law, has already been partially answered in the combined research strategy. It seems perfectly clear from the Dignity Literature Review that dignity can, and has been, objectified and asserted and or conferred on people, including individuals, groups, the whole species and beyond. Dignity has been used to support hierarchies of people in being, for example, ecclesiastical, political and sovereign beings[86].

However, although each incidence of legally asserted and or conferred dignity may temporarily recognise the dignity, societally valued worthiness in being, of a person or thing, they do not explain what dignity is; the elusive nature of dignity. I suggest this is because dignitarian jurisprudence attempts to normalise dignity; something that can really only ever be descriptive. The descriptive nature of dignity means that the objects of dignity remain subject to continual (re)acceptance, (re)affirmation and (re)confirmation of their 'normal' status.

Recognising the problem of the ephemeral indeterminacy of descriptive dignity does not mean that dignity cannot be meaningfully applied in or to law. The dignified embodiment of normative standards may be descriptive, but that does not mean they are unreasonable or nonsensical. A guiding/curtailing/agreeable normative standard, offered with a clearly reasoned sense of guiding/restricting/collaborative value, whether advanced in careful, coercive or cooperative spirit, may well, in fact, guide. However, the residual problem left over from the Dignity Literature Review is that recognised objects of dignity are inadequate to explain the challenge that previously unrecognised dignity assertion can bring to law; or how and why these dignity assertions might be applied in or to law.

The dignity literature reaffirmed my belief in dignity as the essential prerequisite of law and what human beings accept as the basis of law. However, the inadequate explanation of dignity's elusive nature and the limited recognition of dignity, conveniently severing the, often oppressive, assertions of sovereign dignity from contemporary ideas of human dignity, forced me to cast my net wider to explain dignity's assertion and recognition in law. However, in jurisprudence I found that law was similarly severed. Human dignity was already accepted as subsumed by

[86] Please see UKDS at Appendix 2

other priorities; with the governing law of parliament, sovereign, or state appearing to have sole dominion over law. To me this does not make sense. I recognise law as dynamic and tensional, certainly made more explicit by the promulgation of laws (for example by Parliament and the courts), but arising from needs identified in community. A law protecting property or status or preventing murder arises from a need to protect property or status and in response to murder.

The purpose of asserting dignity in a society's law is that society's priorities correlate to the dignity assertion. There is a necessarily correspondence between the dignity asserted to maintain the declared purpose of society's law. This is the case whether the society is oriented toward a particular culture, human dignity, political or religious belief, or accumulation of wealth. The objectified locus of dignity can be an institution, people or a person; for example, vested in the dignity of a nation or a parliament, human dignity or the dignity of a sovereign. The asserter/conferrer of dignity proffers a valuation of worthiness in/to the law, of a particular society, to acknowledge, challenge, inform and/or (re)affirm the law of that society; in order for that society, through the process of actually being in society and heeding that particular law, to consider whether the dignity asserted or conferred is worth continued believe in that actually society and or law being. This point will be discussed further in Chapter Seven.

For the moment, the spring of 2014, interesting examples are being played out internally in the referendum for devolution of Scotland from UK, and externally, (driven not least by the ground root success of national independence parties in the recent European elections) beyond the UK, in the promise of a referendum on the UK's relationship within the European Union. Both arguments are being popularly framed in similar language of sovereignty (the linguistically evident close connection between sovereignty and sovereign dignity will have to wait for Chapter Seven). Both sides of the in/out campaigns are either claiming the conferred benefits of unification or the asserted benefits of independence; the value of being in or out of the UK, or Europe, (re)affirms or challenges who promulgates the law that society.

For the (re)independence of Scotland or the UK to happen, through the process of actually being in society and heeding the result of a particular referendum of the law,

Scottish and UK society will consider whether the sovereignty being asserted, or conferred, is worth the continued believe in that actually society and or law being. If in either case the yes vote is successful, who promulgates the law will change.

No one asserts dignity to be ignored; it is a positive assertion. The whole point of asserting dignity; from the overarching sovereignty of supreme beings to recognition of the dignity the most vulnerable people in society, is that the dignity is intended to be recognised in law. Here I found a surprising ally in Austin, both in positive law assertion, and the historic separation of objects of law[87]. Austin's positive law helped me recognise various objects and subjects of law; his separated spheres of law helping me to illuminate dignity asserted at multiple levels in law. I was able to build on the answers to the two questions in Chapters Three to Five. Expanding Austin's coercive, command/control theory, to include care and cooperation as reasons for societies being, I reintroduce the severed pictures of dignity and law. Twining helps illuminate the, separate, once severed, objects of law with multiple spheres of order. This Chapter, Six - The Sovereignty of Dignity, is preparatory to understanding how dignity can be meaningfully applied to/in law.

Chapter Seven - Jurisprudential Repopulation of the 'Objects of Human Law'. A necessarily limited jurisprudential literature review, again guided by sources revealed in the combined research strategy, supervisory advice, colleagues and friends, I found myself led to the giants of mainstream jurisprudence; arguments for natural law illuminated by Finnis[88], moral law by Fuller[89] (and Waldron[90]), positive law by Hart[91] and Raz[92], the creative style of judicial interpretation advanced by Dworkin[93] and formulaic inductive/deductive reasoning offered by MacCormick[94]. The broad general picture of law afforded through Austin and Twining in Chapter Six provides a canvas on which to situate more focused concepts of law. Chapter Seven suggests complementary between the ideas of natural, moral, positive, creative interpretative and formulaically reasoned laws. The different theories of law reveal focus on

[87] Austin, J. *Lectures on Jurisprudence or the Philosophy of Positive Law 1885*, (Campbell R. ed, Bibliolife)
[88] Finnis (n. 72)
[89] Fuller L. L., *The Morality of Law* revised edition (Yale UP, 1969)
[90] Waldron (n. 39)
[91] Herbert Hart (1994) *The Concept of Law*, 2nd Edition First published 1961, OUP (n. 80)
[92] Joseph Raz *The Authority of Law* (OUP, 1979 reprinted with corrections 2002)
[93] Ronald Dworkin, *Law's Empire* (Hart Publishing, Oxford, 1986)
[94] Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP, 1978 reprinted with corrections 1994)

different aspects and spheres of law, reminiscent of the earlier elusiveness illuminated in dignity. Jurisprudentially recognised internal/external tensions in law recognise the in/to tension in the question: can dignity be meaningfully applied in/to law. The tension between individual, group, species, beyond being; the objects and subjects of dignity; and the internal/external aspects of law are finally recognised. Dignity, societally valued worthiness in being, resists concretisation of general ideas in particular contexts; because dignity, societally valued worthiness in being, is in ever changing, ever evolving, flux. Positive (re)assertions of dignity acknowledge and challenge the law; justified challenge requiring reaffirmation and sometimes relocation conferment of the law.

The picture of incommensurable particulars resisting universalisation suggests there is more to law than the governor controlled normative picture of jurisprudential theory. Chapters Three to Seven suggest law is intimately related to its context; law's object and dignity sphere. The final Chapter, Eight - Applied Judicial, And Other, Reasoning, uses a model inspired by Hohfeld[95], who following Austin, reduced law to jural relationships.

Hohfeld's separation of law in to basic related rights elements allows one to see the actors of law; who had/has the power to assert and confer what law. I reconfigure Hohfeld's matrix of rights to show how people, in and out of law, can recognise their place in law. This descriptive model can be used enquiringly or normatively by people in and outside law to recognise their legal position. The model enables people to recognise the challenge they are making to law; to help them target societal support for their dignity, societally valued worthiness in being, whether person or cause; or perhaps help them realise they would be wasting their time. The model can also be used by people, including judges, in law, to recognise the position of people in law and the objects and subjects they claim; both in the discrete claims of different parties and any societal relationship that may bind them.

[95] Wesley Newcomb Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning I' in Cook W.W., (ed.)Fundamental Legal Conceptions HeinOnline (Yale University Press, New Haven 1919) pp. 23-64

Chapter Four – The Ephemerality of Dignity in Being

4. Introduction

This chapter has two aims: first to include unmissable parts of the Dignity Literature Review (that I require for the later critique) including: definitions of dignity and an outline of the golden rule or ethic of reciprocity followed by consideration of the early philosophy that provides a window on to the evolution of the word dignity; and second to introduce what is problematic in Question Two in just accepting the parameters rather than the significance of dignity asserted at multiple levels of law. Keeping the pervasive contemporary newsworthy picture and the dignity quandaries in mind I suggest common themes are identifiable that carry through in the language of dignity from antiquity to the present day. The antiquarian philosophy of virtue ethics offers ideas intended to guide how one might become a good human being and complements the rationale for dignity assertion, offering self-conscious practical guidance freely given in the spirit of care and co-operation, as a complementary alternative to coercive commanding insistence, on how someone else might be.

4.1 Dignity Definitions

The word –A review of the word dignity is now long overdue, although it has to be said that I consider the valuation of worthiness somehow encapsulated by the word dignity, as more important than the word. The definitions of dignity below support the common use of dignity found throughout the combined research strategy:

Dignity[1] **/ dignit/ • n. (pl. -ties)** the state or quality of being worthy of honour or respect: a man of dignity and unbending principle.

- high regard or estimation
- the state of being worthy of honour and respect
- worthiness, excellence (the dignity of work)
- a composed or serious manner or style: he bowed with great dignity.
- a sense of pride in oneself; self-respect: it was beneath his dignity to shout.
- a high or honourable rank or position (he promised dignities to the nobles in return for his rival's murder).

[1] "dignity" *OED Online* OUP http://www.oed.com/view/Entry/52653?redirectedFrom dignity#eid last accessed 5th January 2013 &: The Oxford Pocket Dictionary of Current English (OUP, 2007), Allen R. E., The Concise Oxford Dictionary (8th ed. Clarendon Press Oxford1990).

Phrases:

- "beneath one's dignity"- not considered worthy enough for one to do
- "stand on one's dignity" insist (especially by one's manner) on being treated with due respect.

Dignified

- having or expressing dignity; noble or stately in appearance or manner.

Dignify

- give dignity or distinction to.
- ennoble make worthy and illustrious.
- give the form or appearance of dignity to (dignified the house with the name of mansion).

Dignitary

- a person holding high rank or office.

The word dignity is taken from the early 13 century, from Old French *dignete*, from Latin *dignitatem* (nominative *dignitas*) "worthiness", from *dignus* "worth (noun), worthy, proper, fitting" from Proto-Indo-European *dek-no*, base *dek-* "to take, accept, receive, greet, be suitable" (cf. Greek *dokein* "to appear, seem, think", *dekhesthai* "to accept"; Sanskrit *dacasyati* "shows honour, is gracious", *dacati* "makes offerings, bestows")[2].

The definitions of dignity are recognisable in popular conceptions of dignity; ancient and modern. Like Feldman, most people have an idea of what dignity means and generally considered it to be a good thing. Yet, in the definitions and etymology (above) are filled with ambiguity; the give and take of dignity; the ephemerality of 'appearing to, seeming to, think'. The definitions struggle to capture the existential idea of worthiness, derived from Latin *dignus* and the elusive necessity of the related acceptance rooted in *dek*. The determining crux of the objective and subjective aspects of dignity creates the tension of indeterminacy that haunts any theory of dignity. The acknowledgment of the gift of dignity bestowed. That dignity, like beauty, is in the eye of the beholder.

[2] Harper Douglas 2011 'dignity' and following the base 'dek' to 'decent' Online Etymology Dictionary <Dictionary.com http://dictionary.reference.com/browse/dignity (and decent) accessed 07 Jul. 2011. See also Oxford English Dictionary http://www.oed.com/view/Entry/52653?redirectedFrom=dignity#eid.

4.2 The Golden Rule or Ethic of Reciprocity

The tension filled ambiguity of dignity is unavoidable; the evaluation of dignity an inherently human trait, accessible in all cultures, by whatever word. As human thought requires a frame of reference human beings understandably revert to their own experience. I suggest this is why dignity allies closely to the desire to be 'true to one's self'; a self-conscious reflection and reasoning that accepts that other people might have a similar desires. The idea of self-conscious reasoning is captured in the recognised in the 'ethic of reciprocity' 'the golden rule[3]; the second person personal[4] maxim of most religions[5] and codes of ethics[6]. That to secure the desire of being 'true to one's self', one should necessarily 'treat others as one would like to be treated' and thereby be able to bask as the beneficiary of being treated as one would like to be treated. Logically the opposite is also reasonable, a cycle of love or hate equally self-sustaining; what goes around comes round.

The assertion of dignity is used positively, although sometimes used to exclude or applied in the negative. People assert dignity in recognition of a good, or lack thereof; positive and negative positions positively reflectively applied to include or deny dignity. The dictionary definitions of dignity are evidenced in common use throughout the combined research strategy. For millennia, human beings have been in contemplation of the kind of beings humans are. Many people find resonance in the separation of the philosophical world to reflect on human being, accepting the spheres: of *physics, logic* and *ethics*, offered by Aristotle placing physical and spiritual (*ethical*) sense in different realms to the testing logic of reason[7]. The combined research strategy and wider literature review recognised a similar philosophical pathway[8] for dignity back to antiquity; to the practical reasoning of ethics: of good, right, duty, obligation, virtue, freedom, rationality[9].

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[3] Antony Flew (ed) "golden rule" *A Dictionary of Philosophy* Pan Books, (The MacMillan Press, London, 1979) p. 134This dictionary of philosophy contains the following quote under the entry for "golden rule": "The maxim 'Treat others how you wish to be treated'. Various expressions of this fundamental moral rule are to be found in tenets of most religions and creeds through the ages, testifying to its universal applicability."
[4] Stephen Darwell *The Second-Person Standpoint: Morality, Respect and Accountability* (Harvard UP, 2009)
[5] Greg M. Epstein *Good Without God: What a Billion Nonreligious People Do Believe* (HarperCollins, New York, 2010) p. 115
[6] Simon Blackburn *Ethics: A Very Short Introduction* (OUP, 2001) p. 101
[7] Aristotle., *Physics* (Waterfield R. tr, Bostock D. introduction and notes, OUP, 2008) p. 22
[8] For example, McCrudden traces dignity's history back to the Stoics, through Cicero, Aquinas, and the social contract theorist of the Enlightenment period and Maritain. See McCrudden C., 'Human Dignity' (University

4.3 Dignity through Philosophy

The dignity/ethical overlap repeatedly returned me to the writings of Plato[10], Aristotle[11], the Stoics[12], Cicero[13], Aquinas[14], Grotius[15], Spinoza[16], Hobbes[17], Locke[18], Rousseau[19], Hume[20] and Kant[21]. The reasoning that follows traces the use of dignity from antiquity to the present day in the practical reasoning of a natural law[22]. The practical reasoning of philosophy (in the broad sense of pursuing of knowledge) reveals the different emphasis human beings have periodically placed on *physical* existing; demonstrable physical, mental or spiritual prowess, *logically* reasoned, and *ethically* reflected upon to determine what it is to be a good human. The self-conscious realisation of individual philosophers returning to the 'golden rule' or 'ethic of reciprocity' to provide the philosophical link that became the familiar binding thread of philosophers generally. From the ancients to the present day[23], with the noteworthy inclusion of well-known dignity advocate, Kant, whose categorical imperative to 'act only on that maxim through which you can at the same time will that it should become a universal law'[24] the 'golden rule', has resonance linking naturally evolving positive assertions of dignity.

The idea of dignity first appeared in an idea of natural law that came to light through the ancient Greeks. The Stoics suggested fundamental moral principles

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of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No 10/ April 2006) Available [online] Social Science Research Network http://papers.ssrn.com/Abstract=899687 Waldron recognises Aristotle, the Stoics, Cicero and Kant. See Waldron J. 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' (Public Law & Legal Theory Research Paper Series No. 09-50 Berkeley, 2009) Available at SSRN: http://ssrn.com/abstract=1461220.Dillon R S., highlights a link between Aristotle, Hobbes, Hume and Kant. See Dillon R. S., 'Introduction' *Dignity Character and Self Respect* (Dillon R. S., ed, Routledge, New York, 1995)

[9] "ethics" *The Oxford Dictionary of Philosophy* (Blackburn S. ed, 2nd OUP, 2005)

[10] Plato *Republic* (Lee H. D. P. & Lee D. tr, Penguin, London, 2007) Book X

[11] Aristotle (n. 7)

[12] John Sellars *Stoicism* (Acumen Publishing Ltd, 2006)

[13] H. Cancik 'Dignity of Man and *Persona* in Stoic Anthropology: some remarks on Cicero', in Kretzmer D. and Klien E. (eds) *The Concept of Human Dignity in Human Rights Discourse* , (Kluwer Law International, 2002)

[14] Thomas Aquinas *Selected Philosophical Writings* (McDermott T. tr, OUP, 2008)

[15] Hugo Grotius 'De Jure Belli ac Pacis (1612)' in Finnis J., *Natural Law and Natural Rights* (OUP, 1980)

[16] Baruch Spinoza *Ethics* (White W. H. and Stirling A.H. tr, Wordsworth Editions, 2001)

[17] Thomas Hobbes *Leviathan* (1651) (Macpherson C. B. ed, 1968, reprinted in Penguin Classics, 1985) p. 190

[18] John Locke *The Second Treatise Of Government (1689): A Letter Concerning Toleration* (Dover Thrift Editions, 2002)

[19] Jean-Jacques Rousseau *The Social Contract (1762)* (Betts C. tr, OUP, 2008)

[20] David Hume *A Treatise of Human Nature* ((1739) Mossner E. C. ed, reprinted Penguin Classics, 1985).

[21] Immanuel Kant *The Moral Law: Groundwork of the Metaphysics of Morals* (Paton H. J. tr, Routledge Classics, 2005)

[22] John Finnis *Natural Law and Natural Rights* (OUP, 1980)

[23] Charles Foster *Human Dignity in Bioethics and Law* (Hart Publishing, 2011)

[24] Kant (n. 21) p. 97

underlie the legal systems of all nations; deduced by reason and reflection, and reducible to the dictates of a natural law. The Stoic history is scant; mostly only available in criticised form. Yet, the idea of human will, deduced by reason and reflection, accorded to nature has sensibly influenced many natural law theories and subsequent philosophical works[25]. The Stoics advocated a natural law over-arching human being; an active relationship of determinism and freedom, presenting a life of reasoned virtue, as the way to be. The philosophical representation of an individual was not what a person said, but how they behaved[26]; a virtuous life that consisted in a will that accorded with nature[27].

Reason, rather than reflection or nature, often dominates the legacy of Stoicism. The deep philosophical reflection and high reason, of the self-effacing upright citizenry of self-denial, offered a path for human being, in a pre-determined virtuous life; deemed better than to ignorantly succumb to slavery to the passions and the sensual pleasures of human emotion[28]. Yet, in repetition the now objectified 'virtuous life' appears disjointed from the founding of reason and reflection that first supported the virtuous life.

Cicero[29] embraced the idea of uniqueness in human being in classic Roman thought, both as a status or rank within the human species and in the beyond species ranking of human being in relation to other beings. Described in some quarters as the great chain of being; humans are deemed higher in the hierarchy of being than rocks, plants or other animals; and, in religious belief, lower than angels and God. *Dignitas* was used infrequently in the writings of Cicero, who referred to the "dignity of human beings as human beings, not dependent on any status" [30] and stated it was "vitally necessary for us to remember always how vastly superior is man's nature to that of cattle and other animals; their only thought is for bodily satisfactions… Man's mind, on the contrary, is developed by study and reflection"[31]. Rosen sees Cicero building on Stoic teaching that human beings should see themselves as

[25] McCrudden (n. 8) and Spinoza (n. 16)
[26] Sellars (n. 12)
[27] Bertrand Russell *History of Western Philosophy* (2nd Edition, Routledge London, 1946) p. 254
[28] Sellars (n. 12)
[29] Cicero, in Cancik (n. 14) pp. 19-39
[30] McCrudden C., 'Human Dignity' (University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No 10/ April 2006) Available [online] SSRN http://papers.ssrn.com/Abstract=899687
[31] Cicero *De Officiis I* 1.30.105-107 in Cancik (n. 14)

"citizens of the world"[32]. The root for Cicero was in the natural law "Nature prescribes that man should help man for the reason that he is human … All of us are bound by one and the same law of nature"[33]. Again I suggest natural law can be recognised in the 'ethic of reciprocity'; of inner reflection on one's own and others reasonably good thoughts, shared in outward reasoning.

The proposition of human beings, as superior to other creatures, appears to continue the distinction in Stoic thought, between succumbing to sensuous pleasures, as being beneath the dignity of a reasoned reflection of human virtue. Cicero elevated virtuous life to an extant status or rank "If we consider what excellence and dignity is in the nature of man, we'll recognise how shameful it is to be dissolved in luxury and to live in a spoilt and weak way, and how virtuous in a moderate, continent, severe, and sober way"[34]. Cicero defines dignity thus, "Dignity is someone's virtuous authority which makes him worthy to be honoured with regard and respect"[35]. Virtuous authority is still self-referential, reflective and reasonable, but again reasoned to be in conformity to a predetermined ideal. Cicero is known to have had a substantial impact on leading thinkers of the Enlightenment period in Western philosophy including Locke, Hume and Montesquieu[36].

Aquinas, followed the wisdom of Plato, Aristotle (who I return to shortly), the Stoics and Cicero, to pursue ethical knowledge of reason, goodness and truth, advocating a life of inner contemplation; a life of virtue. Aquinas suggested dignity as the goodness that something has 'on account of itself'[37], a variant of earlier (and later) assertions of dignity as inherent in being human. Aquinas recognised dignity at all levels of God's creation (possibly even in plants and other beings)[38]. Aquinas defined virtue as not just good in general, but interchangeable with being and applying more widely than quality; as the good according to reason that talks of the soul's good[39]. Like the earlier Stoics, Aquinas advocated a life of personal

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[32] Michael Rosen *Dignity: Its History and Meaning* (Harvard University Press, 2012) p. 12
[33] Cicero, in Cancik (n. 13)
[34] Cicero *De Officiis I* 3.5.7; 3.5.23 in Cancik (n. 29)
[35] Cicero *De Inventione* 2.55.166 in Cancik (n. 29)
[36]Walter Nicgorski, 'Cicero and the Natural Law' (Natural Law, Natural Rights and American Constitutionalism, 2011) <e.g. http:// www.nlnrac.org/classical/cicero> accessed January 2012
[37] Thomas Aquinas in *Commentary On The Sentences* in Rosen (n. 32) p. 16
[38] Aquinas (n.13) p. 23
[39] *ibid* p.398

contemplative quest, striving for one's own goodness in this life to achieve the goal of redemption in death, Aquinas guided by God's eternal given law, over-arched the experiential sensing of nature; presumably also of God's creation.

Aquinas did not deny human made laws or other spheres of influence: A ruler could direct both himself and others to a goal. A wife or a judge could have equally valid but opposite notions of good to a bandit husband[40]. However, in each case one could only have one immediate measure of good; although there could be several measures of good hierarchically ordered. Even a mistaken good, if reasoned to be good, was good. Ruler, judge, wife, bandit; one's good was one's conscience. Living a good life determined by eternally guided intuitively reasoned law did not remove Aquinas from the practicalities of other law. Aquinas distinguished between reflection on God's eternal unknown law, the guidance in the bible of God's given word, and other knowledge and reason[41].

Within natural law Aquinas distinguished between 'the law that is in us by nature', the laws of nature and the sense of natural law that all men agree on. Aquinas continued dividing societal law into four elements; law is an ordinance of reason, for the general good, laid down by whoever has care of the community, and promulgated. In moral actions he suggested four causes of action: the source of movement in moral actions is what is perceived; which requires a second perceiving power, dependant on the third, the will; and the fourth, the motive power executing reason's command[42]. Aquinas did not exclude law beyond a natural law of human nature; on the contrary, he advocated and pursued a spiritual life of religious virtue. However, he did make us masters of, and therefore responsible for, our own reason. Aquinas reduced law into dynamically reasoned, complementary spheres of law, overlaid by human conscience; one's soul minded inner reflection, reasoned with a mind to the general good of communal society.

Aquinas recognised spheres competing for recognition of good; with the self-reflective potential for reasoning of common good in individual, group, species and beyond (in the being of God). The ordering appears reminiscent of the dignity

[40] *ibid* p.378
[41] *ibid*
[42] *ibid* p.287

categories raised by, and in response to, Feldman; there is a taxonomic link between the two. Human being is readily segmentable into individual, group, species and beyond. People unsurprisingly find resonance in the positively reaffirming message of self-reflective reason. The choice of reasoned reflected upon good is paramount in individual reasoning, mindful of wider community and God. I suggest there is a positive bias in reasoning common good, including good law, from individual to group, species and beyond, not because negative desire and reason are unavailable, but because people are more likely to contribute to a common endeavour of survival than to one that is obviously self-defeating. Again, we return to the 'ethic of reciprocity' and the self-serving nature of pursuing common good.

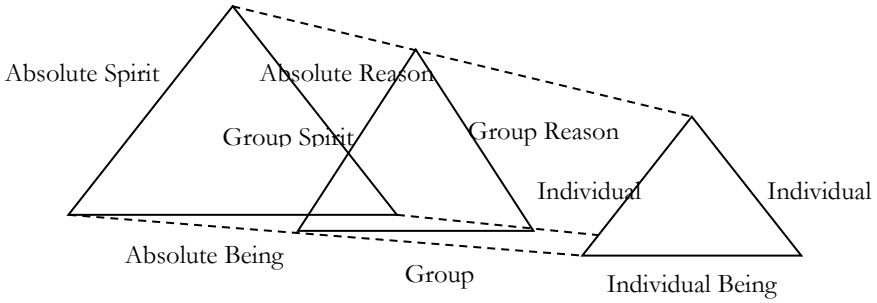
In the nineteenth century Hegel suggested that a problem for Western philosophy was a simple self-conscious one; that human beings had accepted the idea of their being, as the thrown independent existence of being[43]. The disjuncture between self and otherness lost in the pursuance of self. The self-image captured in the words of Descartes; I think, therefore I am[44]. Human being became the sum of individual philosophical, physical and political human parts, rather than the collective evolution of individual, group species and beyond. Any over-arching body, mind or spirit was deemed other than the existent humans' own being. The other, from which the being may have been gifted or thrown, confirmed its otherness, by being other than the thrown being and therefore reflected back to the being, the independent idea that they had chosen to believe they were[45].

Hegel suggested an over-arching consciousness existing *for itself* inherent in human being; an absolute spirit that subsumes individual human spirit. A spiritual essence guiding human being and continuing to evolve in, and beyond, the thrown parameters recognised as individual, group and species human being. In doing so Hegel overarched the dualistic otherness dominant in Western philosophic thought; spirit aligning in individual, group and species human, compatible with over-arching spirit in being. However, spiritual unity was maintained in faith in the superiority of

[43] Georg Hegel *Phenomenology of Spirit* (Miller A.V. tr, OUP 1977) p. 115
[44] Rene Descartes Principles of Philosophy Part 1, article 7 ((1644) Miller V.R. and Miller R.P. translated by (Dordrecht: D. Reidel, 1983).
[45] Hegel (n. 43) p. 115

the guiding spirit of God, in spiritual unity with groups of humans and other beings on, and beyond, Earth.

4.4 A Shared Harmony of Common Self-Interest



The diagram shows potential agreement complementing individual, group, species and beyond being, coinciding with an over-arching spirit, of, for example, nature or God.

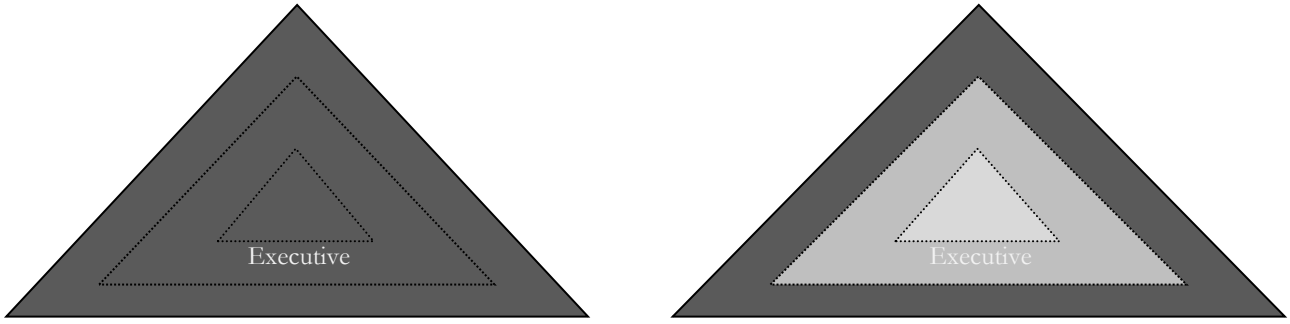
As I read Hegel's description of absolute spirit, in terms of the lord and bondsman, it was clear that Hegel sought to spiritually overarch human being, rather than consider tensions existing between human individuals, groups and species. The humanly malleable natural contestability of absolute spirit, afforded oppressive potential to sacrifice individual and group and to exclude and limit the choice of acceptance of absolute spirit. This bothers me. Absolute spirit appears ethically contestable and ever vulnerable to human reflection and reason in acceptance, understanding and interpretation in, and of, its being. Absolute spirit can only be, as good as the malleable, contestable and exclusionary human spirit allows it to be. As history evidences, both bad and good manipulations of human spirit compete for absolute spirit; each capable of temporarily subsuming human desire.

While absolute spirit is not necessarily denied, it may add very little to the self-conscious reflection on the idea of thrown independent existence that Hegel sought to overcome. The inherent human uncertainty about absolute being leaves individual human beings in the position of self-reflection; having to make up their own minds about what it is to be, and reasoning who or what people might be giving good advice in any over-arching of human being. While many people accept that they are more than the sum, of body, mind and spirit human parts, and have some knowledge of the elemental and universal nature of physical bodies, and shared reasoned knowledge of the human mind, any over-arching of the spirit can only be partially understood or known. The evidential history, in dignity and law, of

governing societies, gives reason to be sceptical of good triumphing over evil in the human battle for absolute spirit. For while government might be actual coincidence of a governing executive mind and legislative body true to the spirit of the common good of society, it can also be the subsumed assertion that governors know best; or governors deliberately preferring the selfish interests of more limited groups.

Hegel's absolute overarching spiritual life force may complement, and or subsume, the impressions and ideas of independent group, individual and species human spirit. Good examples include individuals and societies, who choose to live in harmony with God or nature; who cherish their God or nature and accept that God or nature complements or subsumes their living spirit. This can be seen in life style choices of natural and religious observers throughout the ages, for example, the Stoics[46], Aquinas[47] and many of the dignity commentators, who align the self-interest of individual, group and species to the absolute being of Earth or God, which could obviously include Earth as God's creation.

Shared or Conflicted Harmony of Common Self-Interest



The diagram shows a two dimensional representation of the earlier 'Shared Harmony of Common Self-Interest. To the left there is complementarity; the dark grey coordinated ideal of an over-arching spirit subsuming human individual, group and species governing for the good of the governed society. To the right, more reminiscent of most societies, both historic and modern, conflicted grey-scale scheme. The lack of complementarity shows the interests of governed society still subsumed, but now to a conflicted reality of representative governors and the tension between the selfish betterment of political society and or the executive and the good of the many of governed society.

The evolving philosophical ideas of ethics and virtue found in Aquinas and repeated in Hegel can be directly linked to the founding documents of the UN and the

[46] Sellars (n. 12)
[47] Aquinas (n. 13)

present day. Maritain, a Catholic philosopher, was a well-known presence, influential at the time of the drafting of the UN Charter and Declaration. Probably the foremost commentator on Aquinas during the development of rights theory in the 20th century Maritain was "active in promoting a philosophy that applied the theology of Aquinas to modern conditions". Central to Maritain's philosophy was the concept of human dignity[48]. Maritain argued that the 'rights of the human person … must be recognised and guaranteed in such a way that an organic democracy should be by essence the city of the rights of the person'[49].

Maritain followed Aquinas in seeing each person's 'right to existence, to personal freedom, and to pursuit of the perfection of a moral life, belonging, strictly speaking to a natural law'[50]. Maritain saw dignity as inherent fact and "used his position as a man of affairs as well as an academic to ensure that this message was heard …in the circles… engaged in construction of the post-War global architecture"[51].

Maritain espoused the view of human rights as essential for promotion of the common good rather than radical ethical individualism[52]. Seeing the unlikelihood of timely agreement on specific rights Maritain sought consensus on practices and prohibitions that could be agreed upon. Maritain's philosophy clearly identifies individuals as the most noble constitutive parts of the created universe related first and foremost to the infinitely greater good of the divine transcendent whole[53]. The primacy of the common good is a repetition by Maritain, attributed through Aquinas to Aristotle's maxim "the good of the whole is 'more divine' than the good of the parts[54]. As individual's "each of us is a fragment of a species, a part of the universe, a unique point in the immense web of cosmic, ethnical, historical forces and influences – and bound by their laws"[55]. Maritain's limit on the principle value

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[48] Christopher McCrudden., "Human Dignity and Judicial Interpretation of Human Rights" (Legal Research Paper Series No 24, University of Oxford, 2008) Available at SSRN: http://ssrn.com/abstract=1162024 p. 10

[49] Jacques Maritain In 'Scholasticism and politics' in Lisska A. J. *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (New edition Clarendon Press 1997) p. 227

[50] *ibid* p. 28

[51] McCrudden 2008 (n. 48) p. 39

[52] *ibid* p. 47

[53] Jacques Maritain *The Person and the Common Good* (first published 1947 Fitzgerald J. J. tr, 1966 University of Notre Dame Press), p. 18

[54] *ibid* p. 29

[55] *ibid* p. 38

of the noble individual is the "highest access, compatible with the good of the whole"[56]. "The common good is not just the common good of the nation and has not yet succeeded in becoming the common good of the civilised world, but it tends toward the latter"[57].

4.5 The history of dignity as philosophical-cum-political concept

McCrudden's fascinating, illuminating, history of dignity as philosophical-cum-political concept[58] relayed through history brings dignity right up to date; complementing and out-lining my Dignity Literature Review. However, both now lie redundant. Each shows dignity, and more recently human dignity, occur repeatedly in law, in different spheres and contexts to reflect the importance of the subjects of dignity, often protected by law. McCrudden recognises, as most dignitarian writers do, that the subjective indeterminacy of valuing dignity and the contextual specificity of objectified dignity prove problematic in attempts to pin down a meaningful application for dignity in law. McCrudden none the less concludes that dignity may be a place holder for human rights, as he pursues the 'holy grail' of human rights[59]. I agree with McCrudden, yet he offers little reason to support his conclusion. On the contrary, McCrudden only appears willing to recognise dignity rights already objectified and protected in law and offers no means of overcoming the subjective challenge he recognised. The valuation point of how dignities come in to being and who values dignity, or rights, is left unanswered.

McCrudden's work and the UK Dignity Survey provide plenty of evidence that dignity may be objectified, pre-reasoned and pre-determined, and therefore an easy choice or case in law. However, to understand the role of dignity in law we need to go further; to acknowledge the choices of past dignity determinations vested in repositories of the law; and recognise that any indeterminacy in dignity will also necessarily be determined in the decisional moment of law making. To recognise law some person or body of people has to have made, or make, a dignity assertion and choice. The context of law is premised on dignity, which will determine

[56] *ibid* p. 51
[57] *ibid* p. 55
[58] McCrudden 2008 (n. 48) p. 2
[59] *ibid* p. 25

whether the dignity subsequently asserted is compatible with the premise of law and therefore deserved of protection within that sphere of law.

4.6 Trans-valuation and rank

The 'awesome momentousness'[60] of dignity is championed by Waldron, who recognises the evolution of the idea of dignity and growing importance of human dignity evidenced in the literature. Waldron[61] and Dan-Cohen[62] also offer illuminating religious and poetic trans-valuation reasons for the changed human subjects of dignity. Dan Cohen begins with "the uplifting Biblical idea of *imago Dei*, or in the original Hebrew, *b'tzelem Elohim*: the claim that human beings were created in the image of God[63]. To support dignity's relevance to secular sensibility, Dan-Cohen distinguishes two different claims or moments of considering the *imago Dei* idea. First is the belief that the world in general, and human beings in particular, are God's creation; the second, the idea that humanity resembles God. "The first thesis does not distinguish humanity from the rest of creation; it is the latter claim that gives rise to human dignity". Dan-Cohen then applies a reversal to the creation thesis, attributed to German philosopher Ludwig Feuerbach[64] to make the resemblance idea accessible to a secular audience. "The crucial observation is that people have created God, and indeed created Him in their own image by projecting an idealized vision of themselves". In this reinterpreted view of *imago dei* the cardinal difference between the religious standpoint and its secular reinterpretation is that humanity, which from the religious standpoint is the image, turns out to be the original, reflected in a mirror of its own creation. On this reinterpretation, resemblance to God is there; only the direction of fit is different[65]. The reversal of the creation thesis is reminiscent of Stoic philosophy, positing an overarching human ideal as a guide to being human[66].

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[60] Professor Jeremy Waldron referred to the 'awesome momentousness' of dignity in his eight week lecture series on Human Dignity at Oxford University, in the spring of 2013.
[61] Waldron J. 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' (Public Law & Legal Theory Research Paper Series No. 09-50 Berkeley, 2009) available at SSRN: http://ssrn.com/abstract=1461220.
[62] Meir Dan-Cohen Dan-Cohen, Meir, 'A Concept of Dignity' (September 3, 2009). Available at SSRN: http://ssrn.com/abstract=1468031 or http://dx.doi.org/10.2139/ssrn.1468031
[63] *ibid*
[64] *Essence of Christianity*, (1841) trans. M. Evans (George Eliot) 1854; new edition, intro. K. Barth, foreword H.R. Niebuhr, (New York: Harper & Row, 1957) in Dan-Cohen (n. 63)
[65] Dan-Cohen (n. 62)
[66] Sellars (n. 12)

Waldron[67] starts with an idea of value, the high rank of some human beings in relation to others, and then reverses this order to claim the high rank or dignity is false, and ordinary humanity is the true domain of dignity. Waldron uses the poem of Robbie Burns "For A' That and For A' That" and Burns masterful reversal of rank or dignity in the trans-valuation of the central three stanzas. I think it is worth repeating, with Waldron's interpretation:

> What though on hamely fare we dine, / Wear hoddin grey, an' a that;
>
> Gie fools their silks, and knaves their wine; / A Man's a Man for a' that:
>
> For a' that, and a' that, / Their tinsel show, an' a' that;
>
> The honest man, tho' e'er sae poor, / Is king o' men for a' that.
>
> Ye see yon birkie, ca'd a lord, / Wha struts, an' stares, an' a' that;
>
> Tho' hundreds worship at his word, / He's but a coof for a' that:
>
> For a' that, an' a' that, / His ribband, star, an' a' that:
>
> The man o' independent mind / He looks an' laughs at a' that.
>
> A prince can mak a belted knight, / A marquis, duke, an' a' that;
>
> But an honest man's abon his might, / Gude faith, he maunna fa' that!
>
> For a' that, an' a' that, / Their dignities an' a' that;
>
> The pith o' sense, an' pride o' worth, / Are higher rank than a' that.

Waldron comments - the lowly person's toil, clothes and diet may be homely, but "the man of independent mind" does not pay attention to things like that. He pays attention to honesty and good sense in his attribution of "true rank". Notice also how Burns straddles two positions: one is that merit is and ought to be the basis of true rank and dignity; the other is that rank and dignity are associated with the inherent worth of human beings:

> Then let us pray that come it may, / (As come it will for a' that,)
>
> That Sense and Worth, o'er a' the earth, / Shall bear the gree, an' a' that.
>
> For a' that, an' a' that, / It's coming yet for a' that,
>
> That Man to Man, the world o'er, / Shall brothers be for a' that.

[67] Waldron cites OED: Wordsworth 1795 'Yew-tree Seat', "True dignity abides with him alone Who, in the silent hour of inward though, Can still suspect, and still revere himself, In lowliness of heart" and Burns poem "For A' That and For A' That Waldron (n. 61) p. 27 & 28

In each trans-valuation Burns, Dan-Cohen and Waldron recognise the now familiar topic of dignity as both object and subject. Waldron's suggests that Burns straddles the two aspects of dignity. However, this conflates rather than recognises the two operative parts of the objective subjective tension in dignity that Burns so clearly saw. This repeats the presumption in Hegel of inherent complementarity between an over-arching spirit and different spheres of human being. Dan-Cohen over-arches the tension with a reasoned explanation; the ideal object of dignity created in a reversal of religious imagery. Waldron recognises self-reflective equality in the ability to subjectively appraise extant objects of dignity. However, neither really illuminates the challenge in the trans-valuation to the valuing premise of the dignity assertion. The equal ability to see dignity, does not address the inequality and injustice in the dignity assertion. Dignity in meritous rank may be equal for the have and have not to see, but that does not address the very different choices inherent in reasoning the different perspectives valuing the dignity.

Burns trans-valuation had insightfully grasped the two separate aspects of dignity: first, illuminating a recognised objectified incidence of dignity in nobility and then subjecting the noble object to scrutiny, recognising common human traits as the object of dignity rather than the noble status. Burns then subjects the two dignified human objects to further valuation; rich or poor, honest men of good faith, living up to society's reasoned expectation of human dignity in the continuing valuation of societal worth. Burns takes us back to the Stoic disjuncture of objectified 'virtuous life' separated from the reason and reflection that founds virtuous life. A recent example of disappointed dignity is found in Jimmy Savile, an object of dignity revered as a 'national treasure', knighted for charity fund raising. Later revealed as a manipulative, predatory, paedophile; many felt Savile, now the subject of dignity, should be posthumously stripped of his knighthood[68].

Waldron goes on to suggest an egalitarian conception of dignity, allowing humans beings to be afforded the status or rank previously only afforded to a person of high

[68] The Cabinet Office suggests such dignities cease on death. O'Carroll L., 'Jimmy Savile cannot be stripped of knighthood, say officials' (9 October 2012) <http://www.theguardian.com/media/2012/oct/09/jimmy-savile-knighthood> accessed November 2013. Savile died in 2011. Yet, the lack of action stating there "isn't an honour to revoke" appears to give support for Savile's life time acts, which posthumous removal *ab initio* could disapprove.

office. Waldron is not necessarily suggesting an actual equality[69], but invites us to consider Arendt's account of the ancient Athenian commitment to political equality: "Equality was not natural but political, it was nothing they had been born with; it was the equality of those who had committed themselves to, and now were engaged in, a joint enterprise. By nature they might be utterly different from one another in background, abilities and character; but by political convention they held [them]selves to be one another's equals"[70]. Athenian community provided each participant with an artificial *persona* of equal status in the joint endeavour of political society; equal rights to speak, vote and equally liability to have duties imposed upon them[71]. Waldron suggests "Human dignity might be something similar: there might be a point to its legal recognition, but that point need not be an underlying moral dignity"[72]. I agree. I am returned again to the golden 'ethic of reciprocity', but equal power to self-reflect and evaluate is hardly egalitarian; it is a bit like playing monopoly when all the property and money are in one player's hands and the rest are still free to travel around the board.

The UK Dignity Survey provides evidence to support the changed valuation of dignity in trans-valuation. That some dignities may have been found wanting ,and deemed less worthy, or less dignified; while others aspired, for whatever reason, to complement the being idealised in over-arching objects of God or nature in pursuing a dignified life may be part of the reason. However, I suggest dignity is found on Earth in the flexible parameters of reasonable challenge to the unreasonable reflection of excluding people in and from law through what was noble or sovereign dignity assertion. The similarities between those who had recognised dignity and those who did not could no longer be reasonably justified. The public assertion of dignity and ability of most human beings to reflect and reason allows people to (re)evaluate the worthiness of individuals, included those deemed worthy of dignity, and to rank them, moving them up and down the dignity

[69] Waldron recognises "…the sense in which we stand equal before the law is somewhat fictitious" suggesting law is technical and forbidding. Waldron (n. 61) p. 58
[70] Arendt H., *On Revolution* (Penguin Books 1977) p. 278
[71] Arendt H., (reflections on the wording of the Declaration of Independence in Truth and Politics,. in Between Past and Future: Eight Exercises in Political Thought (Penguin Books, 1977) pp. 246-7 in Waldron (n. 61) p. 9
[72] Waldron (n. 61) p. 9

scope. This Earth bound concept of dignity can recognise its historic and philosophical roots as very good reasons to resist uncritical acceptance of law.

I have a great deal of sympathy for the self-reflective ethical philosophy reasoning dignity filtering down from the philosophers of antiquity to Maritain and offered in the founding assertions of the UN. Yet, as recognised in the same philosophy, even valuing a positive value like dignity, that most agree we should aspire to, is evidently destabilised by the challenge of who does the valuing. I suggest recognition of who values dignity is of critical importance to understanding dignity, and law. Most contemporary dignitarian jurisprudence does not consider the valuing of dignity, which is deliberately obscured in the literature to overcome evident contestability between spheres of being. The valuation is either objectified in an overarching ideal of common good beyond human being, or in more selfish spheres of humanly fabricated goods in individual, group or species; for example, superior dignity in sovereign, nation and species in the hierarchy of being.

I believe in community spirit. I want to believe that community spirit is align-able, but I do not think that alignment comes from objectifying an ideal and coercing people into line; particularly if the general ideas that guide society and the reflection and reasons of the practical valuation are obscured from the view that would make sense of people's obedience. Historic philosophers, better read, and more literate than their cohort, did not claim to be the font of their knowledge. They were recognised as scribes reflecting on evolving knowledge and capturing the facts available in the limits of their place and time. I suggest, with good reason that will soon be apparent, that the language of dignity owes much, largely unaccounted for, to the common sense reasoning of dynamic society. That dignity evolves from common sense to subsequently be recognised in the normative domain of legal political theory.

The lag and lack of attribution to common sense appears inevitable and inherent in the separately scoped increasingly concentrated spheres of particular reason. For example, concentration in ever more specialised spheres of economics, law, philosophy or politics obscures the bigger picture; it becomes impossible to see the book for the pages; tree for the leaves; forest for the trees. The academy is naturally

limited by positive reaffirmation of its general assumptions. The sceptics point is well made; those not concerned with common goods do not enter, and may not be supported in, the academic sphere.

Meanwhile the general population, increasingly educated, speak and act for themselves motivated by their own desires. The common sense of human dignity is everywhere. The populous never lacked their own view point and their views also inform human dignity. As products of our society we, academics, practitioners, theorists of law are amenable and responsive to the common values of society. Normative reflections necessarily describe the pre-existing norms derived from the experience of past society. I recognise the temptation of pursuing a normative agenda for dignity. I see contemporary dignitarian philosophers and legal political theorists, seeking reification of dignity and other human rights, including Dupré[73], Feldman[74], McCrudden[75] and Waldron[76]; they are ahead of me in that game, and doing a sterling job. However, their hard work is unnecessarily destabilised by the continuing challenge of who does the valuing of dignity and rights. I believe law has more to offer; we live in a time when law can, and should be used to, champion human dignity. Human beings already recognise the evaluation of human being found in dignity and understand why dignity is asserted in law. Dignity is a place holder and may be the 'holy grail' of human rights[77]. I consider the valuing capacity of dignity in the next chapter.

[73] Dupre, C. 'Unlocking human dignity: towards a theory for the 21st century'. (*European Human Rights Law Review* 2, 2009) p. 190-205
[74] Feldman D., 'Human Dignity as a Legal Value I' (Public Law, Winter 1999) p 682-702; & D., Feldman 'Human Dignity as a Legal Value II' (Public Law, Spring 2000) p 61-76
[75] See (n. 8) & McCrudden (n. 48)
[76] See Waldron (n. 61 & Bibliography)
[77] McCrudden 2008 (n. 48) p. 25

Chapter Five – Dignity; societally valued worthiness in being

The common sense definition I offer for dignity of 'societally valued worthiness in being' arose from questioning the literature review. The idea of general aspirations of dignity being too elusive or ephemeral to be meaningfully applied in law seems problematic if dignity nonetheless premises claims in the taxonomic separation of individual, group, species and beyond. Perhaps it is my ecology minded environmental background, but I do not see elusiveness or ephemerality as preventing dignity from being meaningfully applied. I offer a taxonomically based ephemeral analogy before going on to outline the different elements of the dignity definition. I consider 'being' to recognise the significance of dignity asserted at multiple levels of being, including the categories suggested of individual, group, species and beyond. Being reveals different 'societally' valuing spheres of dignity. The 'worthiness' of being is determined by individual internal reflection, continually tested in the external experience and observance of shared reflective being, reasoned in the context of sensible understanding of collective human being; perhaps over-arched in absolute spirit, being or will. I suggest this is the reason for the objective/subjective tension in the evaluative aspects of dignity. Finally, in the objective/subjective 'valued' of dignity one can recognise how modern ideas of human dignity relate to older ideas of dignity.

5.1 First… An Ephemeral Analogy

That dignity is elusive and ephemeral does not prevent dignity from being, or being applied. Ephemeral means lasting for a very short time, but ephemeral incidents can live in the succession of things that survive for a very long time. Take, for example, the succession of royal dignity in royal bloodlines[1]. The Oxford English Dictionary[2] definition for ephemeral suggests that "fashions are ephemeral: new ones regularly drive out the old"[3]. This point is interestingly prophetic of a point I will make in

[1] The British Monarchy, 'Home Page' (The Official Website of The British Monarchy July 2013) <http://www.royal.gov.uk/ThecurrentRoyalFamily/Successionandprecedence/Succession/Overview.aspx> accessed 13th June 2014

[2] Taxonomy, origin early 19th century: coined in French from Greek taxis '‹ arrangement' ' + -nomia '‹ distribution' in Angus Stevenson Ed. Oxford Dictionary of English (OED) (3 ed. Oxford University Press, 2010)

[3] *ibid*

relation to law and the laws of fashion in Chapter Seven. However, the example I chose for the thesis is *ephemeroptera* or mayflies.

E*phemeroptera* are the beautiful upwinged mayflies that grace rivers in the spring. Mayflies have a short adult life. The males swarm, usually over rivers at dusk; the female, having selected one male and gone off to mate, enjoys a single egg-laying flight, during which she oviposits usually onto the surface of a river. The eggs are dispersed by water, some sinking to the riverbed. Eggs may hatch immediately, or wait for months for the right conditions. From the eggs nymphs develop, who find niches in the gravel and silt of the river bed, developing survival strategies unique to that environment. The nymphs grow and may have fifty instars (moults) before they make their way (after a couple of years) out on to the river bank to hatch into a 'dun', or *subimago*, prior to fully emerging as adult 'spinners' for their own glorious flights[4]. The mating flight, and successful positing of well-placed eggs, is far from guaranteed. For both male and female the adult phase is fleeting and culminates in certain death. But it does not end there; dead spinners degrade into the environment and have a further nourishing impact on the life cycle; one way or another detritus sinks to the river bed providing nutrients to the next batch of eggs[5]. Ephemera[6] may mean lasting only a short time, transitory; but mayflies are prehistoric, the oldest of all the extant winged insects and date from the Carboniferous period[7].

The mayfly cycle demonstrates a natural continuum. The mayflies' longevity as an order stands testimony to a successful, naturally occurring and evolving survival continuum, empowered by individual, locale specific adaptation[8] and chance survival. Observation of the mayfly continuum evidences, ever vulnerable, temporary forms, motivated to survive at cellular level; where good positioning of eggs, adaptation and luck are the keys to the continuous drive of species survival

[4] 'Dun' and 'spinner' are fly fishing terms the dun, still not fully emerged, is less colourful than the adult.
[5] J.M. Elliot, and U.H. Humpesh, 'A Key to the Adults of the British Ephemeroptera with notes on their Ecology' (*Scientific Publications of the Freshwater Biological Association* No 47 1983)
[6] Ephemera – origin late 16th century: plural of ephemeron, from Greek, neuter of ephēmeros '' lasting only a day' '. As a singular noun the word originally denoted a plant said by ancient writers to last only one day, or an insect with a short lifespan, and hence was applied (late 18th century) to a person or thing of short-lived interest. See OED (n. 2)
[7] 354 to 290 million years ago
[8] There are approximately 2,500 species of mayfly around the world

regardless of individual success. The order ephemeroptera contains 200 genera, in 19 families; about 2500 species worldwide all recognised as mayflies[9].

The short version of this is that just because a mayfly has a fleeting adult existence does not mean that the mayfly as individual being, or as a species, or as an over-arching order, has a fleeting existence. Additionally, as an external experiencer and observer of mayflies the fact that I might (quite literally) pin-down a beautiful exemplary specimen today does not mean either that there are no more mayflies or that I might not find a better example of a mayfly tomorrow. In fact, if I have pinned down a specimen I will have hastened the destruction of the specimen; for even my exemplary specimen will be subject to immediate environmental decay.

5.2 Being - the significance of dignity asserted at multiple levels in law

To explain the definition I offer for dignity, societally valued worthiness in being, I begin with being, including the different spheres of being, that reveal the significance of dignity asserted at multiple levels of law. Heidegger[10] provided the insight to explain what I mean by being. This is a not critique of Heidegger. I use Heidegger because coincidentally, and perhaps contrary to his intentions. I use the idea of throwness to identify incidents of recognised being temporarily punctuated from a continuum of being over which they have absolutely no control. The throwness of being provides an opportunity to break from a long tradition of human empowerment in law and philosophy that places humans at the centre of being. For example, the centrality of human beings in much of the philosophy and law evidenced in the last chapter, in various works that sought to assert the superiority of humans either by virtue of God[11] or nature[12].

Heidegger suggested being as being thrown into being; cast like a pot on a potter's wheel, which could also include being evolved in nature or gifted in creation. This timeless idea of evolving being, need not be constrained by any physical or reasoned existence, for example, of a body in being; or existing language or text; as the whole

[9] Elliot & Humpesh (n. 5)
[10] Martin Heidegger *Being and Time* (First English edition 1962 Macquarrie J & Robinson E,. tr, Blackwell 2008)
[11] Michael Rosen *Dignity: Its History and Meaning* (Harvard University Press 2012)
[12] John Sellars *Stoicism* (Acumen 2006)

point is that being can both punctuate an incident, and recognise potentiality, that over-arches time. The timelessness can be revealed in two, of at least three, ways: there is a continuing physical presence after being, in the physical elements that make up a corpse; continued reason in being that exists in guidance, for example, orally in culture, history and tradition handed down through the ages, that might be reduced to texts, including law; and of course, the much debated continuance of spiritual being after individual human being has expired.

While time is very relevant to the duration of particular individuals, groups and species being, punctuated or thrown into existence, it may have very little relevance in the wider spheres from where and into which any being is thrown. For example, Physical lifecycles in plants, insects, humans and mountains, involve daily cycling of Earth's nutrients across a variety of timescales[13];. Similarly reasoned ideas and human beliefs may be cycled across human time, passed down through human generations for as long as human being and time exists.

Physical being, like the potter's thrown pot, is thrown into being for as long as it is. This works equally for pot, tree or human; they exist as pot, tree, or human, while they are pot, tree or human. The thrown-ness of being, reveals a being recognised from the beginning to the end of that being: taken from the thrown-ness event, subject to contestation on the actual determination point of being thrown; moulded unfired or fired pot; thrown or germinated seed; released or fertilised egg, live birth or somewhere in between. Death, destruction and evolution are the inevitable destiny at the end of particular being.

In determining thrown-ness as the beginning of being, the thought of the how, of the creation of the being, is overcome; all are thrown, or gifted, into a continuum of being and have the potential to be, until death, destruction and evolution. The taxonomy[14] of life phases can be seen in arrangement and distribution of all physical things; whether animate or inanimate, animal, mineral or vegetable. For example: mineral and rock - excavated as clay, to pots, to crocks, to Earth; vegetable - acorn to mighty oak tree, to board planks, pulp or forest floor, to gradual decay to Earth;

[13] David Suzuki *The Sacred Balance Rediscovering Our Place in Nature* (GreyStone Books Vancouver 2007) p. 17
[14] Taxonomy, origin early 19th century: coined in French from Greek taxis '‘ arrangement' ' + -nomia '‘ distribution' OED (n. 2)

animal - gametes, foetuses, new born, immature, mature, corpse, ashes to ashes, dust to dust, Earth.

At the end of any physical being death and destruction are seen as contributing to a wider being. While death and bodily destruction is the inevitable end of one being, it can still be seen to be the recycling elements in the wholeness of Earth's sphere: the destruction of mineral mountain, vegetable tree, and animal human. No matter how beautiful, important or precious a particular evolutionary phase appears; for example, beautiful baby, innocent child, gorgeous model, kind heart, brilliant or wise mind, it is part of a natural cycle of destruction and renewal; a continuance that always brings particular being to an end.

The idea of thrown-ness punctuates a working definition for physical human being: the thrown-ness, or gift, of human life; including Feldman's three spheres of human dignity[15] in species, group and individual. However, even in this apparently obvious taxonomy there are many contestable boundaries both within the categories and at the categories boundaries. For example, does species mean extant human dignity/ being, or does this category also encompass deference to past being (in the dignity of corpses and deference to past dignities), or concern for future beings (dignity of future generations), while there are human beings? In groups and individuals; again existing and identified as dignity/being in particular extant individuals/groups, or recognising the changing potentialities of evolving new and different individuals and groups? For example, environmentalists and transsexuals are arguably new individuals and groups that only evolved or came into being in the twentieth century; human being changing as a direct result of innovation and development in the realisation of scientific and medical knowledge. Within existent individual human being does being refer to existing, sentient, competent [16] being, or intelligent legal actors, capable of asserting, understanding and/or bearing rights? I suggest the existential nature of being and dignity throws up multiple spheres of being and dignity that can be distinguished or punctuated from human being or dignity, but

[15] David Feldman 'Human Dignity as a Legal Value I' (Public Law, Winter 1999) p 684

[16] For example, Naffine attempts to describe how law's persons might be recognised in law as legally identifyable beings reasoned into law, beings existing as human beings or existing as reasoning human being. See Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects,' *Modern Law Review* (2003) 66:3, 346-367

nonetheless necessarily remain a fundamental part of the continuum of human being and dignity.

Within individual human life the separable spheres of punctuated human dignity/ being goes on. Life phases are recognised as contestable value ladened human dignity spheres[17]; existing as discrete segments of human life and punctuating contestable boundaries of law[18]. For example, human being may be recognised by difference at particular physical life phases: sperm, egg; foetus, baby; male, female; infant, child, adolescent, immature, mature, elderly, corpse. Or by reasoned evaluation of capacity to reason: by age (young or old), disoriented, ignorant, impaired, incompetent, incarcerated, incapacitated, insane. One cannot physically or reasonably 'be' two phases at the same time. One is determined to 'be' one life phase or another, to have capacity or not; each boundary is a recognised contestable determination point for law. Spiritual belief can also be existentially separated, for example: Buddhist, Christian, Hindu, Islamist, Jewish, etc… religious belief; or conservative, labour, liberal, etc… political belief.

The punctuated phases and spheres do not separate beings from being human, or from being an individual, or part of a group, or one among many species, either in or beyond the endeavour of human being. Throughout the human example from egg and sperm to decomposed body while something exists, even millennia after death, it is discoverable as human species and maybe identified to a particular group. And yet, in different spheres of physical ordering, human beings are undifferentiated and quite literally constituted "by air, water, soil and sunlight"[19] enjoying evolutionary unity with all other beings on Earth. The revolutionary theory[20] exposed by Darwin, fits naturally into the Aristotelian idea of Earth and the universe as a separable experience within an indivisible whole[21].

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[17] *ibid*

[18] Many question the contestable boundary of existent being, birth, child and teenage competency, vulnerable and elderly adult autonomy, see for example, Margaret Brazier and Caroline Bridge, 'Coercion or caring: analysing adolescent autonomy,' *Legal Studies* (1996) 16:1, 84-109 and Michael C Dunn, Isabel CH Clare, and Anthony J Holland, 'To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy,' *Legal Studies* (2008) 28:2, 234-253

[19] Suzuki (n. 15)

[20] Stephen Jay Gould, The Mismeasurement of Man (New York: W.W. Norton, 1991 in Suzuki (n. 15).

[21] Aristotle., *Physics* (Bostock D. & Waterfield R. tr, OUP, 2008) p. 78

In addition to physical continuity of being; there is also the continuum of reason present in language. The experiential guidance to being, incorporating cutting edge experience of the here and now, into the extant knowledge of past being, including what human beings think they know of the possibility of spiritual continuance. Heidegger referred to extant reasoning as "worlding" meaning how humans are "being-in-the-world" signifying a generative continuum, neither reducible to, nor separable from physical or philosophical form[22]. The extant physical and reasoning spheres may reason a spiritual beyond human being, perhaps the spiritual being of nature or God. The unrevealed unknown engages a meta-physical[23] idea within human being, of potentiality beyond human being, expanding the magnitude of potential spheres of mental and spiritual reason beyond physical being.

The existential nature of reasoning and reflecting 'being-in-the-world' shares the elusiveness and embraces the language of dignity. Being and dignity both provide floating signifiers that recognise and identify examples of being and dignity. Because of their non-exclusive nature neither can be pinned down to a particular idea of being or dignity; they none the less inform every word or idea of being and dignity that is pinned down. Human 'being-in-the-world' and dignity, societally valued worthiness in being, inform the experience of being. The unfolding of knowledge coming in to being (becoming) requires continual (re)evaluation of dignity and necessary re-solution (resolution) of being. I suggest that law attempts to order this resolution; dignity, holding the place[24] to recognise and mediate difference caused by new knowledge, to accept or alter effects, among human beings.

5.3 Societies - Different Spheres of Dignity within Human Being

The existential Earth bound nature of dignity/being is maintained within contemporary relationships of human being. The assertion of dignity, societally valued worthiness in being, invites people to recognise a multiplicity of different

[22] Heidegger (n. 12)

[23] I am using meta-physical in an ordinary language sense, as a shared idea placed beyond individual physical being and therefore meta-physical. Prompted by Stephen Mulhall, 'Ordinary Language Philosophy ' (BBC Radio 4 'In Our Time') <http://www.bbc.co.uk/programmes/b03ggc19> accessed 7th November 2013

[24] Christopher McCrudden (2006) 'Human Dignity' *University of Oxford Faculty of Law Legal Studies Research Paper Series* Working Paper No 10/ April 2006 [online] Social Science Research Network http://papers.ssrn.com/Abstract=899687

potential valuation spheres on Earth. Dignity enables particular individuals to recognise the values and circumstances of their being; the particular environment into which they are gifted or thrown; for example, destitute or privileged in ability to self-sustain. Here I am particularly mindful of the trans-valuation in the last chapter; being might be unequal, unfair and unjust, but natural, some say equal, ability to recognise dignity, allows each to see the potential for change.

The existential nature of being fixes us in, and to, the local experiential society we arrive into; from bustling city to isolated rural community life. Human beings are thrown into inevitable predestined encounters of individual with other individuals. Families, groups, societies and nations that are already engaged in the ongoing enterprise of being; human species life; for example, class, ethnicity, religion and wealth. Contrary to the popular misconception that human beings are born free, human beings are born into multiple, pre-existing, spheres of often conflicted guidance on the best way to be human.

Birth may be the care-filled event of procreative joy, but includes unintended, unwelcome beings born out of ignorance, carelessness, rape and other forced or calculated situations; children thrown into far less welcoming worlds. Individually we may be born free to die, but in society, if anyone cares, we are picked up and nurtured. From birth, and in many cases before, a child who is picked up is valued; they have dignity in their being, in their probably quite limited, society; and if not, the child will surely die. Nurturing comes from individuals, and often groups, with the imposed gifting of individually focused, often parental, guidance; early education in various ways to be human.

However, nurturing also comes with the limitations of human nature. Care is relational and subject to the abilities, through their own nature and nurture, of the caregivers. At some point most people venture out beyond the sphere of the initial caregiver into the wider less caring world where guiding ideas are multiplied. We socialise; encounter and engage in society. We may decide that pre-existence and nurturing alone are no guarantee of the correctness of guidance given, which in time we may come to feel was misguided or wrong. Life experience, the experience of being human, is the constant bombardment of individual minds with multiple

impressions, which in wider spheres of general human being, involves a great plurality of many minds[25]. We are what we are; while we exist, we cannot escape our existential legacy or inevitable end. However, observation and reason remembered in culture, history and tradition, suggest we do have some control over our being and the sort of beings we want to be, and encourage, in the future. In individual being one can exercise self-control. In societal groups', which may extend to the species, we live in groups of careful coerced and cooperative control, including strategies of law.

The potential spheres or levels of dignity are now expanded to potentiality beyond species and from groups to individuals, in segmented spheres within individual being from sperm, egg, foetus, baby, infant, adolescent, mature, elderly, corpse to Earth. Each sphere is recognised as part of a wider taxonomy of human dignity. The distinguishing difference between different spheres of dignity, in and out of law, punctuates different impressions or incidences of dignity, where 'societally valued worthiness in being', introduces contestable boundaries in and of law. Dignity's elusive and ephemeral nature is revealed as the indeterminate choice of shifting subjects objectified in different and changing societal contexts independently valuing worthiness in being.

The 'societally' part of 'societally valued worthiness in being' punctuates the different spheres of dignity within human being. Here I mean society in a broad sense to include both the natural coming togetherness of human beings in the collective experience of society and the artificial positing of society to recognise different spheres of human being. The imposing/gifting collective of philosophical, physical and political being that exist in communities, or are reasoned into being, grouped around a particular cause, issue or location; whether motivated by care, coercion or cooperation. Groups range from two or more people recognising that they are in society. For example, individuals recognised in partnership in or out of legal marriage; together in groups who self-identify or group within and beyond being, including in particular beliefs and legally recognised nations; and the common

[25] As Spinoza suggested "so many heads, so many ways of thinking" Baruch Spinoza *Ethics* (White W. H. and Stirling A.H. tr, Wordsworth Editions, 2001) p. 40

species sense, including international legal agreement, for example, in the incommensurability of murder with the continuing endeavour human survival.

5.4 Dignity Spheres Over-Arching Human Being

Having punctuated societies of beings in the world, one can recognise societies of beings, united in their beliefs, overarching Earth in relation to their being. The literature reviews, of dignity and wider philosophy, saw many theorists recognising spiritual over-arching as the basis of dignity. Belief in the human species made in God's image[26], trans-valuation[27] of dignity in the image of God[28], or dignity in either the wholeness of nature[29] or absolute being[30] of God, or a combination of both. I am not against these ideas. I am concerned by the malleability of the ideal overarching absolute spirit discussed in Chapter three.

Yet absolute spirit does not need to be unworldly, or vulnerable to every manipulative human spirit; it can be the common sense-able continuum of guiding human spirit gifted here on Earth. Chapter One and the combined research strategy discussed in Chapter Two, provide a history of, careful, concernful, cooperative, ethical, positive, self-reflective and virtuous dignity. Practically reasoned, and evidenced among incidences of dignity, from the ancients to the modern day. A sensed and reasoned human guide of how human beings might be, guides effectively as thought, whether gifted from God, as a thought of God, or gifted and thrown into being as a sensed and reasoned guide by human beings, for the sensing and reasoning minds of subsequent human beings.

The guiding spirit of pre-existing human beings; of those who cared for us individually and as groups and cared to report what has gone before, is recognisable and palpable. On the other hand, so is the power to use dignity assertion more selfishly, to over-arch and manipulate human beings with the claim of superiority or

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[26] Rosen (n. 13) p. 12
[27] Waldron J. 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' (Public Law & Legal Theory Research Paper Series No. 09-50 Berkeley, 2009) available at SSRN: http://ssrn.com/abstract=1461220 p. 27 & 28.
[28] Dan-Cohen M. *A Concept of Dignity* available at http://ssrn.com/abstract=1468031 downloaded 30/3/2010
[29] Suzuki (n. 15)
[30] Hegel G. W. F. *Phenomenology of Spirit* (Miller A.V. tr, OUP 1977) p. 115

complementarity, subsuming human will[31]. British History brings to mind centuries of purposive impositions asserted by powerful people using dignity and their own senses of morality to enhance their own power in coercively upheld governing law; although often undone by their selfish acts. Human experience evidences the improbability of either the altruistic or selfish extremes of this conundrum; suggesting the elusive quest of being responds to both ends in being.

5.5 The 'Worthiness' of 'Societally Valued Worthiness in Being'

The tension between altruistic and selfish ways of being helps to explain how and why dignity is important; recognising that dignity evaluation is inherent in human and made here on Earth. The idea of overarching spiritual or human being also brings us to the fourth of the Feldman inspired questions: What causes the objective/subjective tension in the aspects of dignity? The answer is the perennial philosophical quandary in any over-arching evaluative, spiritual or human, guide; to be valued as a guide, requires that the guide is, in fact, valued. The tension between what we believe and therefore value and how we reason what to believe, has been recognised since the ancient Greeks.

Plato wisely resisted explanation of the difference between a belief or impression and a reasoned idea[32], suggesting a "story and wandering" in the knowledge process. First, an impression is named, an idea cannot be thought without naming the subject; second, the impression/ idea is defined, illuminating what the name signifies, which third, brings an image to mind. Once the impression is named, defined and imaged as an idea, fourth, we can come to know the idea as a thing in itself, something that can be contemplated, dwelt upon and "brought to birth in the soul, as a light that is kindled by a leaping spark; and then nourishes itself"[33] only then can we, fifth, posit an idea of the impression. Plato's reasoning of the knowledge process still appears apt; two thousand years later, we repeat his reasoning process, describe the spark and the flame, but we still cannot explain the

[31] Please see the UK Dignity Survey at Appendix Two for numerous examples of how royal and noble dignity was used through law to protect the honours, laws, lives and property.
[32] Plato wisely admitted "There does not exist, nor will there ever exist, any treatise of mine [and logically, from what follows, anybody else's] dealing with this [reasoning] thing. For it does not at all admit of verbal expression". Plato (Epistle VII 341 c4-d2; p531) in Giorgio Agamben (1999) 'The Thing Itself' in *potentialities: Collected Essays In Philosophy* Stanford University Press
[33] *ibid*

already existent spark, or the leap into flame. The ebb and flow of human reasoning is revealed in an internal confluence of sensed impressions evolving into ideas that nourish themselves, to become objectified ideas that can be externalised to share with others. In wider spheres of societal being these ideas may be shared, named, described, and if well received, they can become known and nourished, asserted ever wider as a good idea.

The Platonic description suggests an idea slowly dawning in the quiet contemplation of philosophic reflection; however, the timescale between the fourth and fifth stages of this reasoning taxonomy necessarily ranges. The evolution can be fast, thrown/gifted into instantaneous being; for example, "ouch that's hot" or "stop, don't do that" with the right intonation brings an immediate impression into an instantly posited reasoned idea.

Aristotle followed Plato, separating the world of philosophy into areas: of *physics, logic* and *ethics*; placing physical and spiritual (*ethical*) sense in different realms to the testing logic of reason[34]. Aristotle thought it obvious and necessary to separate things, for example, good and evil, horse and man, hot and cold, dark and pale. In order to know one thing by the other, we distinguish by their differences (a strategy now familiar in law). Aristotle stated a doctrine about all things being one, would be a doctrine about nothing at all[35]. The longevity of Aristotelian thought stands testimony to his genius. By recognising through difference in physical, spiritual and logical sensing Aristotle afforded a dimension for thought that promoted experimental method. Experiencing and observing particular being, in order to test and better understand, the wholeness of Earth and the universe.

Aristotle revealed physics existing in things observed in opposite states or something in between, evolved from extremes of structure, un-structured or something in between. This provides the base of reductionist design used in contemporary sciences to seek ever more basic building blocks[36]. Aristotle's clear headed reasoning also suggested how new beings came in to being, evolving through change to be something different, which did not necessarily break the

[34] Aristotle (n. 23) p. 22
[35] *Ibid* p. 12
[36] *Ibid* p. 21-2

already established observed rule that nothing can be created or destroyed[37]. The process of natural change is apparent and continuous; the continuity of change infinite[38]. The process of change is relative, determined by the cause of change and the ability to change or be changed[39]; an ongoing process of cause and effect.

Extremes of opposition and the gentler more subtle divisions taxonomising the world recognise observable tensions in difference. For example, Aristotle's division of the philosophic world into the realms of *physics, logic* and *ethics*, revealed difference in thought, between actual and potential knowledge, in a continuity of human thought. Knowledge can be immediately physically experienced, or sensed. Belief or spiritual intuition immediately intuitively sensed. However, the logic of reasoning is quite different, in being both a response to the other two senses and extrapolating the potential of the experience into future time; making reason both cause and impression creating effect.

The evolution of philosophical ideas does not exclude the continual sensing and testing of knowledge; or the testing of boundaries to expand or alter human knowledge. In his separation of the philosophic world, Aristotle recognised continuance of an indivisible whole, (not always apparent in his relayed thought). Reduction helps human beings to experience and observe; it does not exclude reasoned or emergent knowledge. Reduction separates manageable observable testable spheres in the hope that by understanding the separate part, we acquire greater knowledge of the whole. Experimental methodology separating *physics* and *logic* undoubtedly reveals observable patterns of cause and effect, which may be *ethic*ally judged in the relational re-joining of their caused effect; although the *ethical* judgement/knowledge may be exposed/coincide with the caused effect.

Aristotle suggested human beings sense particulars and reason to an understanding of general concepts[40]. Contrary to the oppositional idea of viewing only one or the other, the general or particular, there is opportunity to test the knowledge of the experienced particular against the knowledge of general reason and vice versa.

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[37] *Ibid* p. 29
[38] *Ibid* p. 56
[39] *Ibid*
[40] *ibid* p. 22

Aristotle's beings emerge from extremes of structure, un-structured or *something in between*, for example: good and evil are not absolute; darkness and pale are separated by degrees of light[41]; hot and cold by degrees of temperature, horse and man, we now know, by degrees of genetic difference. Too much philosophic thought concentrates on extremes of opposition and forgets about the ends and many shades of difference in between.

In addition for some the observable truism, that we experience the particular and reason to extrapolate general understanding, is also taken as a too literal a truth. What Aristotle proposed was experimental design; understanding general things by particular sense-able example. Extrapolating from the understanding gained to hypothesise, contemplate or dwell, on whether the discrete understanding does indeed apply or contribute to our knowledge of the whole. The second stage testing of hypothesis is the crucial climatic point; proof or negation, of the experiment to better inform knowledge of the whole.

However, a statistically successful hypothesis is not a truth; it can only ever be an idea of a truth. The statistical probability of an idea ranges from probable to almost absolute certainty, with anything over fifty percent still generally claimed as statistically probable. The particular may be location and context specific or vary over time and all of these variances require mindfulness rather than complacency in testing the general hypothesis. For example, I see my neighbour go out to work at seven each morning for five days in a row. The statistical probability, based solely on these facts, indicates, with some certainty, that she will also go out at seven tomorrow. However, tomorrow is Saturday and I know she does not work at the weekend. Even so, the statistical probability remains. Still there on Sunday, though less probable; the idea re-establishes its truthfulness on Monday.

Keeping experimental design and taxonomy of being in mind I turn to Spinoza, who like Aristotle recognised Earth and the universe as an indivisible whole. Observing the inter-dependence of Aristotle's three types of knowledge Spinoza's 'Ethics' suggest the better human understanding of physical and spiritually experienced nature, the better attuned human reasoning would be to being in the

[41] *Ibid* p. 57

world[42]. The insight of Spinoza and holistic contemplation of ethics more generally, broadens the horizon of the known world, without necessarily understanding, or trying to second guess, the overarching premise.

Spinoza suggested the mind possessed ideas that perceive itself as mind existing, and existing in its own body, as well as, external existent objects and the eternal infinite essence of God[43]. This is the now familiar idea of individual being existing, recognised as separate by its relationship to other objects, which may be other people, individual, group and species being, in a relational connection beyond immediate being. Spinoza launched the platform for what became Pantheist belief; that the entirety of the natural universe composes an all-encompassing God[44]. Pantheist followers included Einstein, (mentioned for his brilliance), Hegel and Wordsworth (who was referred to in the trans-valuation of dignity). While I do not understand this belief; there is no need to deny or ignore the overarching potential of the eternal infinite being of Earth or God. Physical, mental and spiritual presencing in nature also recaptures Heidegger's notion of "worlding"[45].

Like physical senses, spiritual senses are immediate and existential. Beings know what they feel; what they believe. Spinoza suggested that beings come to know the world that they feel through experience, observance and reason, acquiring adequate and inadequate ideas of the world. Experience, the ability to physically and spiritually sense knowledge, extends wider than the intellect; the capacity to reason knowledge. Therefore potential for knowledge is always broader than actual knowledge[46]. Human beings do not and cannot know everything. However, the unknowing, as well as the known potential for further knowledge and lack of certainty between existing adequate and inadequate ideas, all create contestable tensions within human being, which extends to dignity and law.

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[42] White W. H., introduction to Spinoza (n. 27) p. XLI
[43] Spinoza (n. 27) p. 86
[44] OED mid18th century: from pan- 'all' + Greek theos 'god' + -ism < http://oxforddictionaries.com/definition/ english/pantheism?q=Pantheist#pantheism__5> accessed 1st September 2013
[45] Heidegger (n. 12)
[46] Spinoza (n. 27) p. 80

Before delving more deeply into Spinoza and 'worthiness', his adequate and inadequate ideas recognise the disjuncture in the inherent power to sense and subsequent ability to reason knowledge. I suggest this is what causes the objective/subjective tension in the aspects of dignity. General and particular ideas cannot reasonably be the same, although the particular is an undeniable part of the general. This identifies the influential crux of human power; the difference between the extant and immediately sensed spark and the enlightened Platonic self-nourishing flame[47]. The power to sense is irresistible and unavoidable, named by Spinoza as desire; the essence of human being (sometimes referred to as will). However, desire is existential belief and all encompassing; good bad, dark pale; hot cold, positive negative. Desires include the extremes of passion, including altruistic and selfish ideas; my concern for subsumption of human power recognised.

Making dignity oriented choices is crucial to dignity; an idea captured a century before Spinoza. In an oration 'On the Dignity of Man' Mirandola described the "indeterminate and indifferent nature" of human beings who "with free choice and dignity" might fashion themselves to be what they choose[48]. Mirandola set limitless aspiration for human being, encapsulating both the strength and frailty of dignity. The oration does not suggest that we can be whatever we choose to be, but that our choices define us as human beings. The choice to "fashion ourselves" tempered by continuing dignity, societally valued worthiness in being, choice; of whether the worthiness of the original dignity valuation, that determined the human choice, still holds good. The choice to "fashion ourselves" as democratic, peace loving nations, willing to share rather than colonise; requires nations, and their laws, to live that choice. If human dignity remains the choice of the sort of beings we want to be.

From Plato's leaping spark that nourishes itself[49]; to Aristotle's observation of cause and effect, reasoned from particular to general, or the other way round[50]; from the affinity of Stoic belief with nature, Cicero within human nature, Aquinas's with God's nature; to Mirandola's uncertainty in the "indeterminate and indifferent

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[47] Plato (n. 35)
[48] Giovanni Pico della Mirandola , 'On the Dignity of Man' (1486) <www.wsu.edu/~wldciv/world_civ_reader/world_civ.../pico.html> accessed 9th April 2010
[49] Plato (n. 35)
[50] Aristotle (n. 23) p. 56

nature" of man[51]; and Spinoza[52] and Hegel's [53] belief of God and nature combined in absolute unity of God and nature; to the present day trans-valuations of dignity in Waldron and Dan-Cohen for two thousand years this imponderable has been dwelt upon, over-looked, eluding explanation. The imponderable needs to be pondered upon not to try and resolve the conundrum, but to keep it in mind; to question the best way of being and reasoning dignity and law.

Hume put up a convincing argument, as to why reasoned ideas must necessarily follow impression or passions. Hume then followed this with good reasons why reasoned ideas should trump passions (impression). Hume expanded upon Spinoza's[54] adequate and inadequate ideas separating 'impression' or intuitive thought, from 'ideas' in the human mind; the first sensed and immediate, the second mediated. Love, hate; virtue, vice; true, false; right, wrong; are all sensed indivisible impressions. Hume argued for the primacy of immediate impression over subsequent ideas, reasoning that both thoughts are related to external objects to give reason to thought. Impressions, passions and senses relate to objects external to our being to ascertain a truth; so, for example, relate to a bricks and mortar castles, rather than fantasy castles. Ideas and reasons may explain the impressions, but can never create them. Hume argued persuasively that an original fact could not be derived from reason, "reason is and ought only to be the slave of the passions"[55].

In human thought the immediacy of impression, intuition or passions is always subject to a relationship to an object. Both the object, and the impression of the person subject to the impression, can change or be mediated and the initial impression may give way to subsequent impression. Our strongest impressions become facts or beliefs and are the impressions that we believe to be true. Again Hume argued persuasively that a belief is no more than the stabilising coincidence of impression and subsequent idea; the rightness of an idea, is in fact, that we intuitively feel the idea to, in fact, be right; an impression.

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[51] Mirandola (n. 51)
[52] Spinoza (n. 27) p. 29
[53] Hegel (n 32)
[54] Spinoza (n. 27) p. 289
[55] David Hume, "reason is and ought only to be the slave of the passions" *A Treatise of Human Nature* ((1739) L. A. Selby-Bigge ed Oxford Clarendon Press 1896) T II.3.3 p. 415

Hume[56] agreed with Spinoza that sensed ideas[57] are either false or true and can only be reasoned subsequently. Although the impressions may later prove false and therefore no longer be true; there is no in between. Impressions are existential, even if we are only a little in love or a little melancholy; we are in love or melancholy. Ideas are different from impressions, in that, they are neither false nor true. Reason has an impression subject, so reasoned ideas can naturally coincide with an impression, right or wrong, good or bad.

However, both intuition and reason may give rise to subsequent impressions, leading to further choices being made between first and subsequent impressions, which may set up a continuum of impressions. Impulsive passion followed by instant or evolving reason nourished by continuing realisation, drive the leap from impression spark and stoke the idea of reasons flame to challenge, inform and maintain first impressions; mediated by further impressions and idea choices in being. Critical reasoning, for example, fair, just, natural and moral, changes the valuing and therefore the value of the impression. An impression may exist, for example, in a dignity right; but that does not stop dignity, societally valued worthiness in being, guiding the idea choices between that impression being and not being, for example, in the right and wrong impressions upheld in law.

I suggest the unresolvable conundrum of the indeterminacy between impression and idea leads human beings to dignity. Desire encapsulates positive to negative aspects, altruistic and selfish, to inform human being, but in informing/guiding it also creates undeniable tensions in and between different people's desires. This tension exists at the fundamental base of societal power, because the ideas we share in being are not, and cannot be the same, as sharing an impression. Desire is individually felt as immediate and inherent sense. However, the reasoned motives behind, our own and other people's, informing /guiding ideas, creep into our impressions. Desire can be internally altered and externally manipulated. Human experience is therefore a double take of the ideas we are thrown: first, the impression, then an immediate reasoned idea, the valuation of worthiness. This returns us to the section on being; the throwness of being and ideas we are thrown.

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[56] David Hume, *A Treatise of Human Nature* ((1739) Mossner E. C., ed Penguin 1985) p. 289
[57] Spinoza (n. 27) p. 81

Desire allows existing human beings, to alter the incoming, physical and spiritual, senses of themselves and others; for good and bad motive (desire) and either may lead to later contestation. Desire can be limited or excluded, for example, by excess or ignorance, lack of appreciation, loss or inability to share; coincidence with, or admiration of others, or by being short lived and or unreliably or infrequently attainable[58]. Experience allows people to avoid, manipulate and temper the first-hand experience of desire.

This is the root of the tension in over-arching absolute being. Experience can be shared carefully, coercively or cooperatively for another to avoid first-hand, a perhaps harmful, experience. For example, if I pick up a hot cup, straight away I can share the idea; I can tell you that the cup is hot. I might also give you the hot cup, so you have a similar impression of the hot cup. In the first instance I share an idea; the idea can only make sense to you, if you have an earlier impression of hot. In the second instance we have a shared idea of the hot cup based on similar, but not the same, impression. If I repeat the example with a second cup of similar heat, in the first scenario, you are none the wiser than you were with the first cup; you rely on my authority for you have sensed no hot cup. In the second scenario you partially rely on our shared experience, but if you do not touch the cup you also rely on my authority and the truthfulness of my assertion.

As Spinoza recognised, human beings do not need to individually sense every impression, to gain an idea of an impression. If we do not experience the impression, we rely on an idea of an impression, which may be given by people who for whatever careful, coercive or cooperative reason seek to avoid, manipulate or temper our first-hand experience. As we do not experience the impression, we necessarily rely on another immediately felt impression of the authority and truthfulness of the asserter. It is this later impression that can only be (re)affirmed by repeated first-hand or trusted second-hand experience that I suggest human beings test in dignity, societally valued worthiness in being.

[58] These categories are similar to those suggested by Hume in the limitations of pride and humility Sect. vi of Book II 'of the passions' Hume (n. 59) p. 342

If the first person gains from the second persons harm, they may not care or feel inclined to co-operate by sharing the experience; selfish spirit resists the altruistic. Having named, defined, imaged and known the Platonic idea *for itself*, one cannot be compelled to share it; particularly if no one else knows of the idea's existence. Sharing ideas remains a matter of choice. The power to choose vests in the person with knowledge and it is up to them whether they care to share freely, withhold their knowledge, or secure the best price, for their idea. For example, changes in philosophical, physical and political knowledge that evolved and accrued in/to developing the richest countries of the world; agriculture, chemistry, medicine, science and technology can, and sometimes are, (re)shared freely to avoid unnecessary pollution and harm in helping poorer countries to develop.

The existential immediacy of impressions of love, hate; virtue, vice; true, false; right and wrong; does not change the fact that human beings impressions can change, for better or worse, in relation to other beings and objects. Or the fact that human beings know that they, and others, have the ability to manipulate their own and other peoples, impressions. The bombardment of being with a strange multiplicity of adequate ideas or impressions "like the waves of the sea agitated by contrary winds" [59], means that in guiding human being, humans have to constantly adapt to the dignity, societally valued worthiness in being, impression, within the sea of new ideas being sensed in being.

5.6 Matrix of Desire – Spinoza Inspired Aristotelian Experimental Design

Most human beings experience, observe and can reason for themselves, including when reasoning dignity, what is 'societally valued worthiness in being. I return to Spinoza to illuminate a matrix of desires that might help human beings to better understand the nature of being by recognising 'worthiness' in the differences of human nature, by the similarities in common humanly sensed desires. Using Aristotelian inspired experimental design and reductionist methodology, I suggest human beings can separate or distinguish the particular from the general scheme of emotional desires. The general, particular and degrees of being in between; of individuals, groups, species, and beyond, all provide focal points for human being.

[59] Spinoza (n. 27) p. 145

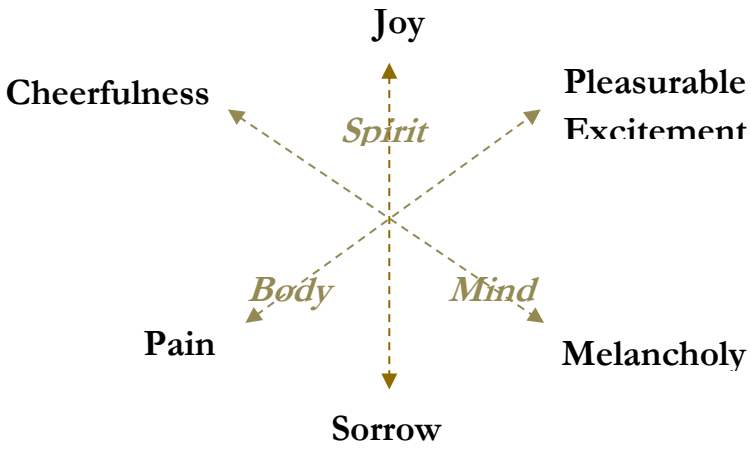
The desires help distinguish different descriptions of human being to recognise dignity, societally valued worthiness in being, in law. The descriptive matrix reveals interdependence in being, dignity and law: the 'spark' of existing physical or reasoned meta-physical impressions of being; the 'flame' of ideas reasoned in law and the determination of dignity, societally valued worthiness in being, that challenges, founds and maintains the changing impression of desirable human being.

Spinoza's surety in the eternal infinite essence or spirit of God subsumed and therefore took for granted the power consequences of human beings over-arching other human beings desire. Spinoza therefore concentrated on the internal individual experience of desire, illuminating the potential for the matrix of desire in the general individual/group sense that might be extrapolated to recognise commonality in a general intuitive species sense. The desires outlined still appeal to common sense almost four hundred years later.

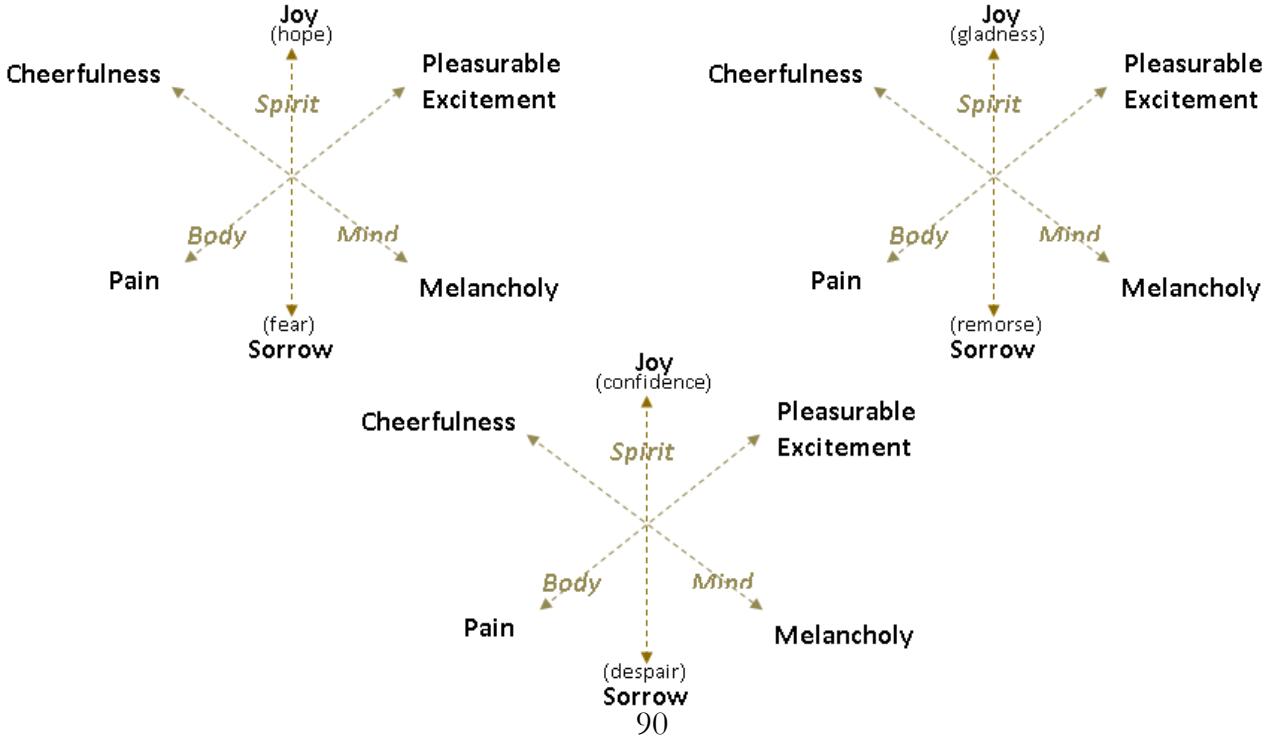
Spinoza suggested human beings sensed desires intuitively. The sensed desires can be recognised on a spectrum of joy to sorrow. Joy marks the passage to greater perfection (of joy); sorrow the passage to the lesser perfection. Spinoza suggested the senses of joy and sorrow are experienced by the cheerfulness or melancholy of the mind and pleasurable excitement or pain of the body. This might be explained in physical and spiritual experience, reasoned in the Platonic mind to nourish further intuitive sense; the original intuitive sense subsequently becoming a complex of intuitive senses naming, defining, picturing, informing, reconsidering and reaffirming the original sense. Each individual, combined and collective bundle of senses can be revealed on a matrix of spiritual impressions from joy to sorrow. The joy/sorrow dynamic can be complimented by physical sensations, from pleasurable excitement to pain, and mental sensations, from cheerfulness to melancholy. The additional dimensions provided reasons that affirm or challenge the initial intuitive spiritual sense, to enhance or diminish the scale of joy to sorrow. The sense of reason and physical experience can mediate joys and sorrows. Spinoza referred to the body and mind senses as unsteady joys or sorrows[60].

[60] Spinoza (n. 27) p. 113

Matrix of Desire – based on the philosophy of Spinoza



Spinoza recognised sensed ideas, including hope - fear, confidence - despair, gladness - remorse, provide opposite ends within the spiritual spectrum of joy to sorrow. One could also use any of the other valuing impressions that commonly occur in philosophy: love, hate; virtue, vice; true, false; right and wrong. Each can be recognised as individually inherently sensed and can be inserted into the 'matrix of desire' to be recognised as a joyful or sorrowful sense. The combination of body, mind and spirit senses included in the matrix gives a holistic idea of impressions of desire. The recognisable dynamic of emotional desires arise individually, but may also be used more generally, to avoid, manipulate or temper first-hand experience of desires for careful, coercive or cooperative means in increased or diminished subsumption of human power in human societal being.



Having populated the 'matrix of desire' and hinted at how understanding human being can contribute to better understanding of dignity and law, let me expand on Spinoza's components in the model. Experience of external (physical, mental and spiritual) objects affect joys and sorrows; so for example, love and hate become joys and sorrows, with external causes; while inclinations and aversions become joys and sorrows with the accompanying idea of some external object[61]. Spinoza suggests the degrees between joy and sorrow are the path from greater to lesser perfection, alluding to, but not naming the perfection of joy (or being). The only other perfection than joy (or being) would be the perfection of desire, but as desire would then be unlimited by reason, for Spinoza, this would be a false or inadequate idea[62].

Logically, the perfection of joy (being or desire) cannot to be realised at the extremes of desire, only between them. Wholeness might be perfection, but as Aristotle recognised this is a theory of everything and nothing, in the ecstasy of ultimate desire, the desire consumes itself. Pursuit of desire starts out as cheerful and pleasurable, but both lack of realisation or overindulgence introduces melancholy and pain. Too much of the same experience quells desire; too little experience cannot inform desire of its own lack. The constant bombardment of human beings with multiple physically, spiritually, sensed ideas, requires reasoned mediation, to avoid the lack, or overload. Sensed impressions cannot be prevented, but they can be excluded or avoided, as outline above, too much or too little input is exhausting or exhausted.

Spinoza suggests the foundational endeavour of virtue is to preserve being[63]. Happiness, and one might add hope, are unsteady joys that exist in the preservation of being. For Spinoza the desire to be is strengthened by fellow beings whose natural desire is also to be. Human beings, who are positive in being; joyful, hopeful, confident and glad, can desire nothing more excellent than the continuance of their being and should as much as possible stand together in one body and mind to seek the common good of all[64]. All well and good, but as so often happens, the glare of positive good overshadows and overlooks the probability that the opposite

[61] Spinoza (n. 27) p. 148-9
[62] *Ibid*
[63] *Ibid* p. 177
[64] *Ibid*

end of the scale is also true and a life full of pain and melancholy is harder to maintain. Human beings who have negative experience in being; a life filled with sorrow, pain, fear, despair, and remorse may not want more of the same. Sorrows disempower people who may be too busy surviving and may not feel able to stand together in one body and mind to seek the common good of all[65]. Joyful life might not be attainable, and people may have no control over the life they were gifted. Cases of vulnerable children and adults, abused, killed, neglected and tortured by carers and people in positions of power, appear all too frequently in the news.

Human beings may hear the collective ethical, virtuous 'voice of dignity', but are also vulnerable to other people's dignity assertions. The power of some people to sense, joy hope, confidence, gladness and pleasure may come at the expense of others sorrows, pain fear, despair and remorse. People are also vulnerable to other people's transferred sense of joy to sorrow, which includes the inherited sense of advantage and dis-advantaged in the accumulation of rights and historic legacy of laws limitation and exclusion. The tragic lack of joy, and any lack of joy is tragic, may be beyond group or individual control, but that is no reason not to try to increase joy and reduce sorrow in human being.

The malleability of human desire revealed by Spinoza; is that reason changes desire so, anything which might increase, diminish, help or limit the body's power of action, the idea of that thing will increase, diminish, help or limit the body's power of thought[66]. The ability to reason action places human thought in a direct relationship with people's power to act; all very well if altruism triumphs over selfishness in governing beings. However, the Chapter One news and double edged sword that Feldman recognised in the subjective objective aspects of dignity justify my concern with Hegelian absolute power. Human beings are subject to incoming conditioning of sensed or reasoned ideas and are therefore vulnerable to the bad and good reasoned senses of other human beings.

I suggest the matrix of desire provides a better model for human beings dignity, societally valued worthiness in being, in law, than offered in other law theories. The

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[65] *Ibid*
[66] Spinoza (n. 27) p. 107

matrix desires embraces a number of goods catalogued and repeated by philosophers down through the ages. However, in view of what is to follow I am particularly reminded of Bentham's[67] more recent pain pleasure utilitarian calculus. I suggest the new matrix supports careful and cooperative, mental and spiritual dimensions that can be used alongside recognised impacts of physical coercion to better understand the happiness of human beings in bringing 'the greatest happiness to the greatest number' of people in society. The model provides a better description of the desires of governed; and in the governing roles of being and the guiding desires, guided by rules, that may become normative ideas in law.

The law ideas, that impact on people's first-hand experience of desires, impressions, have a human locus, revealed in incidences asserted in dignity, the common sense denominator of societal being. The matrix illuminates recognisable human emotions that allow people to evaluate their own emotions alongside a general picture of reasoned emotions, which may be asserted as dignified objects of law. Understanding the general picture can illuminate spaces capable of accepting tolerable difference within the picture; dignity can hold that place to introduce a broader understanding of humans in being. In a society whose experience shows that a combination of care, coercion and cooperation provide the basis of shared human being, the above 'Matrix of Desire' provides a more comprehensive understanding of human being than theories that only offer one sided imposition and recognition of law in a coercive system of pain, pleasure and punishment.

The emphasis on coercion may once have been necessarily self-serving; in subsuming society to the sovereign, but it is now out of date and unnecessarily overplayed. While coercive ideas undoubtedly exist, for example, in the jurisprudence of command[68] and controlling normative[69] order theories, I suggest that the coercive element is exaggerated and misplaced. While some people may

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[67] See Jeremy Bentham *An Introduction to the Principles of Morals and Legislation* (Burns J.H. & Hart H.L.A., eds, first published 1970, Clarendon Press Oxford 2005)

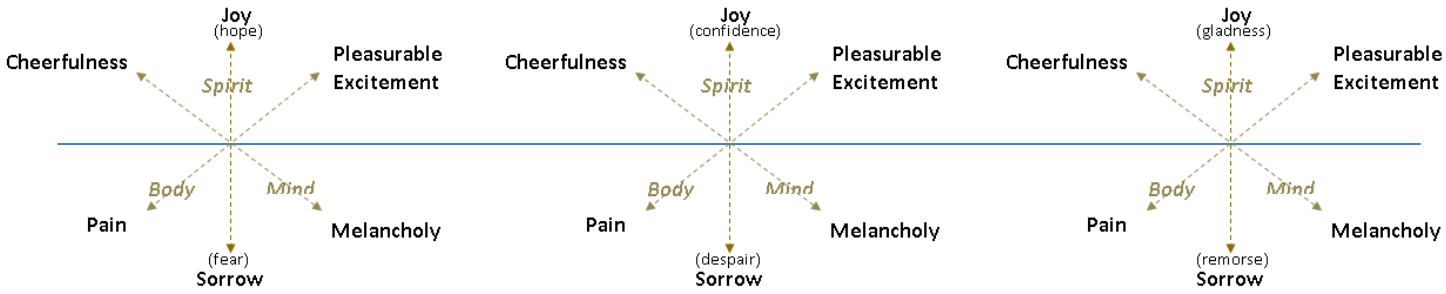
[68] For example, Bentham *ibid* and John Austin *Lectures On Jurisprudence Or The Philosophy Of Positive Law Volume. 1.* (Campbell R (Ed) Reproduced by Bibliolife, Amazon.co.uk, Ltd., Marston Gate, 1885)

[69] For example, Waldron's idea of 'respectful coercion' proposed in the last of a series lectures on dignity given at Oxford in May and June 2013 or Joseph Raz 'The Normativity of Law' delivered in three lectures: - Autonomous Normativity: The Framework; Elusive Virtues: Rule of Law, Consent, Democracy - Does Democracy Make Morality? Democracy, Law without the State; 22, 23 & 25 April 2013 *The Quain Lectures* University College London

respond to coercion other people quite reasonably regard it as a challenge it. Offering options of coercion or coercive care[70], underestimates a far richer potential in law, as the locus and source for guidance, guided by the continuous societally informed dialogue in the ebb and flow of how human beings choose to be.

Tensions in good and bad manipulations of intuitive human power are tested over time, by the rigour of observation and experience, as suggested by Hume[71]. The actual coincidence of individual and group impression and reasoned governing idea sees and recognises reason's ability to limit sense. The multiplicity of impressions fluctuating between joy and sorrow, inform and are informed by multiple spheres of being, to guide human being. First and second hand experience from joy to sorrow; pleasure to pain, cheerfulness to melancholy, combine to guide human beings to select the most adequate ideas to inform our being, always in "ignorance of our future and destiny"[72].

Placed on the 'matrix of desire' the critical balance of joy and sorrow is the meeting point that tips the balance between joy and sorrow. A sense of joy or sorrow does not obscure any impression of the advantage cost of joy. Positive advantage secured to the common sense of good in pursuance of the common good; including Spinoza standing together in one body and mind to together seek the common good of all[73] and the good of Hegel's absolute being, can be seen in their human being glory, with no negative cost to society.



However, any advantageous joy secured at someone else's sorrowful past, or continuing sorrowful expense, is revealed as a cost to the stability of care, coercion

[70] *ibid* ; Brazier & Bridge (n. 20) offering options of either 'coercion or care' both inspired and bothered me.
[71] Hume (n. 59)
[72] Spinoza (n. 27) p. 145
[73] *Ibid*

or co-operation holding the societal agreement together. The tipping point on the sorrowful path from joy to greater sorrow recognises the inevitable instability caused in individual being and any group or society to which they belong. Because the impression of sorrowfulness in common sense reasoning suggests the common good is not looking after their interests, it makes sense that individuals or groups will look elsewhere and be more susceptible to other ideas of being. If the society you are in only offers pain and melancholy, in the fear, despair and remorse of sorrow, what is there to lose?

The tension in the relationship between intuitive immediate impressions captured and released by reason's ability to limit sense, keeps returning me to the crucial point in the contestable evaluation of dignity. The imponderable that needs to be pondered upon not to resolve the conundrum, but to keep it in mind; to question the best way of being and reasoning dignity and law. It is the same point that bothered Feldman in what causes the objective/subjective tension in the aspects of dignity (and also the law). Law is an idea; a fantasy castle of objectified impressions of common governing sense of human desire, vested in one or many, dependant on franchise. Past reasoning of this governing impression exists as a series of objectified guiding ideas in the law.

However, law as practically reasoned guiding ideas cannot do more than posit those ideas as ways to be. Law arrives as an objectified guiding idea to individuals and groups who have their own impressions. If the law ideas coincide with the impression beliefs of the people in society and are, in fact, valued as having 'societally worthiness in being', the guiding belief will be temporarily realised, which may in fact last for a very long time, and become the objectified subject of law. The law can be recognised in concretised/frozen incidences of dignity, societally valued worthiness in being, mirrored in complementary roles and guiding normative rules of law; but they remain ideas, subject to impression.

The governing ideas of governing law are part of a much wider sensing of being. The law may offer guidance and attempt to normalise a particular way to be, but the law is not the only word on the matter; the be all and end all of being. The collective 'voice of dignity' impression: of love, hate; virtue, vice; true, false; right,

wrong, experienced by individuals and groups in multiple spheres, is directly and immediately sensed in internal and external relations to particular beings or objects and by reason. Whatever law's normative intent the law may not be taken as the objectified given; it may become the subject of challenge and criticism. The ability to challenge the law is subject to individual and group ability to interact with the law. The common, law, sense of dignity, societally valued worthiness in being, is dependent on its society, which will determine whether a challenge is possible or the individual or group's sense of dignity is simply to obey.

Reasoned ideas of law may be sensed and temporarily objectified. However, accepting the power of reason to cause sensed impressions, rather than actual impressions, re-blurs the distinction between impression and idea. The distinction between impressions and ideas is nonetheless vitally important, because it illuminates the foundation point of dualistic law, revealing the point of uncertainty in the objective/subjective tension, in dignity and law. Whether dignity, societally valued worthiness in being, will support the inclusion of the objectified subject in law, or make a subject of the object of law by recognising a challenge to potentially exclude it from protection of law, is dependent on dignity.

Accepting the good and bad potential of overarching independent ideas I acknowledge that the experience of human being can, and does, help to inform the lives of humans in being. However, I recognise that experience is not static and argue that even if there is overarching authority in thrown/gifted guidance; that this is not an adequate reason to abdicate the responsibility for contemporary human being. It does not make sense for the elusive potentially of being to remain shackled to a past, possibly expired, sense of overarching dignity, when emergent impressions of reasoned dignity are equally as likely to have been gifted or thrown as the original impression. The contested knowledge of human being is ever subject to further (re)testing and alteration by the continuum of sensed experience. The continuing general experience of external existent objects and beings continually processed by internal reason, may subsequently be externalised and shared in the continuum of human being.

I am not denying that governing law has purposive top down normative intent to guide human behaviour and, of course, a great deal has been written on the topic[74]. I suggest human impression, including dignity impression, remains inherent within human beings. Hume's 'Treatise of Human Nature': 'being an attempt to introduce the experimental method of reasoning' recognised that there might be very good reason, why factual value based reasoning, legal or otherwise, should be followed. Impressions of weakness and slavery to passions (impressions) recognised in human vulnerabilities from vice to virtue in the human condition makes good sense of considering others pre-sensed reflection and reasoning. In both law and society, yet again, we hear the lure of the gifted 'voice of dignity'. Hume argued persuasively that the illusiveness of fact and value supported a fabrication of law, which enabled humans to rely on the rigour of observation and experience in recognising coincidence of their own impression, with reasoned idea[75].

Hume's separation of impression and ideas supports a strong argument for the assertion of dignity in law. If we take Hume's argument to dignity; 'societally valued worthiness in being', as a valuation, cannot be reasoned to be an original fact. Yet, the objectified sense of outrage[76] after the fact, of colonisation and world war, is no lesser sense for coming after the genocidal fact. The fact, that scenes of oppression and genocide outraged the common sense dignity of mankind determines why we ought to attempt to avoid such outrageous behaviour in future. The outrage became a UN based common sense, a societal impression that coincides with the ideas of the wrongs of war, which can, in fact, remain conjoined to the secondary impression of outraged dignity for a very long time.

5.7 Dignity Valued

To understand why dignity is valued one sensibly turns to the customary, historic and traditional uses of the word. The question inspired by Feldman, of 'how the modern idea of human dignity relates to older ideas of dignity', now looms large. I suggest old and new assertions of dignity are directly related. From the dignity of sovereigns claiming the 'divine right of kings' in a God given right to rule, to the

[74] Please see chapter Seven
[75] Hume (n. 59)
[76] The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948 available at www.un.org/en/documents/udhr/ last accessed 19th Aug 2010

modern day claims of inherent, perhaps God given, individual and group rights, recognised through and beyond species level; the asserter of dignity, societally valued worthiness in being claims recognition in an attempt to guide, mould and encourage human acceptance of a particular design. Dignity should be recognised for what it is and has always been; the discriminating distinguishing assertion conferment of a person or thing intended to be recognised as worthy of being.

The call to recognition of dignity, in both new assertions of dignity and objects already deemed of 'societally valued worthiness in being', has a normative agenda. Dignity relies either on bold assertion of arrogant confidence, for example, the assured assertion of sovereign dignity; or, more reasonably, on complementarity of careful, coercive or cooperative assurance, of the assertion being accepted, for example in the dignity of the elderly or of not being tortured. The dignity assertion is that the norm is a good way to be, enforced, supported or encouraged by reason from the experience of being, or belief in being beyond. The same is true of all dignity asserters; a fundamental claim of recognition of worth is the crucial point to the assertion of dignity.

Normative assertions take existing societally determined and dependant knowledge for granted, when they claim to know what society 'values as worthiness in being', but they rely upon and over-look earlier determinations, while attempting to normalise a position that may not yet exist, in a world that constantly changes and evolves. For example, in the Dignity Literature Review all the dignitarian theorists recognised subjects of dignity determined by societal valuation. The mistake of many of these authors is that they then attempt to pin dignity down to their own sense of worthiness; be that fair, good, equal, just, moral or right, and to substantiate incidences of dignity. This misunderstands the dynamic tension in dignity. The arrogance of moral confidence does not negate the guiding importance of the assertion. What it does is to overlook the value of the dignity assertion, allowing elusive, stupid and meaningless scepticism to creep in and undermine the practical reason that gave rise to the confidence in assurance for the dignity assertion.

The positive ferment of undetermined dignity, societally valued worthiness in being, is where the light of hope and potential to change undesirable being comes in to

being, and law[77]. I suggest the (re)assurance of dignity provides practically reasoned guidance to being; the reliability of the guidance known to be, dependent on the transparency of knowledge and motive of the societal giver. Dignity, as valued guidance for human beings by human beings, founds a firmer footing for the invocation and continuity of dignity; the normativity of dignity (re)assured by continuous (re)affirmation of dignity.

The suggestion of overarching law that has no recourse to (re)evaluation by the human subjects, who the law is intended to guide, mould and support, is seriously misguiding and misguided. Because the very human reasoning that is required to reason obedience to the over-arching law is clearly premised in human agents who are capable of independent reason. I suggest that even where coercion is the existent form of governance, it is better informed if it cares for and co-operates to identify and coerce spiritual unity with its subjects, rather than over-riding and subsuming them. Even the normative assertion of a despotic regime needs a complicit minority cared for sufficiently and co-operating adequately to identify and overcome any resistance. I think of the well fed guards and military posturing of the Republic of Korea controlled by Kim Jong-un; a country known to starve its citizens, while the world respects the integrity of its societal borders.

In a world of widening franchise, increased access to, and sharing of, knowledge, the design of dignity, and law, can change to recognise the work of care and co-operation as well as coercion. Instead of accepting the dogmatic idea of one-sided coercive normative governance we can see societies coming together for all manner of careful, coercive and co-operative reasons. It seems totally unnecessary in a highly communicative, increasingly global, contemporary society to have to maintain a myth of elusivity around an evaluative term like dignity, societally valued worthiness in being, rather than simply stating the reason why one asserted dignity was recognised as worthy of being, while another one was not. The latter allowing the legal criticism inherent in the asserted claim to be re-considered and, depending on the reason for the dignity assertion failing, perhaps later re-claimed. Dignity

[77]This reminds me of Leonard Cohen's 'Anthem', which prefaces this thesis lyrics available at Leonard Cohen, (The Official Website) <http://www.leonardcohen.com/us/music/futureten-new-songs/anthem> accessed 14th June 2014.

action, followed by self-reflective evaluative dignity reaction, is precisely what determines the terms of governance between governors and governed.

The legacy of dignity, societally valued worthiness in being, wisdom carried in the 'voice of dignity'[78] provides a continuing stream of guidance from the guiding spirits of human beings who have existed before; to the individuals, families, groups and societies whose knowledge and wisdom continues to inform contemporary societies of things valued as worthy in being. From the lively analogy of dignity offered by Foster, as the existential motion in a circling wheel of high kicking dancing girls, or a choir or orchestra, whose glorious sound only exists in the momentous coming together of choir or orchestra in the relationship of a live event; a chorus of dignity wisdom is constantly being gifted and evolved. Dignity wisdom is there for the taking, helping to guide human beings trying to fathom, and contribute to, being in their own contemporary existence and future world. The momentousness of societies, from flash mobs, to the established institutionalised convenience of international law, is dignity that its society is 'societally valued worthiness in being'.

5.8 The value of Dignity over Absolute Spirit, Being or Will

The valuing of dignity, outlined above, complements the continuing ideas of inherent existential human being, or will, and brings all reasonable ideas for absolute spirit down to Earth; without denying the wider consequences of beyond human being, sensitive to nature, which might be God's nature. My reason for preferring dignity is two-fold:

- First, in each case, of absolute spirit, being or will, there is no tangible limit to its existence, either in or beyond being; no end to the altruistic or selfish potential which may lend each to human tyranny. While I have little doubt of physical, reasoning and spiritual being over-arching human being, any human claim or assertion of human knowledge of absolute being, spirit or will, must be viewed with some scepticism. The over-arching reflection, possibly trans-valuation, holds an inherent valuation of dignity. The knowledge claim bearing the confidence of past (dignity assertion and) societal recognition. Dignity offers

[78] Charles Foster *Human Dignity in Bioethics and Law* (Hart Publishing, 2011) p. 3I

and claims more; in the continuing (re)assurance of dignity, societally valued worthiness in being, in the light of contemporary physical and reasoning change that recognises only partial spiritual knowledge.

I accept the exchange of ideas around absolute spirit, or will, necessarily enlighten the dignity discussion and interdependence of being, dignity and law. I like the focus of dignity's grounded immanence. While dignity shares the existential quality of absolute inherent potential, it is a recognisably human assertion of worthiness in human being. Like being, spirit or will, dignity, can be manipulated, contested and exclusionary, and therefore impose the sacrifice of dignity deemed to be unworthy. However, dignity is always held in check by the relational context of the society of the dignity assertion.

Dignity is held captive to contemporary judgment of human reason. Dignity, societally valued worthiness in being, sensibly and reasonably changes in the sense and reason of changing human society and the existential capacity of what that society actually values in its being.

- Second, as evidenced above, the 'voice of dignity', the common-sense language that brings dignity, societally valued worthiness in being, is not a particular voice; it is the collective of many voices evolving naturally from the continuous toing and froing of human experience over time. I suggest evolving naturally in two senses, first as an existential fact, that words evolve naturally through sharing in common use; second, to acknowledge that unfolding knowledge is in one sense derived from the universal laws of nature[79]. The 'voice of dignity' arises in human experientially based judgment. When a prisoner is tortured, or a person is discriminated against, or a child, elderly or vulnerable person is neglected, the common sense natural language of the 'voice' is not of an affront to the person's absolute spirit, being, or will, but to their dignity.

[79] The idea of laws evolving from nature is discussed in Chapter Six. See the introduction by Don Garett in Spinoza (n. 27) p. L11 for an outline of the Pantheist idea that all knowledge comes from the experience of thing in nature.

5.9 A Temporary Conclusion on Dignity

In keeping with Plato's taxonomy of reasoning knowledge I recognise my impression of a collective idea of dignity. My impression of dignity is of an idea that has been named for many centuries. Throughout this Chapter I have tested the definition I offer to the name dignity, as 'societally valued worthiness in being'. I explained the words in the definition and have demonstrated that the definition withstands repeated assertion and is consistent with dignity's previous definitions. The image of dignity formed has been consistently maintained over time, as an asserted image of positive status (even if some instances cannot in the long run bear scrutiny), of upright or upstanding demeanour, entailing the adoption of an ethical or virtuous way of being. The named, defined, image provides a contemporary impression of dignity that maintains a convincing image in the glare of light coming from past impressions and contemporary ideas of dignity. Dignity has long been posited and recognised. Dignity denial does not reasonably bear scrutiny.

In outlining dignity I have elaborated on four of the five questions inspired by and in response to Feldman. I have revealed multiple spheres of being, within and beyond human being, which might explain the significance of multiple levels of dignity, including individual, group and species asserted in law. In the next chapter I turn to law to reveal multiple levels in law, before I address the final question as to whether dignity can be meaningfully applied in and to law. I have suggested how modern ideas of human dignity relate to older ideas of dignity. I followed the unresolved philosophical debate of the indeterminate leap from sensed impression to reasoned ideas to recognise the cause of the on-going objective/subjective tension in the aspects of dignity (and the law).

The power of dignity arises in the valuing capacity inherent in each human being. It is this immediate common-sense of 'societally valued worthiness in being' that I advocate for dignity; the momentous impression of contemporary worthiness, informed, but unfettered by past judgement. Valuing may coincide with, or be recognised as subsumed within a wider collective, but the capacity to value cannot be transferred. The experience of collective valuation belongs to no one and ever remains existentially emergent.

Experience of dignity manipulation, contestation and exclusion is recognised as human being happening here on Earth (whatever the consequences in/of beyond Earth being). There is no good reason to abdicate the responsibility for knowingly bad human being to an elusive absolute beyond. Absolute, past and future being are just that; they guide and motivate, but cannot replace the existential experience of human being here and now. The reasoning of successive generations in what they experience, learn, know and observe (see, for example, Aristotle and Linnaeus below) contribute to the continuum and guidance of being. However, extant human beings are responsible for the action, and inaction, that they individually contribute, as groups and as a species in 'living the dash' (in my case 1961 – to whenever I die) from the beginning to the end of their own being. Overarching absolutes may explain some human reasoning, but it cannot take responsibility for our individual/group being.

5.10 A Return to the Ephemeral Analogy

All physical beings, humans, mayflies, and indeed living things (chickweed) develop survival strategies. Within the species sapiens (in the order of primates, suborder: anthropoidea, family: hominidae, genus: homo – the Linnaean taxonomic system premised on earlier Aristotelian observance), positive self-interested positioning of individual, and familial, social, national, groups, is strategically positive for the human species, genus family order etc.; if all individual human beings and all groups of human beings excel at human being, it is a truism that it is good for human being. Similarly for all reasoning beings, positive self-interested reasoning that works for one individual, familial, social, national, group, can be reasoned as strategically positive for the human species, genus family order etc.; if all individual human reason and all groups of human reasoning excel at human reasoning, it is a truism that it is good for human reason. Plurality of reasoning minds provides more reason; not by what they reason, the product of their reason, but by their very reasoning.

I suggest reasoning dignity, and in turn law, can be viewed as subsets of that reason. Positive self-interested dignity 'societally valued worthiness in being' reasoning that works for one individual, familial, social, national, group, is strategically positive for the human species, genus family order etc.; if all dignity 'societally valued worthiness

in being' reasoning and all groups of dignity 'societally valued worthiness in being' reasoning excel at dignity 'societally valued worthiness in being' reasoning, it is good for human dignity 'societally valued worthiness in being' reasoning.

In elaborating multiple spheres of human being, the potential for multiple ideas of dignity, general and particular, are revealed. Initially in a multiplicity of ideas of what it is to be human, the physical aspect of being; but in being shared with other people in the mentally reasoned ideas of what we intuitively (spiritually) consider to be worthy in human being. I suggest this can, should and does premise what is, or should be law. In the remaining chapters I refocus my attention to law to consider whether incidents of dignity can, in fact, be pinned down, ever mindful of the wider human dignity 'societally valued worthiness in being' reasoning strategy.

Before I leave the mayfly analogy I want to bear in mind, just as it was with external experience and observation of the mayflies the fact that I might (quite literally) pin-down a beautiful exemplary specimen of dignity or law today does not mean that there is no other dignity or law. Or that another incident might not be recognised or distinguished tomorrow. If I have, in fact, pinned down a specimen of dignity or law I will have hastened the destruction of the specimen. Because while the specimen was emergent it appeared an exemplary specimen (all I's dotted and T's crossed) yet now it is an object of dignity or law it is subject to the challenging environmental of application, where it may be challenged, interpreted and perhaps decay.

Chapter Six – The Elusiveness of Dignity in Law

6.1 Different Spheres of Dignity/Being, Leading to Different Spheres of Law

The recognised tension in the objective subjective aspects of dignity captures the give and take in the etymology recognised in my own and earlier definitions of dignity. The elusive indeterminacy of being, dignity and law, highlights the crux not just of dignity evaluation, but any evaluation. Recognising difference in the general and particular ideas of conceptual experimental design as the plurality of potential differences between particular ideas and impressions means that particular ideas might sensibly reasonably thoughtfully change earlier general ideas and impressions.

The problematic tension of evaluation is as old and well recognised as the design. Any incommensurability in general and particular ideas inevitably gets caught on the evaluative (dignity) cusp of sensed and emergent impressions (of being) reasoned in ideas evolving (in law). the essential contest in the elusive indeterminacy of dignity in being and law is precisely why dignity is so important, because the evaluation of dignity sensibly reasonably thoughtfully changes general and particular ideas and impressions of law.

The focus now necessarily changes from dignity to law, because the jurisprudence of particular laws has been severed from the general idea of law. The scoping exercise (of Austin) that purportedly severed the particular example from the general law is discussed in the next chapter. The reasoning elusiveness of dignity (evaluation) needs to be celebrated and recognised to explain how and why it is meaningfully applied to law and that cannot be done in the confines of a jurisprudential picture that already excludes the evaluative dignity reasoning of law from the law picture. I will return to whether dignity can be meaningfully applied to law in Chapter Eight.

In this chapter I discuss essentially contested concepts, including being, dignity and law. Inspired by William Twining to recognise the law in context; the vital importance of maintaining the general pictured endeavour of law; what and who is law for, when reasoning particulars of the law.

The tension in experimental design existed before Aristotle[1] recognised being in extremes of opposites separated by everything in between. Heraclitus[2] had suggested the existence of entities characterized by pairs of contrary properties, seeing unity in the opposites; in the path up, being the same as the path down. Heraclitus also recognised the temporal element of ever-present change in the universe, famously stating no one steps into the same river twice[3]. Meaning that, one may step into a familiar and readily identifiable river, but because of the environmental impacts, of shifting sands and flowing waters, the river constantly changes. The evolving river can be recognised as a particular river, but the river is not the same. The same is true of being, dignity and law. The shift and flow in the continuous changing values in/of human ideas of dignity and being are constantly re-determined in a positive continuum of law. Law can be recognised as a particular law, at a particular time, but any change in the law is evidence of the law constantly changing.

The problem is not simply a problem of elusiveness, in or of, dignity, but of change; the changing values, in or of, being, including the changing values recognised, in or of, law. Like dignity and being, the elusiveness in/of law is compounded by the scope, or level of law, and the tensions between sometimes competing, always contestable, concepts and contexts of law. However, if we accept the normative purpose advocated for law, as 'human survival and social control'[4], a phrase and intent often repeated in jurisprudential theory dignity has a fundamental role to play. Because law premised as 'human survival and social control'[5] assumes surviving as worth being and worth being controlled.

6.2 Different Spheres of Law

To bring dignity more clearly into the picture of law we need to take a closer look at the different spheres of law. However, mindful of the tension in dignity and law's

[1] Aristotle., *Physics* (Bostock D. & Waterfield R. tr, OUP, 2008) p. 21-2
[2] (c. 535 – c. 475 BC)
[3] Plato., *Plato's Cratylus* (Jowett B., tr, Actonian Press; [Kindle Edition] 2010) 402a
[4] The phrase 'human survival and social control' was taken from the repetition of these ideas in the work of Hart, Fuller and Raz, examples included in Appendix 5. The terms are also repeated throughout most jurisprudential texts.
[5] *ibid*

endeavour we need to hold the ancient wisdom of Heraclitus, recognising that both river and law's being are shaped by the environment around them. In contemporary law Twining spent an illustrious career recognising variety in law and setting the law in context. From the 'Great Juristic Bazaar'[6] where Twining set out stalls of different legal theories competing to be heard in law; to an exposé of 'How To Do Things With Rules'[7] through normative law, to the sociologically enlightened exploration of alternative ways for law to be in 'General Jurisprudence'[8], Twining has created a very broad picture of law.

Twining describes the general flow of ideas that inform law as 'talk about law' reserving 'law talk' for particular discussion of existent law in the residual continuums of 'the law'[9]. 'Law talk' of 'the law' is necessarily shaped by 'talk about law'. Twining laments the fact that much contemporary and twentieth century jurisprudence focuses on 'law talk' and hankers for a return to a broader 'talk about law' in which to situate 'law talk'. It is with Twining in mind that I map my understanding of law before suggesting a picture of law that accommodates most legal theories and reveals places for the assertion of dignity.

6.3 The Dignity/Law Bazaar

First, in setting out my dignity/law bazaar, I am not going to limit myself to a particular idea of dignity, or law, rather I advocate dignity as the location and evaluative currency of the law market in order to re-model understanding of law's bazaar. I accept some aspects of dignity and law are necessarily elusive, contestable, complex and vague. The natural continuum of law means ideas, of dignity and law, slip in and out of law's recognition in the competing concepts and contexts of law; dependent on robustness of dignity to (re) gain recognition. Like the loud mouthed stall traders in any bazaar, every day dignity calls society to sample law's wares; the essential pre-requisite of law. A law populated by practitioners and theorists, legislators and judges, who all turn up to peddle law's wares.

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[6] William Twining *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* (Dartmouth 2002) pp. 365-381
[7] William Twining & David Miers *How To Do Things With Rules* (Cambridge University Press 1999) p. 131-135
[8] William Twining W. *General Jurisprudence* (Cambridge University Press 2009)
[9] Twining & Miers (n. 7) Appendix III p.422-3

I am suggesting dignity is the fundamental pre-requisite in all concepts of law. I do not seek to undermine or compete with theories of positive law, or equal[10], just[11] and moral[12] concepts of naturally evolving law; quite the contrary. I regard dignity as positive and believe dignity offers a solid foundation for equal, just and moral law; a foundation often evidentially lacking, which sees equal, just and moral values wither from want of such foundation. Contrary to ideas of equal, just, moral, naturally evolving laws at odds with positive law[13] I suggest that these values are essential to determine positive law, if we choose to value human, rather than some other dignity. Nor am I denying the violence of law; again quite to the contrary. I am suggesting we recognise the violence of law; by listening to law's society, to make better law and better society, and avoid recourse to war.

The dignity I refer to is the common sense dignity evidenced (named spark) in Chapter One; defined in Chapter Two, illuminated in Chapter Three and (nourished as a flame) recognised in the practical reasonableness of 'societally valued worthiness in being' in Chapter Four. Dignity, recognised individually, locally, nationally and or internationally as dignity; even where the incidence of dignity is not recognised as a valid dignity assertion beyond the local context. Dignity that is aspired to, deferred to, promoted, pursued, revered and supported; often as noticeable by its absence as by its presence. The dignity I advocate is human dignity; the common sense of inherent human dignity. The inherent individual human potential recognised in the positive aspiration advanced by the UN[14] as the basis for founding peace in the world. An idea (reminiscent of Plato's spark leaping to flame[15]) revealed in the founding UN documentation as an experimentally constructed leap of faith, in and of nations', reciprocally upholding human dignity.

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[10] Jeremy Waldron consistently advocates an egalitarian view of law. Please see bibliography for full listing of Waldron's articles. For recent examples see, Waldron J., 'How Law Protects Dignity' (Cambridge Law Journal. 2012)

[11] John Rawls *A Theory of Justice* (first published 1971, Harvard University Press 2003)

[12] Many law theories suggest the law should be moral, for example, see Lon Fuller *The Morality of Law* (2nd edition Yale University Press 1969); and Stephen Darwell S. *The Second-Person Standpoint: Morality, Respect and Accountability* (Harvard University Press 2009)

[13] Scott Veitch Emilios Christodoulidis & Lindsay Farmer *Jurisprudence: Themes and Concepts* (2nd, Routledge, Abingdon, Oxford. 2012); Denise Meyerson, *Understanding Jurisprudence* (1st, Routledge, Abingdon, Oxford 2007)

[14] The UN Charter is available at www.un.org/en/documents/charter last accessed on the19th August 2010

[15] Plato (Epistle VII 341 c4-d2; p531) in Giorgio Agamben 'The Thing Itself' in *potentialities: Collected Essays In Philosophy* (Stanford University Press 1999)

I recognise that human dignity has rarely been the dignity that societies choose; which is precisely the reason why human dignity should be celebrated and championed. Human dignity offers hope; the vision of the UN aspiring to encompass all human beings as equally valued was, and still is, contextually set in a very divided and unequal world. The idea of human dignity is complex, expanding and difficult to achieve. And yet, in 2014, sixty-nine years after the UN infrastructure was founded, the organisation still holds together, committed to the aspiration to pursue peace in the world.

6.4 Mapping the Law

Twining used the analogy of the Bengal Archipelago, overlaid with a list of essentially contested levels of law to suggest a 'suitably vague' starting point[16] enabling themes for discussion of what law could be. Tully similarly combines the magnificence of Bill Reid's carving of a characterful, if somewhat overpopulated, Haida Canoe[17] using the title 'Strange Multiplicity' to aptly suggest the intricate complexity of describing law[18]. Twining and Tully both assume a background canvas against which patterns of laws can be recognised and discrete examples of law identified. Twining's archipelago analogy illustrates large, small, old, new, and transitional landmasses, shaped by waters/laws of varying size, current and strength. The analogy recognises: the temporality of fixed boundaries; the unavoidable interaction between water/land, water/other water and land/other landmass; and the error of focusing on the water's surface appearance, which obscures the complex nature of hidden currents and depths.

Every time I hear Twining's criticism of the narrow 'country and western' scope of much contemporary jurisprudence it reminds me of the old adage; he likes both kinds of music, country and western[19]. Like Twining, I have more eclectic jurisprudential taste. Law, like music, has me yearning for classics, awed, mystified

[16] Twining (n. 8) p. 67-70
[17] The Haida Canoe is a large carving; the original Black Canoe is now displayed outside the Canadian Embassy in Washington D.C a copy is exhibited at Vancouver International Airport. The carving depicts an overcrowded boat including characters representing some of the clans of the Haida, a First Nation native to Haida Gwaii, which is also known as the Queen Charlotte Islands on the Canadian North-west Pacific Coast.
[18] James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995)
[19] Twining refers to the Country and Western Tradition of Western legal theorising as vulnerable to charges of 'parochialism and ethnocentrism' see Twining (n. 8) p.10

and romanticised by artistic impression, lost in the flow of the rhythm and rudely awakened by the beat of a drum. Law has long been 'in the mix' it is time to jazz it up with global roots, African rhythm, Eastern wisdom and Southern soul. To recognise law for what it is, informed by people, energized by culture, community and religion, engaged in rap with urban vibe, listening to folk and country[20].

Twining's law/water analogy can be extended further to recognise law as a watershed, revealing the cyclical power of the nature of law/water. Law/water may inevitably flow downhill, but law and watercourse are powered by the accumulation of individual human power and droplets of water. Context specific law(s)/geographically discreet watersheds undergo constant change, altered and eroded by short and long term events. For example, challenges to morality/weather cause regular and continuous change in the topographic landscape of law/land, for example, from laissez-faire to the 'good faith' and 'reasonable actors' of contract law. Long term societal threats, for example, terrorist threats/temperature rises lead to acts against terrorism[21] and climatic change.

From down falling precipitation, water washes over Earth's surface, displacing soils, relocating minerals, nutrients, live and dead beings. Percolating through cracks and fissures of apparently solid rock, to seep or burst from hillsides in streams and rivers and rising in ponds, springs and aquifers. Slow moving glacial ice, frozen for millennia, carves through apparently solid mountain rock to calve from glaciers. The icebergs that calve create colossal waves, due to their heavy weight and initial submergence, raising water levels to further erode the rock, before being borne away to melt in oceans and flow freely once again as water. At the other end of the scale the temporary existence of water, in fleeting puddles and ephemeral ponds, is quickly colonised by long dormant, opportunistic life, that with equal rapidity ceases to exist, evaporating and recycled, to soon re-fall as rain. The down flow and

[20] I do draw the line at the Pet Shop Boys – what have I, what have I, what have I, done to deserve that!
[21] The Terrorism Act 2000; The Anti-terrorism, Crime and Security Act 2001, which was legislated in response to the 9/11 act of terrorism which destroyed the World Trade Centre in New York; The Criminal Justice Act 2003; The Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2003; The Prevention of Terrorism Act 2005; The Terrorism Act 2006 followed the London bombings of the 7 July 2005; The Counter-Terrorism Act 2008; The Coroners and Justice Act 2009; The Terrorism (United Nations Measures) Orders, giving effect to Resolution 1373 of the United Nations Security Council (2001) challenged and responded to a number of times in the UK Supreme Court.

groundswell of cycling water is as fundamental to the cycling of the Earth, as changing perceptions of dignity are to law.

Like torrential rain, or water gushing from hillsides, bursting banks and bubbling up through brooks and streams, human law cannot and should not try to stop the constant flow of new impressions and ideas that challenge the existing established idea of law. Like water, law, while it exists, retains a constituted fluidity from which you may punctuate a temporary example of 'the law'; just as you could analyse a sample of water. Law may stream from above, subsuming, displacing and relocating people and resources, but it cannot avoid being enriched by the impressions and ideas of those who law encounters. Law may assimilate, but at the same time law too becomes assimilated.

The extended watershed analogy suggests law is shaped through the hard and soft rock of humanity, not simply powered by governors or the morally good. Both water and laws mould, and are moulded by, their environment: for example, from the core subjects of undergraduate law: criminal laws respond to crimes; contract laws respond to the needs of contracting parties; equity, trusts and property law, once used to attain and maintain secure advantage, can now be reduced to contractual or other legal arrangements made between and to benefit specific legally recognised parties; tort and public law, undeniable innovations of human law, respond to tortious and public acts. Law, like water, is sporadic; it may be channelled and controlled to a point, but 'the law' will stagnate if not allowed to run freely. Too much/little water leads to flooding and drought; too much/ little law is lost in bureaucratic red tape and the presumed externalities of law.

6.5 A Legal Nationalist

Like Twining, I come from the perspective of a 'legal nationalist'[22]; an enthusiast for the potential of law, as a means of enabling 'human survival and social control' and a lasting alternative to war. I hold an idealistic optimism in the hope that human beings can learn from past mistakes and with care, co-operation, forethought,

[22] Twining (n. 8) "I am a 'legal nationalist' in that I believe that law can pervade nearly all aspects of social life, that it is a marvellous subject of study, and that a legal perspective can provide important lenses on social and political events and phenomena" p. 324

innovation and reflection, evolve law to realise the potential offered for governance by law, offering more than coercive governance by fear, oppression and war. I am hopeful, but appreciate that law has historically been used far more fearfully and selfishly. Transparency appears to be a key lesson learned in law and, at least since Bentham, legal theorists have been attempting to demystify the law and to recognise the "law is something men add to the world, not find with it"[23]. "Bentham's laudable demystification of law consisted of his constant insistence that law is not divine phenomenon, nor a product of nature, but a human artefact"[24]. I similarly seek to bring law, and responsibility for law, down to law's human makers here on Earth; hence the title: 'Human Dignity: bringing law down to Earth'.

6.6 Conceptualising the Contested Contestable

Recognising and celebrating the elusive contestability of dignity engages the "necessary conditions" of "essentially contested concepts" suggested by Gallie[25]: dignity is a value judgement; of internally complex character; which requires an explanation of its worth, to elucidate its meaning; dignity is capable of adaptation; and must be used both aggressively and defensively[26]. Exploring contestability in/of "essentially contested concepts" brings meaning to the concept. Exploring the tensions in dignity and recognising indeterminacy in law helps to explain understand and bring meaning to dignity. Gallie introduced the idea of "essentially contested concepts" by way of a theoretical game of 'champions'[27] and then through examples of religion, art, science, democracy and social justice[28].

The contestability of dignity is multifarious and massive. The inherent nature of dignity means every single person has something invested in the idea. Gallie's mention of science is helpful, because science is recognised as cutting edge, experiential, experimental new and elusive knowledge. The nature of every experimental hypothesis introduced and recognised as contesting and contestable.

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[23] Herbert Hart 'The Demystification of the Law' *Essays on Bentham* (OUP 1982) p. 26
[24] Peter Hacker 'Hart's Philosophy of Law' in (Hacker PMS and Raz J., (eds), *Law, Morality and Society*: *Essays in Honour of H.L.A. Hart* (Clarendon 1977) p. 8
[25] Walter Gallie Philosophy and the Historical Understanding (Chatto & Windus London 1964)
[26] *ibid* (n. 25) p161
[27] *ibid* (n. 25) p 158-168
[28] *ibid* (n. 25) p168

There are no black swans, until black swans are found, then our impression is changed and black swans exist. By accepting contestability in knowledge we recognise the possibility and potential of change in and to knowledge to change our understanding of what we know. Pursuit of knowledge continually affirms or contests our existing knowledge; constant (re)affirmation (re)assures the reliability and stability of knowledge. The more reliable the knowledge proves to be the greater under-standing of knowledge and the higher we lift the lower limit beneath which any "exotic interpretation must be assigned to the lunatic fringe"[29]. So, for example, the idea that the world was round was once the "lunatic fringe", in a world that was flat. Philosophy contests the knowledge of knowledge.

6.6.1 A game of 'champions'

Let us take a game of 'champions' and expand it beyond the strategy examples, used by Gallie, and many jurisprudential writers, of examples from within a game, of say chess or cricket, and elaborate the game of champions outside the game. It is easy to make sport strategy conform to the contestability game of champions, studying and highlighting strategy is the key to advancing skills in any game, whether studying individual pursuits like swimming or tennis or team sports like soccer or rugby. In the pool a swimmer might appraise the opposition *valuing* their chances of winning; *adapt* a diving technique to get a good start; or focus on an *internally complex character* biding time knowing that they have a strong finish; the strategy might *require explanation*; the strategy *is used aggressively;* the swimmer wants to win, but necessarily *defensively* to conserve strategy and strength[30].

Beyond the immediacy of any championship game, strategies are scrutinised from every angle; strategies are *valued.* Where a particular serving style proves effective in tennis; or a concentration technique enhances goal scoring in rugby, modifying or *adapting* style may be the key to the contested game. Other players and teams do not remain statically fixed; they watch and adapt their own game. If champion status is dependent on something beyond the game; for example, you have to be in the league to win the league, then this is a necessary pre-requisite of any bid for the

[29] *ibid* (n. 25) p.190
[30] *ibid* p161

championship title. Strategy, along with a decent team, might need to focus on other *internally complex characters*[31] over which the club has control; for example, enhanced crowd facilities, improved information and communication, or an attractive marketable kit. The corresponding result is movement between leagues and all teams who want to play in the champions' league have to up their game and also improve facilities, communications, kit, etc. If 'championship' status is dependent on something existing beyond club control, for example, a winning team or fan base, championship fate is existentially dependent on maintenance of a continuing winning team and or fan base. Outside the incident game other factors, for example, local support or rivalries, or income generation of handsome or pretty celebrity players, or a unique haka, may *require explanation*. If the existential advantage is not available an alternative strategy is necessary to win the game. Finally, returning to *value*, if being 'champion' can be bought, then teams may place *value* on what a given society of sport *values*; with rich clubs able to secure and maintain the advantage[32] of the best, managers, players etc, but something in the joy of the game is lost. Different strategies might be adopted to be the richest club, rather than the best champion's club.

There are a number of further points to make:

- First, there is always un-contestable within the contestable: for example, we often agree on the game or enterprise in play; we agree we play the same game. In the championship example, few who know the game have a problem, either identifying match players, or the players involved in the wider championship game and can probably also agree that all are involved in the championship game. However, to deny involvement beyond match players; of, for example, coaches, fans, league and club infrastructure, managers, owners and referees means they all fall away as not engaged in the championship game. This suggests Sir Alex Ferguson, the most successful manager in British football history (winner of almost 40 trophies, and 13 Premier League titles), was not engaged in championship football and that the fans that support the very

[31] *ibid* (n. 25) p161

[32] For example: BBC News Gareth Bale joined Real Madrid from Spurs in £85m world record deal (1st September 2013) http://www.bbc.co.uk/sport/0/football/23538218

existence of any champions' league club, play no part in the championship game. The Wimbledon Championship would not be Wimbledon if no one paid to sit on Murray's Mount to watch the games and eat the strawberries.

- Second, knowledge of the game is improved by observance of strategy, so further issues become clearer and less contestable within contestable play or at a certain rank of play. For example: the role of match players and support staff is more clearly defined in super champion, champion and leagues divisions, but more contestable at local, for example, junior and fun team level, where champion players and supporting roles maybe less clearly defined.

- Third, in the observance and practice of various strategies all teams, regardless of rank, are capable of gaining greater knowledge, to improve understanding of the game, both in themselves and their opposition, which may again make more, less contestable. Old Master and innovative entrepreneur can both innovate and inspire.

- Fourth, whatever strategy is adopted there is no guarantee that simply repeating the strategy will always win; in fact, on the contrary, positive lessons must be applied.

- Finally, on Gallie's fifth condition, that the concept or strategy *must be used both aggressively and defensively*[33]; although this is true, it is only true while you still want to be part of the game. Gallie recognised understanding the history of the contestation, within the contestable, is key to any un-contestable notion which arises[34].

The history of various laws stands behind legacies of laws. The contestability brought vividly to life by the different perspectives revealed in colonisation:

[33] Gallie (n. 25) p. 161
[34] *ibid* p.168 "understanding of how concepts of this kind function or can be used requires some appreciation of how they came to be usable in a rather unusual way"

indigenous First Nations with their own pre-existing way of being[35], rightly see colonising governments as barbaric, intrusive and oppressive; while incoming colonisers tend to overlook their very existence[36]. The fundamental existential legacies of law explain the motive of law and why people obey the law. Governance strategies whether based on brute force or despotic power, geographic kinship relations, monarchic or parliamentary sovereignty, religious associations, or any combination of the above exist in an existential continuum of, not necessarily contested, contestation. The *values* of society are contested and may be magnified by the things society *values,* including issues of autonomy, belief, community, difference, economics, freedom, markets, nationhood, privacy, property, power, religion, responsibility, society, stewardship and wealth; categories repeatedly encountered in the Dignity Literature Review, wider jurisprudential and philosophical/political thought.

For example, nations have different, but nonetheless recognised constitutions: the UK's constitution is unwritten, but increasing statutorily codified; other national constitutions are codified[37], some in one foundational document[38], others in a number of different documents[39]. National histories stand behind the constitution, and are embedded within the law: for example, the America Declaration of Independence codifies and *adapts*[40] the common law with a revolutionary constitution that *values* "life, liberty and the pursuit of happiness"; a backlash against

[35] The important idea of people's history standing behind them was a recurrent and powerful theme amongst the many different First Nations' who took part as teachers, including chiefs and professors, and students of the Indigenous Law Summer School I attended at the University of Victoria, BC, Canada from June to August 2009

[36] *ibid* Also as an English person I have experienced resentment from people colonised by the British and English. As an independent traveller I have visited with many different peoples', often with experienced and knowledgeable scientists and anthropologists, including First Nations in Canada and Aboriginal communities in Australia, Southern Africa and China all with different perspectives on the legacies of colonisation. In the case of *Mabo and Others v. Queensland* (No. 2) (1992) 175 CLR 1 F.C. 92/014 the court acceptance of native title replaced the 17th century doctrine of *terra nullius* or 'no-one's land' on which British claims to land possession of Australia were based.

[37] For example, much of Europe and America

[38] For example, see Australian Broadcasting Corporation, 'Constitutions Compared' (ABC 1998) <http://www.abc.net.au/concon/compare/preamble/preau_ca.htm> accessed 14th June 2014

[39] Australia has a single foundational document, based on the American model, but still chooses to retain the colonial imposition of monarchy and the establishing wording of responsible governance. See footnote above and also John Kilcullen The Australian Constitution: A First Reading (Macquarie University 2004) http://www.humanities.mq.edu.au/Ockham/1stRd.html accessed 20th April 2010

[40] Gallie (n. 25) p161

the limitations imposed by British colonial rule[41]. Other former Commonwealth jurisdictions also evidence the colonial influence and subsequent evolution *adapted* and enhanced[42]. For example, the phrase "peace, order and good government" is still used in Canada to describe both contemporary *values* and the principles upon which the country's Confederation took place[43]. Each constitution lives to the extent of the, again not necessarily contested, contestation in its interpretation.

Separately and together dignity and law have an *internally complex character*[44], which has a long legal, political and philosophical history attempting *to be explained*[45]. Finally, returning to *value*, if law exclusively prioritises one set of *values* at the expense of another*,* some of the joy in the law game is lost. Law is impoverished by *valuing* only one's own impressions and ideas; autonomy, belief, community, difference, economics, freedom, markets, nation -hood privacy, property, power, religion, responsibility, society, stewardship and wealth.

So to 'champion' human dignity in law, we need to consider human dignity's *value*. The positive assertions state human dignity as inherent, without explaining where the power of human dignity comes from. I suggest human dignity's power comes from the common practically reasoned and shared experience of dignity; revealed in the ever-changing 'voice of dignity' impression from which temporary incidences of dignity may be sampled or punctuated. The, right or wrong, impression of dignity is existential and challengeable by reason. The trans-valuation of rank comes to mind[46]. The assertion of human dignity, as opposed to some other manifestation of dignity, asserts the value of 'human' alongside the value within a value of dignity,

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[41] The unanimous declaration of Congress of the thirteen founding states of the United States of American July 4th, 1776 'Declaration of Independence' <www.earlyamerica.com/earlyamerica/.../text.html> accessed 9th April 2010

[42] The phrase "peace, order and good government" was used to express the legitimate objects of legislative powers conferred by statute and appears in many 19th and 20th century Imperial Acts and Letters Patent of the British Parliament, including the New Zealand Constitution Act 1852, the Colonial Laws Validity Act 1865, The British North America Act, 1867, the British Settlements Act 1887, the Commonwealth of Australia Constitution Act 1900, the South Africa Act 1909, the Government of Ireland Act 1920 and the West Indies Act 1962.

[43] *Ibid* I know this and the contemporary use thanks to a personal conversation with Dean Fortin the Mayor of Victoria in British Columbia Canada who in 2009 used the term in a citizenship ceremony to celebrate the Canadian virtues of 'peace, order and good government'.

[44] Gallie (n. 25) p161

[45] *ibid*

[46] Waldron J. (2009) 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' *Public Law & Legal Theory Research Paper Series* Working Paper No. 09-50 Berkeley p. 27 & 28.

societally valued worthiness in being. The practically reasoned value comes from the experience of being human. The experience existential; the power/experience exists while human beings exist. The power of dignity is to *value*; the value upheld by experience of the object valued, but only valid while the valuation continues to exist. As a result dignity has an *internally complex character*; dignity may be concretised as an idea and used in law, but only while the valuation exists and this needs *to be explained*. The e*xplanation of the value* of human dignity can be revealed in the interplay between human dignity and other claims to dignity. Champions asserting dignity in law include claims for equal, just and moral law, as well as sovereign protectionism, and the dignity of individual and group human rights.

Dignity is *adaptable,* history demonstrates dignity can uphold, or undermine: government, systems of governance and systems of laws. For example:

- In governments – dignity can be recognised: externally in the commitment to comity, the mutual respect of the dignity of nations; and internally in historic transitions from sovereign dignity, to the dignity of parliament and state, to the dignity of individual and group right bearers in the modern state.

- In systems of governance - dignity upholds the existing UK monarchy and government, but undermined the previous supremacy of the monarch; shifting power away from the monarch to parliament. Dignity helped colonising countries in colonisation, but, in re-cognition of the inability of colonising countries to uphold sovereign dignity in colonies, dignity is also evidenced in the de-colonising transition to a more local dignity.

- In systems of laws dignity is used to recognise and respect external limitations on law; for example, recognition of sovereign dignity surrendered (for example, to the EU) or empowered (for example, another nation's newly constituted government). Dignity is also used to recognise and respect internal limitations on law, for example, in the separation of powers; the executive, judicator and parliament held in balance by mutual respect for each one's dignity. Similarly in

establishing and respecting various internal jurisdictions for law, from arbitration panels, tribunals, magistrates' courts to The Supreme Court and beyond, dignity is used to uphold each jurisdiction[47].

Dignity, like law, is unique, unlike other contenders describing law as equal, just or moral, dignity is existentially inherent in being. The contestation arises in different claims of dignity; the contestation between human dignity and other equally valid claims to dignity. Championing Human dignity only works if human beings are *valued* above other dignities. For example, if we champion the selfish impressions of autonomy, economics, freedom, markets, nationhood, privacy, property, power; as so many liberal thinkers would have us do, we must recognise that they come at the expense of belief, community, difference, religion, responsibility, society, stewardship and wealth. The other category rather than human dignity becomes society's focus; human dignity is sacrificed to the dignity of the other and a selfish agenda, rather than human oriented system of governance ensues. Therefore if we want human dignity to be law's champion, human dignity must be pursued *both aggressively and defensively* in law.

For example, in the UK the legacy of sovereign dignity is held symbolically in the Crown. Since representative parliamentary governance became the norm, the previously sovereign role of the Crown in court and law now upholds national dignity in law[48], "wielding and representing the State's power or dignity", it is "the public Majesty which must be assailed, and … protected"[49]. If we want to continue the trend recognised in representative governance, as governance 'of the people for the people', I suggest respecting people's human dignity is the obvious next step on the way.

6.7 Appreciating the Master's Tools

I recognise normative assertions may be necessary guidance as an ideal description of a general good. What bothers me about some theories of law is the normative

[47] The examples are all taken from the UKDS Appendix 2
[48] For judicial authority of this idea see *Thomas v. the Queen*. - (1874) L.R. 10 Q.B. 31 and *Town Investments Ltd and others v Department of the Environment* - [1977] 1 All ER 813
[49] R v *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* - [1991] 1 All ER 306 QBD 1 April 1990

arrogance of the assertion that assumes law knows what society wants. The arrogance may be the well founded confidence of practically reasoned knowledge, in which case the apparent knowingness can be properly attributed to dignity and need not hide opaquely in law's over-arching desire. If the normative guidance is necessary so is the explanation. Dignity remains subject to challenge, recognising different and changing societal desire. Law can never be perfect; with flexible franchise and generational change, the law can, and indeed should, change to recognise more of society's wants. Law may be exclusionary by nature and 'human survival and social control' tends to restrict being in its guidance on what human beings can be. However, if law accepts human rather than any other dignity as its currency it will necessarily positively strive toward inclusivity in human dignity.

The phrase "you cannot use the master's tools to take down the master's house" was coined by Lord[50] and popularised by Second Wave feminists in the 1970s[51]. Lord argued if the "tools of a racist patriarchy are used to examine the fruits of that same patriarchy" it would only permit of the narrowest possible change. Lord's assessment saw the tools as of no 'use', because they remained the 'fruit' of a still existent 'racist patriarchy' who failed to see or hear the problem of those they oppressed. And yet, it is precisely Lord's kind of critical legal and moral challenge that raises the awareness that evolves the law. As Borrows reasons just as building tools can construct, (hammer, crow bar etc) so they can destruct[52]. I argue further that the same tools can also reconstruct. The fact that dignity was previously played in the law game to secure the interests of a few, does not prevent dignity, or law, from being wielded, and being seen to be wielded, for the common good.

Waldron[53] also used a building site analogy for human dignity and argued convincingly that just because the end product is not in view that is no reason to abandon the project. I suggest final construction is largely irrelevant to the on-going

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[50] Audre Lord The Master's Tools Will Never Dismantle the Master's House in *Sister Outsider* (The Crossing Press Feminist Series/Trumansburg New York 1984) pp. 110 -114

[51] Aspasia Tsaoussi, 'Using the Master's Tools: How the Law Reshapes Gender Boundaries in the Public-Private Sphere' Science and Society: Journal of Political and Moral Theory, (2010) (Vol. 26) pp.57-79 <Available at SSRN: http://ssrn.com/abstract=1714970> accessed February 2011

[52] John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010) p132

[53] Jeremy Waldron made the point in a lecture entitled "*The Rule of Law and Human Dignity*", Sir David Williams Lecture Faculty of Law, University of Cambridge last accessed 12th July 2011 www.cpl.law.cam.ac.uk/past_activities/2011_the_rule_of_law_and_human_dignity.php

project of dignity or law. Human dignity and law are engaged in an endless project of human economy[54]; essential management, decoration, re-modelling, (re)construction and maintenance, with new build, condemnation, demolition, factored in; an essential part of the process of how to be human. Each person inherits the good and bad legacy of law's construction which has taken considerable time, effort, innovation and skill; learning much about law's success from law's failings. Law now enjoys wider franchise and responds to a more diverse population than ever before, it seems churlish and unrealistic to destroy the law house. However, we should be wise to old occupants of law, entrenched in their being; people who, could not, did or, do not want to see or hear law's people. The law is complex and needs to be explained so we can learn from law's failures to enlighten law's future path.

Lord was understandably enraged by patriarchal insistence that it is the oppressed who must educate the master, which she rightly recognised 'as a diversion of energies and a tragic repetition of racist patriarchal thought'[55]. Nonetheless she did educate. And this is an important and sadly incontestable 'rank' point; the disabled, along with all other actors in society, are forced to challenge, critique and re-educate society (including their oppressive governors). Borrows, another educator caught by the legacy of colonisation, speaks eloquently for First Nations peoples watching the 'slow wheels of justice' failing to heal decimated lives "grinding up the bodies and souls of those pulled into its clutches"[56].

Borrows suggests a trans-systemic law that incorporates both indigenous law values and human rights[57] as a richer way of life. Borrows' idea is important; first, reclaiming First Nations' culture necessarily helps to restore the trampled confidence of First Nations people, but further, his 'talk about law' also educates the wider system of law; bringing the richness of First Nations' values to the broader picture of law. All law, including indigenous law, is by law's nature a laden power

[54] Economy – origin late 15th cent. (in the sense " management of material resources' '): from French économie, or via Latin from Greek oikonomia '" household management' ', based on oikos '" house' ' + nemein '" manage' in Stevenson A., Oxford Dictionary of English (3 ed. Oxford University Press, 2010) '
[55] Lord (n. 51)
[56] John Borrows & Leonard Rotman 2007 *Aboriginal legal issues: Cases, Materials & Commentary* LexisNexis Canada Inc p.1067
[57] Borrows (n. 53)

relationship asserted with confidence, which requires one to speak up to be heard and to reveal oneself to be seen. The trader's in law's bazaar call out to society to offer their wares; it is the choice of society to accept.

Borrows' suggestion of living the law you want, is sage advice to any group as a law action from the perspective of the governed: those who like a particular law; should as much as they are able to, live the law they like. Those who dislike the law should, as much as they are able to, seek to change and or even to ultimately overthrow the law. Law needs to respond to 'the law's' imperfections continuously evolving in a process[58] of maintenance and generational law remodelling. Lord and Borrows challenge the idea of the authority of law as a down flowing stream, suggesting that people disabled in law provide the impetus for change. The law is changed by those oppressed by it challenging established positions of law and re-educating law to recognise them in law.

Western jurisprudence and academic discipline demand legal theorists study the wisdom of law masters (people of both sexes, who have 'mastered' the law and speak with society acknowledged authority to be an authority on law). Students take the theory like a relay baton, to run with as they will, within the constraint of societal acceptability. This is not unusual; most societies have repositories for their law[59]. People recognised by society as an authority in their laws, who inform the upcoming generations of their society's law. The sphere of law I envisage needs to be open to these different law ideas.

Critiquing law theory requires you to familiarise yourself with the master's tools; it does not insist you understand the master's motive or their use of tools and it does not require you to agree with the master. Once an idea has been adopted by another, the master is only relevant while they have influence on the adopter. The old master's ideas may be rigorously tested, or casually ignored. The master's views embraced and expanded upon, or have a particular angle enhanced and, of course,

[58] James MacLean *Rethinking law as process: creativity, novelty, change*, (Taylor & Francis Abingdon 2011)
[59] For example, First Nations of the Pacific North West have an oral governance system, which requires law rules and roles to be witnessed by other independent people or bands. Witnesses are paid to remember the agreement. Val Napoleon *"Ayook: Gitksan Legal Order, Law, and Legal Theory"* PhD Thesis and witnessed at a ceremony in 'The Big House' AKA the Mungo Martin House in Victoria BC during the indigenous law summer school (n. 35)

in a more destructive, but possibly illuminating manner, the master's work can be completely destroyed. Tool mastery requires societally accepted ideas and in any system of law, even where the law is most faithfully reproduced, there is an element of interpretation, which requires mastery of law tools. The master's tools are available to those that choose them and temporarily belong to those that master them. The tool of dominant, pluralistic law is available to mould by those able to master it and who can carry society with them to inform the process of law.

I offer reinforcement on the foundation of law, a re-constructive underpinning to the human law house; for the love of humanity, Earth, a much loved house, and the beings that dwell on it. Earth can only ever be temporarily occupied and cannot permanently belong to any one, or any one group of, humans; any one or any particular law. Human beings have joint responsibility for law's task of 'human survival and social control'. Human dignity calls us all to the care of human dignity; to the endless continuum of how we occupy Earth and whether we can find a way to live a satisfactory life in common. Human dignity requires law's global forum, to be informed by the combined experience of human law on Earth. The experience of law needs to be revealed and shared as the basis for law, with the legacies of laws recognised as supplements that demonstrate, where appropriate, how similar legal issues were dealt with in the past. General understanding of law, could lead to practical guidance in law, which in this age of instant communication has realisable potential. The problem for this idea of law is a historic resistance to grandiose general theories of law[60]. Yet this is precisely what I turn to in the next chapter to re-establish the general design to keep it in mind as in subsequent chapters I narrow my scope to ever narrower areas of particular reasoning, dignity, and law.

[60] Twining Great Juristic Bazaar (n. 6) p. 16

Chapter Seven - The Sovereignty of Dignity

This chapter re-establishes a general picture of law. A general design to keep in mind as in subsequent chapters I narrow my scope to ever narrower particular areas of reasoning, dignity, and law. Jurisprudential ignorance permitted a belief in law that offered guiding rules and resolved conflicts at multiple levels and spheres of being. The human made law evolved naturally through custom[1], conquest[2], cooperation[3] and unification[4]. The assertion of law was dependent on who made or challenged the law; a matter of dignity, and who had dignity. The resulting practice of law worked out differences and disagreements in how humans are, or might be, through the medium of law; a reasoned alternative to other resolutions, like war. Law might be coercive, but also involved co-operation motivated by concern for, and of, beings, human and other, and the Earth environment in which they live[5].

Human law was evidenced through history to have been dictated or declared, whether consensual or not and asserted authoritatively, whether moral[6], or not. Again dignity appeared to determine who had the authority to assert law. Human law did not work in isolation from other academic disciplines, but embraced the historic experiential wisdom of old, alongside contemporary thought, including economic environmental philosophic political scientific and technological thought. Human law was informed by society and could learn from mistakes made in past law. Law evolved constantly to meet the changing needs of present and subsequent societies. Naturally law also encompassed the political orders and judicial

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[1] Amanda Perreau-Saussine and James Bernard Murphy eds. *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (1st edition Cambridge University Press 2009); Brian D. Lepard *Customary International Law: A New Theory with Practical Applications* (1st edition Cambridge University Press 2010).

[2] History learnt from living and travelling with anthropologists, natural historians, and First Nations' Elders on the North West Pacific Coast and personal discussions with artists, politicians, students and treaty negotiators from First Nations and more recently established communities in contemporary societies, in England, Canada and Australia.

[3] Alan S. Milward *The Rise and Fall of a National Strategy: The UK and The European Community:* (*Volume 1* Routledge 2002) Stephen Wall *The Official History of Britain and the European Community, Vol. II: From Rejection to Referendum, 1963-1975* (Routledge 2012); Mary Ann Glendon *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001)

[4] E.g. The United Kingdoms of the UK; the United States of Europe; the United Nations of the World

[5] Bill Devall & George Sessions.*Deep Ecology: Living as if Nature Mattered* (Gibbs Smith 2001); Arne Naess & David Rothenberg (Tr) (*Ecology, Community and Lifestyle: Outline of an Ecosophy* Cambridge University Press, 1993); James E. Lovelock *Gaia a new look at life on earth* (OUP, 1979); & McGonigle M. *Ecotheology* article personally given to author in July 2009.

[6] Many theories offer the counterpoint that law should be moral, for example, see Lon L. Fuller *The Morality of Law* (revised edition Yale University Press 1969); and Stephen Darwell *The Second-Person Standpoint: Morality, Respect and Accountability*, (Harvard University Press 2009)

determinations agreed by those most legally powerful as the law of a particular system at a particular time, as the guiding commands of that system at that time. This all-encompassing view of law embraced the fundamental notions of common enterprise and collective endeavour which root human dignity in law.

I called this broad picture of human made law, 'Human Law', as I did not know what else to call it. I am in good company, with Austin[7], who also recognised human made law as Human Law. My improving knowledge of jurisprudence has done little to unseat my earlier impression of law. However, popular jurisprudence[8] seems to be troublingly slow to recognise law's evolution; particularly between the innovative international agreements of the UN committed to by particular national governments. One reason is the competitively premised, confused and incomplete picture of law offered by contemporary jurisprudence, where too much attention is focussed on disagreements about what law's exponents say the law is and too little is paid to general endeavour that all lawyers engage in; 'talk about' how law could be made to work better for society[9].

For example, positivist law is often asserted as a *fait accompli*[10] proclaiming established and normative orders as old and new artefacts of law, which depending on the view point, are either, concretised[11] or frozen[12] as the law. Positivist law opposition often reveals posited law as evidently self-serving; protecting the legal architecture that produces it, as much, if not more, than the human society expected

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[7] John Austin *Lectures On Jurisprudence Or The Philosophy Of Positive Law Volume. 1.* (Campbell R (Ed) Reproduced by Bibliolife, Amazon.co.uk, Ltd., Marston Gate, 1885)

[8] Scott Veitch Emilios Christodoulidis & Lindsay Farmer *Jurisprudence: Themes and Concepts* (2nd, Routledge, Abingdon, Oxford. 2012); Denise Meyerson *Understanding Jurisprudence* (1st, Routledge, Abingdon, Oxford 2007)

[9] Returning to Twining's distinction between 'law talk' and 'talk about law, Twining W., *General Jurisprudence* (Cambridge University Press 2009) p. 24

[10] For example, Hart joins the ranks of the take it or leave it attitude of other 'great battle cries' of earlier legal positivists "propositions of law are… statements not of what 'law' is but of what 'the law' is, i.e. what the law of some system permits or requires or empowers people to do" Hart H.L.A, *The Concept of Law*, (2nd Ed, first published 1961, OUP 1994) p. 247. Hart also foot notes Gray from 'the Nature and Sources of the Law', "The law of the state is not an ideal but something which actually exists… not that which ought to be, but that which is" s.213 Austin, 'The Province of Jurisprudence Defined, lecture at V'. pp. 184-5 "existence of law is one thing, it's merit or demerit another"; and Kelsen H 'General Theory of Law and State' p. 113 "legal norms may have any kind of content" all in *The Concept of Law* at p. 207.

[11] Advocates who sought to objectify dignity in dignity theory and assert normative law in this Chapter identify the advantage of concretisation to clearly define and reaffirm laws.

[12] Those disadvantaged by the intransigence of law lament law's frozen nature, for example see Borrows J., (1998) 'Frozen Rights in Canada: Constitutional Interpretation and the Trickster' *American Indian Law Review* 22: 37

to live by it. Many challenges to positivist law suggest that law evolves naturally[13] and ought to be equal[14], just[15] and moral[16], but often without sufficient evidence of these values, or with these values patently denied, placing these theories at odds with positivist law. The positivistic *fate* of equal, just, moral and natural descriptions of law is *accomplished* by the positive claim of positivist law. As positivist law claims all the laws that actually exist and is able to overlook all descriptions of law that do not exist, by proving themselves not to be equal, just, moral or natural. For example, lack of equality, justice, morality or nature in traffic lights or road side rules[17].

I offer a re-picturing of law, focused on the commonly agreed endeavour of law, stated by positivist and natural moralist alike, as 'human survival and social control'[18]. I accept that there is contestation in dignity, societally valued worthiness in being, different national laws and different realms of law produced by the constant bombardment of competing evaluations of dignity with which human beings are inundated. Some of these evaluations are recognised in law, where, at least, family, society, national, and supra-national groups, try to influence individuals and regulate their being.

The spheres of dignity are inevitably expanded when the evaluation of dignity is extended beyond the immediacy of human time, either by overarching human law or by a careful, coercive or cooperative sense of responsibility to future human beings. Even in an Earth-bound suggestion of human dignity, the sagacious wisdom of our forebears' on how to be, already merges with current and future desire. The practically reasoned reciprocal sense of human dignity suggests the best way for humans to be, is concerned for each other including how to be contemporarily ordered and controlled while preserving human survival and Earth's being to secure good being for future human being.

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[13] Finnis J., *Natural Law and Natural Rights* (Oxford University Press, 1980)
[14] Please see bibliography for full listing of Waldron's articles.
[15] Rawls J., *A Theory of Justice* revised edition ((1971) Harvard University Press 2003)
[16] Fuller and Darwell (n. 6)
[17] Raz J., The Authority of Law -- Essays on Law and Morality, OUP 1979 reprinted 2002 p. 15
[18] Including Hart H.L.A, (n. 10); Raz (n. 17) and Fuller (n. 6) See appendix 5

The re-picturing of Human Law that follows is enhanced by the work of Twining, and particularly 'General Jurisprudence'[19], where Twining's broad scope of law is re-placed in a schema originally devised by Austin[20]. Austin is important as he is a founding author of the separated conception of positivist law, which is credited with restricting the scope of law evident in much subsequent jurisprudential discussion. Twining's work is important as he reacts to the restricted parameters of contemporary jurisprudence by demonstrating a continuing commitment to a broader law; setting the narrow 'law talk' of what The Law is in wider 'talk about law' context of, for example, how, what, why, where law is. I then take the picture wider still to suggest law's systemic (re)action in The Natural Law Continuum.

7.1 Twining - General Jurisprudence - Contestable Boundaries of Law

In 'General Jurisprudence' Twining offers the most generous and broad picture of law found in contemporary jurisprudence[21]. The outline of law claims to be built on the Anglo-American tradition in respect of methods, but differs from other theories in three vitally important respects:

(i) The view of law is based on a conception of law that goes beyond municipal or state law and covers all levels of legal ordering including global, trans-national, international, regional, municipal (including national and sub-national), and local non-state[22]. Twining recognises law can concern itself to include the complicated picture of globalisation: from the temptation to concentric circles ranging from the very local, through sub-state, regional, continental, North-South, global, and beyond to outer space. Embracing the even more complicated picture of: empires, alliances, coalitions, diasporas, networks, trade routes, and movement; 'sub worlds' such as the common-law world, the Arab world, the Islamic world, and Christendom; special groupings of power such as the G7, the G8, NATO, the European Union, the Commonwealth, multi-national corporations, crime syndicates, and other non-governmental organisations and networks[23].

[19] Twining (n. 9)
[20] Austin (n. 7)
[21] Twining (n. 9) p.21
[22] *ibid* p.39
[23] *ibid* p.14

(ii) Twining focuses on a wide range of concepts and traditional analytical jurisprudence, including, but not limited to, 'fundamental' or 'essentially contested' or 'philosophically interesting' or very abstract concepts[24]. Law is not confined to 'law talk'; of concepts of legal doctrine or its presuppositions, but extends to the discussion of general discourses about legal phenomena; 'talk about law'; such as dispute, function, institution, and order, which are susceptible to, and in need of, the same kind of conceptual elucidation[25].

(iii) 'General Jurisprudence' is not just concerned with individual concepts, but with groups of related concepts in both jurisprudence and other specialised discourses, such as, public international law, prison conditions, contract, or corruption[26].

Twining introduces a very good 'deliberately vague' 'travelling well' metaphor for the transferability of concepts and terms across different contexts. I think this works even better than Twining suggests; the metaphor, associated with wine, not only travels well, but should then be allowed to breathe, to take on local flavour and adjust to contextual temperature. I also suggest human dignity is actually better than Twining's preferred 'travels quite well' concept of 'inhumane and degrading treatment', but for exactly the same reasons. Inserting human dignity into Twining's suggestion: first, human dignity provides a framework for debating human issues; second, human dignity provides a direct link to the idea of basic human needs; and, third, human dignity allows some flexibility in respect of its interpretation and application in different social and economic concepts. The reason I prefer human dignity to 'inhumane and degrading treatment' is, as Twining suggests, that 'the notion of degrading … invokes an abstract universal principle of respect for persons or human dignity, while allowing some latitude for different economic conditions and cultural attitudes to respect and shame' [27]. The language of 'inhumane and degrading treatment' is therefore an unnecessary addition, where the affront to human dignity is already invoked.

[24] *ibid* p.39
[25] *ibid* p.24
[26] *ibid* p.39
[27] *ibid* p. 44

I recognise the spheres of being, or law, in Twining's societal ordering. I suggest many are recognisable as passing the threshold where the dignity referred to might be 'talked about' even in 'law talk'. I keep them in mind, along with the newsworthy categories of affronts to human dignity outlined in the introduction, and revealed in the UK Dignity Survey of my combined research strategy:-

> Where individual dignity concerned issues of abuse; association, either forced or restricted; asylum; belief, either forced or restricted; care, or lack thereof, where positive care obligations have been undertaken, for example, to care for children, disabled, elderly, sick or vulnerable people, or the dead; defamation; discrimination; dying; education; freedom; harassment; honour; ill, negligent, or unfair treatment; victimisation; relating to many spheres of personal, public and private life. Individual issues focused at group dignity included domestic and employment issues; justice; medical care, including medical and bio-ethics, treatment and negligence; privacy; refugee status; slavery; and torture.

In illuminating the re-picturing of law I suggest dignity determines the topics emerging and accepted in the broad sphere of Human Law.

In recognising a broad picture of law Twining sees himself as an exception to the modern picture of law, lamenting a lack in contemporary jurisprudence, which, as just evidenced, he does not find lacking in the amorphous whole of societal legal ordering[28]. Twining harks "back to a time when jurists as different as Bentham, Austin, Maine, Holland and followers of natural law were all conceived as pursuing different aspects of 'general jurisprudence' "[29]. I think jurist still do, but are encouraged to narrow their scope.

In focusing ever more closely on particular ideas, levels, or spheres of law, theorists fail to acknowledge that there still is a grand design. Mainstays of popular jurisprudence, who were constantly referred to in the Dignity Literature Review;

[28] Twining (n. 9) p. 16
[29] *ibid* p.21

Hart[30], Fuller[31], Raz[32], Dworkin[33] and McCormick[34], as well as all the dignity theorists mentioned, are clearly engaged in the same 'law' enterprise of 'human survival and social control'[35]. In the future I hope to use these theorists to demonstrate the important role they play in informing law in a re-illuminated grand design. A grand design that recognises human dignity, and a history of law, that has often promoted other peoples' and things' dignity, at the expense of human dignity.

7.2 Austin's Philosophy of Positive Law

Austin followed a philosophic period known as The Enlightenment, which introduced different ideas of social contract, including Hobbes[36], Locke[37], Paine[38] and Rousseau[39], popularising recognition of a contractually based societal relationship between governors and the governed. By the nineteenth century, in a jurisprudential lecture series, 'The Philosophy of Positive Law', Austin sought to bring clarity to law by narrowing the scope of law; "The Province of Jurisprudence Determined"[40]. Austin attributed the legacy he built upon, claiming he 'admired' and was 'strongly influenced' by the utilitarian work of Bentham[41] (eighteenth century) and identifying four objects of law that he claimed were 'closely analogous' to divisions of laws suggested by Locke[42] in the seventeenth century.

The four 'objects' of law' Austin identified were the 'law of God'; 'human law', which he subdivided into 'positive law (the appropriate matter of jurisprudence)' and the 'laws set by people not as political superiors'; 'objects improperly but by close analogy termed laws' and 'laws so called by mere figure of speech'[43]. 'Human law' and 'objects improperly but by close analogy termed laws' were relationally linked by lines identifying 'positive morality'. The division of the 'objects of law',

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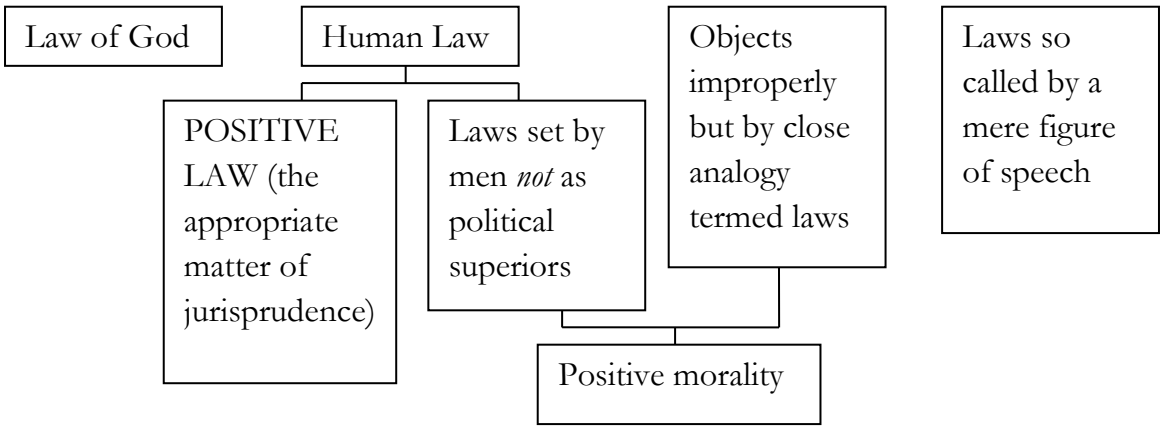
[30] Hart (n. 10)
[31] Fuller (n. 6)
[32] Raz (n. 17)
[33] Dworkin, R. *Law's Empire* (Hart Publishing, Oxford, 1986)
[34] MacCormick, N.,*Legal Reasoning and Legal Theory* (OUP, 1978 reprinted with corrections 1994)
[35] See Appendix 5
[36] Hobbes T., *Leviathan* (1651) (Macpherson C. B. ed, 1968, reprinted in Penguin Classics, 1985)
[37] Locke J., *The Second Treatise Of Government (1689): A Letter Concerning Toleration* (Dover Thrift Editions, 2002)
[38] Paine. T., *Rights of Man, Common Sense, and Other Political Writings* (Philp M. ed, OUP, 2008)
[39] Rousseau JJ., *The Social Contract (1762)* (Betts C. tr, OUP, 2008)
[40] Austin (n. 7) part 1 'Lectures I-VI Definitions 'The Province of Jurisprudence Determined' and p. 6
[41] Austin (n. 7) several mentions from p. 9
[42] Locke in his 'Essay on the Human Understanding' in Austin (n. 7) p. 100
[43] Austin (n. 7) 'Lecture 1. 'Method of Determination' p. 5

and by volume a large part of the whole of Austin's work, was dedicated to separating and clarifying 'positive law' while setting 'positive law' in the context of the other 'objects of law' guided by 'positive morality'.

7.2.1 Austin's Schema of the 'Objects of Law'



In keeping with the Aristotelian discipline, Austin sought to distinguish 'positive law (the appropriate matter of jurisprudence)', from the other objects of law. Each 'object of law' distinguished by its difference: 'positive law (the appropriate matter of jurisprudence)' was introduced as a distinct sub-set of 'human law', distinguished and subtly different from the 'laws set by people not as political superiors'. Revealed and unrevealed 'laws of God' were identified, non-exclusively, with Christian religion; the unrevealed, revealed by nature, or natural law. 'Objects improperly but by close analogy termed laws', recognised spheres of law in customary, international and other nations' agreements. 'Laws so called by mere figure of speech' were disregarded, simplistically revealed as other than law in the rules of professions and fashion.

In Austin's scheme of the 'divisions and relations of the several objects' of law, the four primary objects; 'laws of God', 'human laws', 'objects improperly but by close analogy termed laws' and 'laws so called by mere figure of speech' were placed on the same line. 'Positive law (the appropriate matter of jurisprudence)' was lower in the hierarchy of law as a sub-set within Austin's 'human law'. 'Positive morality'

provided a direct relational link between the 'laws set by people not as political superiors' and the 'objects improperly but by close analogy termed laws' situated at the bottom of the diagram.

7.2.2 Re-Picturing Human Law

In order to re-picture Human Law I recognise a pattern within Austin's 'human law', that I suggest is repeated in Austin's other four primary 'objects of law'. The separation of 'positive law' as 'the appropriate matter of jurisprudence' from 'laws set by people not as political superiors' occurs as a necessary tension in all 'objects of law'. Austin's division of 'human law' is then considered more closely in analogous relation to the other 'objects of law', to recognise the human experiential exchange, whether by coercion co-operation or care, in the 'positive' emergence of Human Law, which occurs in all the 'objects of law'. The spheres, or 'objects of law', can now be recognised as challenging, informing and complementing one another, in the broad spectrum of Human Law; jostling to determine how human beings should be. Having recognised the experiential base for Human Law, that complements Austin's design, I re-populate the model with different concepts of equal[44], formalistic[45], interpreted[46], moral[47], natural[48] positive law, recognised as contributing to governing law in a grand scheme of Human Law.

I suggest 'positive law' is not taken as Austin intended by subsequent positivist jurisprudence; the distinction between the two aspects of 'human law'; 'positive law (the appropriate matter of jurisprudence)' and the 'laws set by people not as political superiors' are re-merged. I suggest that this is a mistake because subsequent positivists attempt to merge a general idea with a particular impression, rather than recognise an actual coincidence between the two; the problem of over-arching ideas recognised in Chapter Three. I also recognise two related tensions recognised in the incommensurability of experimental design discussed in Chapter Four that arguably arose from the separation of Austin's 'human law', and are now familiar in and to

[44] Waldron (n. 14)
[45] MacCormick (n. 34)
[46] Dworkin (n. 33)
[47] Fuller and Darwell (n. 6)
[48] Finnis (n. 13)

law: first, a tension in the internal/external relationship of the law and, second the general/particular tension of issues in and of law.

The first point was certainly recognised, and arguably introduced, by Austin's separation of the various 'objects of law'; and also by the subsequent positivistic elaboration of the internal/external relationships law, recognised in Twining's language of 'law talk' and 'talk about law'. I suggest the general/particular tension in and of law arose directly from the miss taking of 'positive law', obscuring the 'positive' valuation in and from the different spheres of dignity and law discussed in Chapters Three to Five. A problem recognised as a tension in Aristotelian experimental design; the punctuated, segmented, hypothetical, parameters of the particular, may not work when applied to the grand design.

7.2.3 The Pattern in Austin's 'Human Law'

Within Austin's 'human law' he introduces two internally related spheres of law: 'positive law' that is habitually obeyed and 'the appropriate matter of jurisprudence' and the 'laws set by people not as political superiors'. Austin deliberately distinguishes 'positive law (the appropriate matter of jurisprudence)' which is habitually obeyed, from the other laws including 'laws set by people *not* as political superiors', that might be challenged and therefore not be habitually obeyed. Austin's distinction is important, because it keeps 'positive law (the appropriate matter of jurisprudence)' politically and existentially focused on the law that is habitually obeyed. The law that is accepted, for whatever reason, whether motivated as Austin suggested by coercion, or alternatively as I suggest by a combination of care, coercion and cooperation, in determining the agreement, alliance and continuance of the societal relationship between governors and governed.

7.2.3.1Positive Law (the appropriate matter of jurisprudence)

Positive Law (the appropriate matter of jurisprudence) quickly narrows Austin's careful outline of contextually set law to the 'positive' ferment of societal determination; what I have been calling dignity, societally valued worthiness in being. Austin defines 'positive law' by two essential related components:

- First, 'positive law' concerns members of an independent political society, who are in habitual obedience to,

- Second, a sovereign body or bodies, who are obedient to no one[49].

Austin's proposition plays to its own 'positive' strength; for as people cease to be members of a society, or a society is no longer independent, or a sovereign dignity pledges obedience to some other person or society, or is subsumed by a wider society, society's members simply claim or are temporarily subsumed under a different mantle.

Austin's delineated scope of 'positive law' as 'the appropriate matter of jurisprudence' provides an informative reduction of a sphere of law. Intentional severing of 'positive law' from its original authors brings clarity to an evolving continuum of emerging and acceptable 'positive law', by lapsing, ignoring or repealing, commands and political superiors who are no longer habitually obeyed. The natural wastage means 'positive law' exists in a continuum of legal wisdom; law that stands the test of time through continual re-cognition, distanced from the, possibly negative, association with original or earlier asserters. However, the 'positive' ferment of 'positive law' is the emergent (re)acceptance of law, and not the same as the residual body of The Law, which is a historic reflection of The Law that might tell us what The Law is, in a particular context, at a particular time.

Austin undoubtedly intended the severance of 'positive law' to separate it from the other aspect of Austin's 'human law'; the 'laws set by people not as political superiors', as well as, the 'laws of God', 'positive morality' 'objects improperly but by close analogy termed laws' and 'laws so called by mere figure of speech'. However, Austin's intention was to focus attention on 'human law' to bring clarity to the 'positive' ferment of 'positive law'. To illuminate the intense challenging and innovative agitation activity, the (re)cognition bringing human law to habitual obedience, the dignity determination of societally valued worthiness in being. The intention was certainly not to sever all relational ties between 'positive law' and the guiding influences, of either the 'law of God' or 'positive morality'. On the

[49] Austin (n. 7) p. 116

contrary with great clarity and lucidity Austin accommodated both 'law of God'[50] and 'positive morality'[51] as distinct guiding influences alongside 'positive law'.

Austin's reflection was inevitably contextual; fitting a time and place in UK history when dignity was, in fact, only recognised in either the person of the sovereign, parliament, or a combination of the two. For example, indictments, the formal documents containing accusation and charges against a felon, were worded as acts against the Sovereign, the supreme law giver; there was no other societal locus for law. Early indictments recognised direct affronts to the Sovereign, as they dealt with matters of treason[52]. As the sovereign remit widened later indictments were similarly worded: "in contempt of our said Lord the King and his laws to the evil and pernicious example of all others in the like case offending and against the peace of our Lord the King his Crown and Dignity"[53]; or "to the great displeasure of Almighty God, in contempt of our Lady the Queen"[54] and against "the peace of our Lady the Queen, her Crown and dignity"[55].

Indictments continued to be worded in this way well into the 20th Century and were clearly intended to bring the Sovereign's subjects into line[56] and "punished for the sake of example"[57]; although it became "the public Majesty which must be assailed, and … protected"[58]. However, earlier affronts to royal dignity had afforded limited justice in social responsibility which would not otherwise have been available. Where guardians "omit, neglect, and refuse"[59], to feed and clothe a child or "having the care, or charge, or concern…ill-treat, and wilfully neglect" a lunatic; it was said to be against the "peace of our lady the Queen, her crown and dignity"[60] Similarly

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[50] Austin (n. 7) from p. 27
[51] Austin (n. 7) from p. 81
[52] *Lords Middleton and Castlemaine, John Stafford and Others* (1713) Unreported: Coram Rege Roll, K. B. Regina, Mich. 12 Ann., Roll 8, in the Public Record Office. & *Duke of Wharton's Case* (1729) Unreported: Baga de Secretis, Trin. 2 Geo. 2, K. B. 8/67 in the Public Record Office both referred to in *The King v. Casement.* - [1917] 1 K.B. 98
[53] *Rex v. Beale* (1718) cited in *Rex v. Gibbs* (1800) 1 East and in (Crown Roll 384, Roll 22, in the Record Office)cited in *The King v. Charles Hildyard Thornton Whitaker.* - [1914] 3 K.B. 1283
[54] *R v Shaw* - [1861-73] All ER Rep Ext 1434
[55] *Davey and Others v Lee* - [1967] 2 All ER 423 *Bell v Ingham* - [1968] 2 All ER 333
[56] *R v Cooper Crown Cases Reserved* - [1874-80] All ER Rep Ext 1781& *Charles Bradlaugh and Annie Besant v. The Queen.* - (1878) 3 QBD. 607
[57] *The Office of the Judge Promoted by Combe v. Edwards.* - (1878) 3 P.D. 103
[58] R v *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* - [1991] 1 All ER 306 QBD 1 April 1990
[59] *The Queen v. Ryland.* - (1867) L.R. 1 C.C.R. 99
[60] *R v F Smith and T Smith* - [1874-80] All ER Rep Ext 1440

remuneration of public contractors, even if willingly employed for nothing, was "a course altogether derogatory to the dignity of the crown and to the honour of the country[61].

Interestingly, as in the UK we have just experienced the wettest winter on record from December 2013 to February 2014 protection of the environment, from the ingress of the sea, has been recognised as a right against the Crown, since the nineteenth century. However, it was a "duty of imperfect obligation" because there was no legal means by which to make the Crown perform that duty. "The King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted" [62].

7.2.3.2 The Temporal Being of Sovereign Dignity

I recognise that in some societies, including the UK, the locus of legal recognition once coincided with the actual sovereign[63] over-arching society and above the law. The UK sovereign did wield undisputed legal power. I nonetheless challenge the presumption of 'obedience to no one' even in Austin's own time. I suggest there is an obvious, but un-stated, desire and duty on the part of the sovereign to make rules and garner support for issues of societal interest that sovereign governors choose to champion; a sovereign who does not care, coerce or cooperate to make rules is sovereign of what? Maybe everything, but nobody would or could know, or care. When ability, desire or duty to make, or conform to, societal rule ceases to exist, so does the sovereign status (for example, consider the role of dead sovereigns or the abdication of Edward VIII in the UK).

Austin's deliberate severance of 'positive law' also suggested law could only be properly called law, if it was commanded by a political superior[64]. Yet the 'positive law' was defined as much by society's habitual obedience, as the political superiors command. The law existed, non-exclusively (of other law) and was context specific.

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[61] *Churchward v. The Queen.* - (1865) L.R. 1 Q.B. 173;

[62] *Attorney-General v. Tomline*- (1880) 14 Ch.D. 58 [CA.] 13 March 1880 ICLR: Ch

[63] 'Sovereign' – origin - Middle English: from Old French soverain, based on Latin super '' above' '. The change in the ending was due to association with reign see Angus Stevenson Ed. Oxford Dictionary of English (3 ed. Oxford University Press, 2010)

[64] Austin (n. 7) p.12 -25 Lec. I

Austin provided an example, of the conflict between Charles I and Parliament[65]; where the English nation divided into two distinct societies, neither ceasing to be English, but each side habitually obedient to a different law giver; to either the sovereign or parliament's dignity. Austin obviously saw political superiority in the sovereign or parliament. However, when the nation again reunited under Charles II, there was also a strategic coincidence of the law in both the sovereign and parliament, which subsumed legal authority under a shared mantle ensuring the continuing societal stability of habitual obedience from both sides.

The EU provides a more recent example of a society of 'positive law' now over-arching national UK law. Again, because it is too often left un-stated, I cannot let the inference that the sovereign body or bodies is obedient to no one pass. The Member States of the EU are usually obedient to the EU, because the whole basis of the EU's founding was to work co-operatively towards common goals set by Member States; it makes no sense to suggest there is no duty on the EU to pursue those common goals. Even though it is also recognised, that in the nature of 'positive law', those goals will continue to evolve.

For Austin command and habitual obedience were necessarily backed by the threat of punishment or sanction[66], but this was not, and need not, be the case for everyone. For example, historically, dignities were granted to recognise, establish and bind people to the sovereign (coercion), but by careful and co-operative means, in the grant and recognition of estates, privileges and rights. Though political superiority maybe and often is an existential fact; for example in the UK, by the fifteenth century the legal authority of political superiority vested solely in the sovereign, in a God given right to rule[67], popular franchise first linked to property ownership and then men of adequate income[68], eventually expanded to become almost universal. Law can only have vested first in sovereign dignity and then in Parliament's dignity, because society was persuaded of the value of their dignity, whether by careful, coercive or cooperative means, as sufficiently, societally valued worthiness in being, not to overthrow them.

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[65] *ibid* p. 124
[66] Austin (n. 7) p. 124
[67] Please see excerpts from the Dignity Survey: Nobility - Honours, Dignities and Estates at Appendix ?
[68] Bob Whitfield *The Extension of the Franchise: 1832-1931* (Heinemann Advanced History 2001)

Austin's model of 'positive law' also fits contemporary suggestions of dissipated trans-systemic systems of governing law. For example, Borrows[69] suggestion of co-existing Federal, Provincial and First Nations laws, each recognised and responding to different communities in Canada, that are all nonetheless part of the 'positive' ferment of Canadian societal law. 'Positive' resistance, evident in continuing treaty negotiations[70], challenges the 'positive' assertion that First Nations peoples accept habitual obedience to Canadian law; whether Federal or Provincial. I am mindful of the historic exclusion and oppressive potential of the following statement I nonetheless suggest the history of colonisation stands behind recognition of First Nations laws evolving in Canadian societal law that can be recognised in the 'positive' political and legal challenges to, and careful cooperative determinations of, Canadian society.

There are similar continuing re-negotiations going on in the UK for, after many years of unrest, peaceful self-governance in Northern Ireland, devolution, (with a referendum on independence soon) of power to Scotland and to a lesser extent Wales; with a vocal separatist movement in Cornwall. Like Borrows, and Austin, I believe 'positive' systems of trans-systemic law can and do exist. They exist in the 'positive laws' that we habitually obey, that shape and are shaped by, the laws and communities we live in.

Having disputed Austin's insistence on the necessity of coercion I also challenge the idea of a fixed locus for sovereignty. I recognise that law may be challenged by the people of society, as indeed the law of Charles I was in Austin's example. Schmidt[71] suggests any challenge to law creates a state of exception; an exception to the existing rule. It is a matter of fact; a societally stable coincidence of impression and idea, whether the asserter of the 'state of exception' is one governing sovereign, a governing state dignity, or many asserters of human dignity, who have the ability to challenge a guiding governing law.

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[69] I attended an Indigenous Law Summer School taught by Professors John Borrows, Gordon Christie and Val Napoleon at the University of Victoria, BC Canada. Borrows gave also provided addition lectures on the Canadian Constitution. See also Borrows, J. *Canada's Indigenous Constitution* (University of Toronto Press 2010)

[70] *ibid* see also the Aboriginal Affairs and Northern Development Canada, 'Acts, Agreements and Land Claims' (Aboriginal Affairs and Northern Development Canada 2010) <http://www.aadnc-aandc.gc.ca/eng/1100100028568/1100100028572> accessed 21st June 2013

[71] Schmitt C., *Political Theology: Four Chapters on the Concept of Sovereignty* (1922 University of Chicago Press, 2005) p. 1

A challenge can be either that the law exists and ought to act; or that a particular law does not have societal support, or that the law's authoritative base is disputed. The first challenge is a call for action, recognising an idea previously objectified in the law's reasoning and that the anticipated situation has now occurred and needs to be acted upon. The law will be reaffirmed, providing that the anticipated promise of law, the pre-reasoned re-action to the impression (cause) of the reasoned idea, is dealt with by the anticipated effect. The second is a challenge to law either to deny or (re)introduce a law; to provide a dignity impression, in a reasoned idea. The challenge requires law to clarify, reinterpret or provide a judgement, in order to change, even if only to reaffirm, the existing impression of law, to maintain the stability of law's impression. The third is a challenge to the law's authority.

I accept Austin's 'positive law' idea of a necessary locus for societal recognition of law; however, I dispute the actuality of being able to pin the determination of any law to the locus of a sovereign (or a parliament). That is the beauty of Austin's positive law, because sovereigns, governments, parliaments and legislation change. For example, the dignity, societally valued worthiness in being, of the UK sovereign in parliament is an important stabilising general dignity idea; an abstraction that locates and maintains the continuity of our UK laws in our particular Queen and current Parliament as the UK governing power. Sovereign dignity, rather than our particular Queen, maintains the law that precedes our Queen's long reign; possibly without review. Sensibly, reasonably, thoughtfully particular governments can and do review old laws; or allow them to lapse to distance themselves from particular laws that are not to their liking and or not of their making; that is the nature of truly positive law. For example, the Act of Settlement 1700 (which followed the Bill of Rights 1689) is still on the statute book and apparently excludes Catholics, and those married to a catholic, from governance of this realm[72], but did not prevent Tony Blair from becoming Prime Minister[73]. The law might naturally change under different administrations. For example, the Equality Act 2010 carefully crafted

[72] "That all and every Person and Persons that then were or afterwards should be reconciled to or shall hold Communion with the See or Church of Rome or should professe the Popish Religion or marry a Papist should be excluded and are by that Act made for ever [X1incapable] to inherit possess or enjoy the Crown and Government of this Realm and Ireland and the Dominions thereunto belonging or any part of the same or to have use or exercise any regall Power Authority or Jurisdiction within the same And in all and every such Case and Cases the People of these Realms shall be and are thereby absolved of their Allegiance"
[73] Tony Blair's wife Cherie was a catholic and Tony converted to Catholicism when he left office.

under a Labour administration and navigated through Parliament in the face of (according polls at the time) almost certain electoral defeat, became a different Act under the new Conservative Liberal Democrat alliance; with the new Government immediately resisting some of the more socially equalising measures[74].

Similarly, ideas that subsequently attempted to ground law in a basic rule[75], rule of recognition[76], extant authority[77] or rule of law[78], fail to illuminate that they are trying to objectify and pin down the elusive knowledge of being that is in ever-changing flux. The continuing determination of dignity, of societies coming, or holding together, in alliance and agreement, necessarily challenges The Law in evolving knowledge, to be worthy or tolerable of habitual obedience. Any claimed dignity; sovereign, parliamentary or human, can only provide a temporary locus for the determination of dignity.

For example, in the British Commonwealth, as well as the UK, sovereign dignity did undoubtedly subsume individual, group, species and beyond species dignity in law, as apparently habitually obedient to the sovereign. Dignity, asserted and recognised, held, and indeed holds, a sovereign figurehead in place. Queen Elizabeth II remains the unifying head of state dignity in the UK and several other states. However, the Queen's status is subject to continuing societal recognition of the Queen's asserted dignity status. If, as they are considering, Jamaica decides to remove the Queen as their Head of State the Queen's sovereign dignity, as Head of State will be the subject of the Jamaicans decision. The Queen would, in fact, be de-valued by the Jamaican state and as matter of legal fact no longer be Queen of Jamaica. The Queen would no longer be recognised by Jamaican, or any other society, as the Queen of Jamaica. Who or what replaced the Queen as Head of the Jamaican state, would, following election or some other valuation process of societal recognition, come, in legal fact, to be the Head of the Jamaican state.

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[74] Amelia Gentleman , 'Theresa May scraps legal requirement to reduce inequality' (The Guardian 17 November 2010) <http://www.theguardian.com/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality> accessed 14th June 2014 with a sub-heading "Measure introduced by Harriet Harman under Labour dismissed by home secretary as 'ridiculous'"

[75] H., Kelsen *Pure Theory of Law* (1949 Transaction Publishers Ltd (reprint 2009)) p. 45

[76] Hart (n. 10) pp. 94-110

[77] Raz (n. 17)

[78] Thomas Bingham *The Rule of Law* (Reprint edition Penguin 2011)

The idea that a sovereign is only a temporary incidence of dignity suggests that dignity vests in the changing recognition of the people of society, who recognise the incidence of dignity. I am again reminded of the suggestion of trans-valuation[79]; of dignity starting with the idea of high value, or rank of some humans in relation to others, and the reversal of the valuation. However, I suggest the re-ordering comes not in opposition but from the recognition of sameness in the ability to value, in the inward realisation of inherent value, rather than any externalised high value. The recognition of incidences of dignity is of people or things that enough people value as worthy in being.

7.2.3.3 The Sovereignty of Dignity - The Essential Focal Point for Law

The separation of the locus of societal recognition of law began long before Austin[80] and included Montesquieu's[81] recognition of instability in the command/habitual obedience model. Montesquieu suggested a, now widely accepted, separation of powers, between the three branches of government; of executive, judiciary and legislature [82]. The reason for the separation of the governing powers was to create stability, habitual obedience, by imposing checks and balances on the control of human power. Sovereignty, or sovereign dignity, was already recognised as necessarily held in a dynamic balance mediating control of the separated command/obedience, guiding/serving, (desire/duty) power of law.

Far from being 'obedient to no one'[83], as Austin suggested, the branches of government have long been recognised as being sensibly answerable to one another and necessarily obedient to society, as each, individually and combined, lack at least one of the essential components of 'positive law'. For example, as noted above the abstraction of sovereign dignity premises the Queen in Parliament, does not prevent changes in government of people who are answerable to society. History evidences sovereign dignity cannot protect a particular government's electoral success in the continual shift from right to left (and back) of Her Majesty's government. And,

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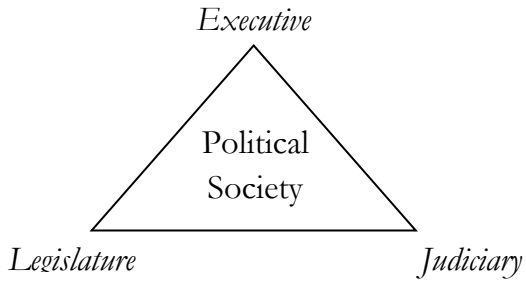
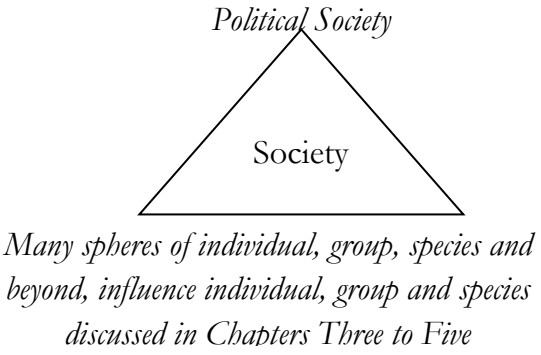
[79] Dan-Cohen, Feuerbach in Chapter Four and Waldron J. (2009) 'Dignity, Rank, and Rights: The 2009 Tanner Lectures' *Public Law & Legal Theory Research Paper Series* Working Paper No. 09-50 Berkeley p. 27 & 28.
[80] For example, in the social contract theories above (n. 36 – 39)
[81] Montesquieu *The Spirit of Laws by Montesquieu* (first published 1748 Nugent C. (tr) Halcyon Press 2010)
[82] *ibid* Montesquieu apparently based this on the British constitutional system, in which he perceived a division of authority between the monarch, Parliament, and the courts of law.
[83] Austin (n. 7) p. 116

quite rightly, sovereign dignity cannot prevent reasonable disciplinary action being taken against particular rogue or incompetent judges or parliamentarians. Royal dignity will not stop the Queen dying, but sovereign dignity through the (un)natural (because I am not convinced royalty exists by nature) will ensure Prince Charles's succession; when the name and possibly (by human nature) the relationship of sovereign dignity will change. Sovereign dignity cannot prevent future referendums on the appropriateness of maintaining a sovereign monarch, which again belies the apparently sovereign nature of the sovereign. For example, Independent Scotland would keep the Queen as head of state and remain part of the Commonwealth. However, some SNP members have said they would like another referendum on keeping the monarchy in its present form, in the event of a Yes vote in 2014[84]. The possibility of referendum suggests the sovereign is not sovereign after all.

The executive may have the desire and duty to make governing rules for society, but the legislature and judiciary ally with the executive to temper the *desire* by careful counsel, practical reasoning in and of society, in what will be agreeable to habitual obedience; and cooperatively take on some of the *duty*, by performing tasks in and to society to ensure the rules continue to be habitually obeyed.





The separation of powers recognised a need for moderation within the dynamism of the governing sphere of political society to mediate external societal influences. Montesquieu recognised that government is not without competition for the governing role. Other spheres of influence compete for dignity. Concern for the

[84] Andrew Grice, 'How an independent Scotland would look' (The Independent 15th October 2012) <http://www.independent.co.uk/news/uk/politics/how-an-independent-scotland-would-look-8212474.html> accessed 15th June 2014

governmental endeavour, of 'human survival and social control', must deliver on this promise and coincide with the shared, conflicted ideas of common self-interest, on which a habitually obedient society of law depends. Because the other societal rewards for societally governing law are not immediately obvious. People who are habitually obedient to society may not need a particular society, or law, in order to be, providing that they have somewhere else to go. Alternatively, if they have no place to go, their choices may be easily subsumed and their choices recognised as extremely limited.

This is why Austin's separation of human law into 'positive law' (the appropriate matter of jurisprudence) from the 'law set by people *not* as political superiors', was so important. Austin recognised that there is a difference between emergent and (re)accepted 'positive law' that is actually obeyed and The Law legacy 'set by people *not* as political superiors', which is subject to challenge. The Law might state normative intent in equal, just, moral, natural and posited law, while the challenges revealed in emergent 'positive law' show The Law to be none of these things. Worse The Law might state anything it likes and not allow challenge, in order to attempt to stifle emergent 'positive law'.

Dignity as a 'positive' incidence of 'societally valued worthiness in being', recognises there is always an alternative other dignity. Human dignity recognises McCrudden's suggestion of dignity as a place-holder[85], providing a recognisable 'positive' human alternative to earlier assertions of national, parliamentary or sovereign dignity; grounding the determination of group dignity in the collective of individuals in human being. Other dignity writers' recognitions of inherent human dignity, in each and every human being, includes being as individual, group, species and beyond. While no dignity theory suggests human dignity cannot coincide with parliament, sovereign or state dignity, I suggest the continuum of dignity, informed by past incidences of dignity assertion, arises in the contemporary understanding of dignity', to assert and recognise dignity as what society values worthy in being.

[85] Christopher McCrudden 'Human Dignity' (University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No 10/ April 2006) Available [online] Social Science Research Network http://papers.ssrn.com/Abstract=899687

Dignity may once have been recognised in the sovereign head or governing legislative body of a governing sphere of law, but dignity vests in the combined spirit of governed society, in those who The Law is intended to guide and serve. I am not denying law once guided and served a discrete high society or that that 'high society' maintained its discrete advantage by coercive means. I suggest dignity is the source of challenge, critique and cooperation in society, high and common, with the 'positive law' of what society deems to be worthy in being, including ideas of an equal, just, moral and natural world.

Now that, through the widening of franchise, governing law recognises more people of society, The Law can be better informed about dignity. The changed recognition of the combined spirit of the people of a wider more inclusive governed society suggests that dignity vests in human dignity. I suggest The Law should be more responsive to the ideas of the governed of society and human law would be wise to be informed by the evolving checks and balances of contemporary society: for example, in transparent legal, media, and resisting political action.

In this new human, as opposed to sovereign or state, era, the governed of society need to see, to be able to recognise and contribute to, the care, coercion and cooperation vested in society; as Borrows suggests we have to live the kind of society we want to be[86]. The governors of society lose nothing by acknowledging the inaccurate, uncompromising and destabilising impression that they wield unlimited power over society. Human law is informed by society cooperatively making law and people bringing challenges to the law. I believe the people who set law '*not* as political superiors' necessarily recognise the rising chorus of the 'voice of dignity' and slowly come to realise and respect society's changing recognition of dignity. However, much jurisprudential theory and some judges appear to lack the vision of Human Law.

Before we temporarily leave 'positive law' I suggest related spheres support the societally governing 'human law'/rule making role; for example, arbiter, chief, elder, judge, parent, politician, lawyer and teacher, all provide focal points for the dissemination of society's guiding laws/rules. I include these 'positive' examples as

[86] Borrows (n. 69)

loci for dignity because these roles are deliberately intended to guide societal being in conforming to governing law and therefore undoubtedly guide the habitual obedience of society. One can also recognise anti-law/rulemaking, for example, in

individual criminals, groups of insurgents and illegal gang cultures. I do not suggest that any of these examples were recognised by Austin. I recognise that as a shortcoming of Austin's sovereignty oriented view of 'positive law'.

7.2.3.4 Governing Law (Austin's Human Law)

Austin's 'human law' inter-relates 'positive law (the appropriate matter of jurisprudence)' with the 'laws set by people not as political superiors'. The broader image of Austin's 'human law' is clearly based on governing national law and, in Austin's case, the law of the United Kingdom, expanding and contracting with empire[87]. I therefore recognise Austin's 'human law' as 'governing law'. Austin recognised other systems of governing law existed, both historically and in other

[87] Austin (n. 7) Lecture VI

European countries, but his concern was to look inward to the governing national law of the UK and the discrete utilitarian calculus contained within and determined by independent nationally oriented law[88]. However, as Austin recognised, 'positive law' could cover any 1, recognisable independent political society; whose members were habitually obedient to; 2, a sovereign body or bodies.

Like Austin and Twining I see the necessity of setting the law in context. However, in order to recognise the law in any context and to explain and bring more clarity to its law, we need to recognise the societal dimension of whose dignity; and what society is valuing as worthiness in being. We need to see the different spheres of social ordering which the law is operating in, to recognise and distinguish between the different spheres or societies of dignity. Identifying dignity and the society valuing it, reveals the boundaries of law that are being contested; which may, for example, be common, customary, municipal, national or international law. Seeing society also recognises the dignities that are being excluded; that are forced beyond the protective endeavour of 'human survival and social control' in governing law.

7.2.3.5 The Essential Existential 'Positive Law' Agreement

The relationship between 'positive law (the appropriate matter of jurisprudence)' on the one hand and 'laws set by people *not* as political superiors' on the other has a necessarily dynamic interactive quality. I suggest the coming together of any society is premised on 'positive' agreement determined by dignity of the society's being. In the short term it does not matter whether society is organised by care, coercion or cooperation; it is that society does, in fact, come together. The motivation may be the acknowledged governing law endeavour of 'human survival and social control'.

I am convinced, by philosophic social contract reasoning, that the societal relationship between the governed and governor, including the tripartite separation of powers in the governing roles of 'laws set by people *not* as political superiors', are found in the 'positive law (the appropriate matter of jurisprudence)' of societal agreement. Austin reduced the essential elements of societal *agreement* to command and habitual obedience. I suggest a more optimistic and sustainable idea of societal

[88] *ibid*

agreement (harmony or accordance in opinion or feeling[89]), *alliance* (a union or association formed for mutual benefit[90]), and *continuation* (the state of remaining in existence or operation[91]), of the same. The 'positive' *agreements* (commands) of 'governing law' have to enjoy *alliance* (obedience); or society and its idea are no longer *continued*. The well-established idea of social contract is premised on 'positive' *agreement alliance* between the governor and the governed; in an agreement that is habitually *continued* (obeyed).

I gained this insight from Borrows[92] and the contestation within two conflicted stories of the coming together, in *alliance* and *agreement,* of First Nations with what was to become the dominant legal authority in Canada; and the *continuing* compromise of that *agreement*. The 1867 confederation of Canada[93] declares itself to be based on caring, coercive and cooperative principles of peace, order and good government, which in relation to First Nations' people are known to have been periodically exclusively and coercively enforced.

A more cooperative strategy had been revealed in the earlier trading *agreements* and supportive war pacts of self-interested *alliance* formed between the colonising governments and First Nations[94]; in relationships bound on promises of mutual peace, friendship and respect[95]. Canadian history reveals the earlier *agreements* with the British Crown as initially over-run and out-lawed by the incoming population. However, the earlier *agreements* now found legal recognition for indigenous rights and land claims for undefeated First Nations previously disenfranchised by British/Canadian governance[96].

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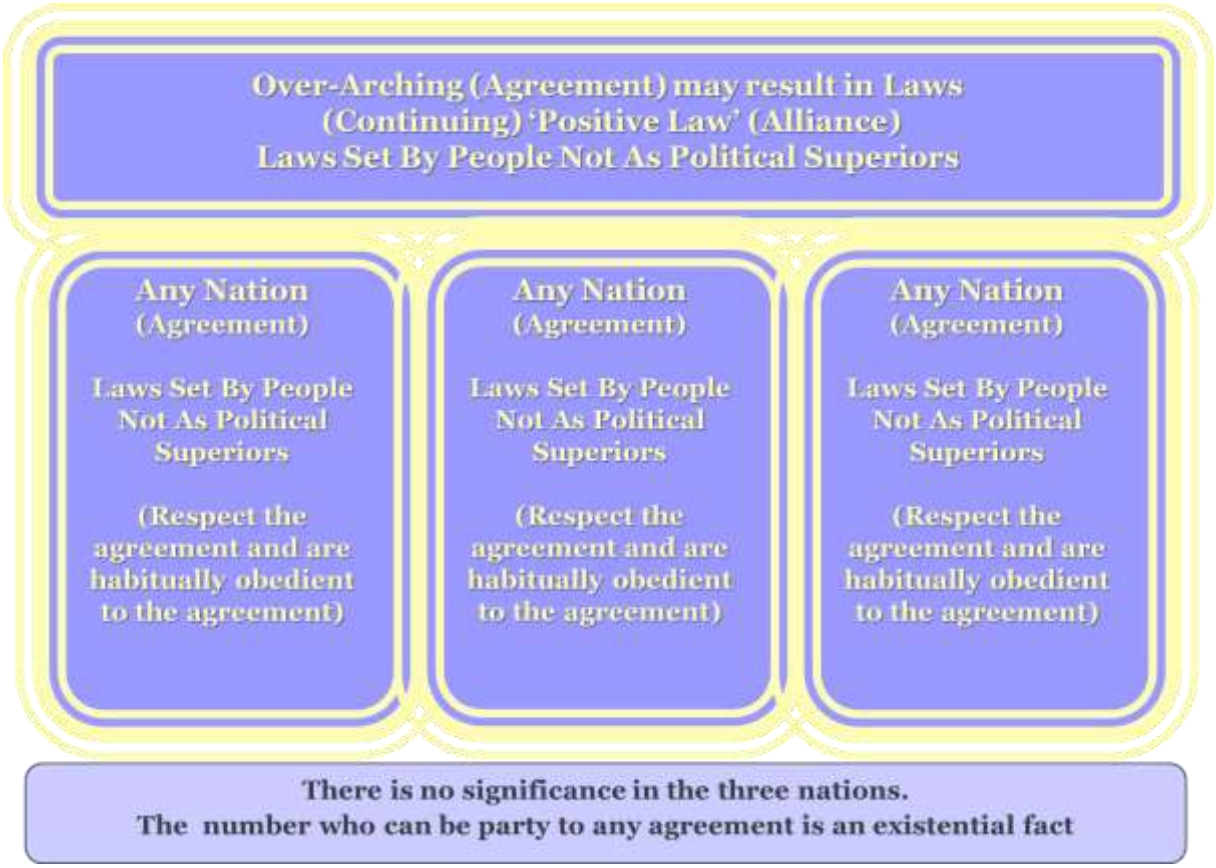
[89] OED http://oxforddictionaries.com/definition/english/agreement?q=agreement (n. 63)
[90] OED http://oxforddictionaries.com/definition/english/alliance?q=alliance (n. 63)
[91] OED http://oxforddictionaries.com/definition/english/continuance?q=continuance (n. 63)
[92] Borrows (n. 6)
[93] The phrase "peace, order and good government" appears in many 19th and 20th century British Acts of Parliament, including the New Zealand Constitution Act 1852, the Colonial Laws Validity Act 1865, The British North America Act, 1867, the British Settlements Act 1887, the Commonwealth of Australia Constitution Act 1900, the South Africa Act 1909, the Government of Ireland Act 1920 and the West Indies Act 1962.
[94] See Borrows J., John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002) p. 125
[95] Borrows (n. 69) p. 148
[96] Borrows J. & Rotman L, 2007 3rd edn *Aboriginal legal issues: Cases, Materials & Commentary* LexisNexis Canada Inc

A further example of societal *agreement, alliance* and *continuation* provided foundation for the UN, where peace (mutual human survival) was the *alliance* motive, reason and premise for (societal control) *agreement*. Peace was threatened: without an *agreement* (which may subsequently be translated into a rule, or law) peace would not exist; the *agreement* cannot exist without coming together, whether by careful, coerced or co-operative *alliance*; and neither will *continue* to exist unless the *agreement* and *alliance continue*, through the *continuance* of peaceful motive. The *agreement* is 'positive' and not exclusive. The *agreement* does not prevent old *alliances* existing or new *alliances* being formed, it simply exists. The existential nature of *agreement; alliance* and *continuance*, are determined by the motive for *agreement*, 'peace in the world'. However, evidentially the *alliance* has also been vested in society by 'care', evidenced in outraged dignity and humanitarian aid; 'coercion', in sanctions and further *agreement* being linked to funding; as well as the nations' 'co-operation'.

Beyond national law, a new sphere of law has been created, where political leaders', the representative members of independent national political societies, are empowered, by the populous members of national societies, to make such *alliances* and *agreements* in the international sphere of law. In the process of 'positive law' *agreement* the representative members of independent political societies overarch their societies to make and *continue alliance agreements* on behalf of their societies. As suggested, dignity vests in the coming together of *alliance, agreement* and the *continuance* of the same; dignity providing the essential (re)accepting focal point for law, possibly mirrored in recognition of an incidence of dignity. 'Positive law' *agreement* may result in a text; the *agreement* reduced to writing in an incident of The Law, subsequently relied upon and posited as The Law by the 'laws set by people not as political superiors', as part of 'governing law'. However, the dignity of the 'positive law' *agreement*, vests in the *continuance* of the 'positive law' *agreement* in the relevant society, in this case the UN. The UN *alliance agreement* must *continue* to exist by careful, coercive, cooperative means, for the *agreement* of the UN to survive.



7.2.3.6 Laws set by people *not* as political superiors

Austin placed the 'laws set by men *not* as political superiors' as a sub-set beside 'positive law' within 'human law'. Austin recognised that in human being subsequent generations necessarily (re)cognise the various 'objects of law'. The reason for this was in the earlier discussions of Spinoza[97] and Hume[98]. The recognition of sensed impression, mediated by ideas, that lead to subsequent impressions and ideas bring people sensibly together in reasoned societal *alliance* to *agree* (re)accept, recognise (*continuing*) or re-cognise (choose differently) how human beings might survive together; to identify a base for Human Law.

A rule or law is a guiding idea of how a society might be together; thought about, 'talked about', externalised and shared since antiquity[99]. The shared idea cannot be an immediate impression, but gains strength from coincidence with earlier and or later impressions and ideas. Strong belief in an idea can lead to one's own and

[97] Baruch Spinoza *Ethics* (White W. H. and Stirling A.H. tr, Wordsworth Editions, 2001)
[98] David Hume, *A Treatise of Human Nature* ((1739) Mossner E. C., ed Penguin 1985) p. 327
[99] Platonic evolution of impression to idea (Epistle VII 341 c4-d2; p531) in Giorgio Agamben 'The Thing Itself' in *potentialities: Collected Essays In Philosophy* (Stanford University Press, 1999)

others subsequent impressions. However, there has to be the coincidence of an idea with an existing (continuing) or subsequent impression, which brings the idea into being; even if the idea or impression is misguided or wrong. For example, we have an idea of black swans and a round world, because we believe that they do, in fact, exist ('belief' and 'fact' being strong coincidences of ideas with impression); we have that stable impression.

'Governing law' ideas must be similarly bound to and premised on an impression subject. The idea of the impression I have been sharing here is of 'governing law' *agreement* bound to, and premised on, reasoned *alliance* in the wisdom of law, evolved by the *continuous* challenge of dignity. I suggest this idea as an alternative premise for 'governing law', the practically reasoned preference to the mystical overarching unlimited, uncompromising, human assertions of normativity; or a right to rule based on an assumption of heritage, wealth or religious impressions that may not be shared sufficiently in the society of 'governing law'. I am not denying the valuing of heritage, wealth or religion as ways to be. I am suggesting that if the society does not share the impression, they provide a poor and unstable foundation for 'governing law'; because those who do not share the belief (impression) have no grounding for their belief in law.

The basis of 'positive law' is an age old understanding of the indeterminacy in human knowledge; cause and effect made recognisable by segmenting discrete examples from the wholeness of being. Intuitive impressions and normative ideas both the cause and effect of *agreements*, formed by the cause/effect of ideas and impressions, coming and *continuing* together in societal *alliance*. The sharing of ideas and impressions create more ideas and impressions premised on division and remerging of multiple evolving impressions of dignity of different societies in being.

The impression of dignity is key to the *continuance* of the *alliance* and *agreement*; the more consistent the *continuance* of *alliance* in the coincidence of impression and ideas, the stronger the *agreement*, which leads to subsequent impressions of a strong *agreement*. The strongest impressions become facts, or beliefs, the impressions that

we believe to be true[100]. However, subsequent ideas and impressions evolve the earlier impressions. So the fantastic elaboration of law ideas and impressions remain dependent on a *continuing* (re)determination of dignity of the independent impression and ideas that *continually* evolve the collective impression of law's society.

For example, the idea (effect) of kingdoms, nations and states being united in law is premised on the impressions (cause) of dignity of those societies agreeing to be United Kingdoms, United Nations and United States. For example, the founding idea (leap of faith) that brought the EU peacefully together in *alliance* was premised in the first-hand experience of war (cause - impressions), which led to a complex amalgam of impressions and ideas and the common belief (cause - impression) based on mutual (dis)trust (cause – shared idea of impression) that if the heavy industries of coal and steel were under common management (idea), none of the *agreement* countries would have independent means to build weapons to use against the other countries[101]. Long may it *continue*!

In national 'governing law' primary legislation usually has its dignity pre-tested and recognised in sovereign or parliamentary dignity; in the UK this is evidenced in the law's detailed passage through Parliament. The resultant law enjoys a pre-reasoned, stable, but not unchallengeable, dignity premise, in 'laws set by people *not* as political superiors'. As a result the emergence of these national 'governing laws' are largely overlooked in jurisprudence, deemed to be other than law and the archetype of a sovereign command. Perhaps some people still deem politicians to be superiors and above societal scrutiny? However, the being and behaviour of Members of Parliament, as well as the emergence and interpretation of parliamentary legislation is challengeable in 'positive law'.

For example, the Hunting Act 2004 (the 'Act') had a difficult passage through Parliament before being brought into posited 'governing law' where it was immediately challenged by the Countryside Alliance[102]. The Alliance sought judicial

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[100] Hume (n. 96) p. 135 & p. 334

[101] European Union 'A peaceful Europe – the beginnings of cooperation' (- Europa) <http://europa.eu/about-eu/eu-history/1945-1959/index_en.htm> accessed 16th August 2013

[102] *Regina (Countryside Alliance and others) v Attorney General and another*, [2005] EWHC 1677 (Admin); [2006] EWCA Civ 817Court of Appeal (Civil Division); [2007] House of Lords UKHL 52; and *Countryside Alliance and others v United Kingdom* (App no 27809/08) in the European Court of Human Rights (Section 4)

review, challenging the legitimacy of the Act by relying on various Articles, including Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms appended to Human Rights Act 1998. The claimants claimed "respect for a particular lifestyle" suggesting the word "home… is …the place where a person lives… [a] place where he and his family are entitled to be left in peace, free from interference by the state or its agents; … an important aspect of his dignity as a human being"[103]. The case went through the British Court system and to the European Court of Human Rights where the court decided that the Act was "a proportionate interference in the circumstances"[104]. Lord Bingham's judgement in the House of Lords stated "… in accordance with the general interest [of society]. As already pointed out, Parliament's judgment is not immune from challenge. The national courts in the first instance, and ultimately the Strasbourg court, have a power and a duty to measure national legislation against convention standards. But for reasons already given, respect should be paid to the recent and closely-considered judgment of a democratic assembly, and no ground is shown for disturbing that judgment in this instance"[105]. The hunting fraternity still challenge the Act as a restriction on their lifestyle[106]. And since the change in the complexion of the UK government there have been suggestions of relaxing or repealing the law, with the Prime Minister suggesting a free vote[107].

Legislation that has not enjoyed parliamentary scrutiny, for example, emergency powers and orders in council, along with delegated legislation and judge-made law are even more evidently the subject of 'laws set by men *not* as political superiors' and require a 'positive law' dignity determination; as to whether the law should be 'habitually obeyed'. These 'laws set by men *not* as political superiors' are less stable than parliamentary legislation, because they do not get the same 'positive' societal scrutiny. Statutory Instruments[108] can be challenged as disproportionate or unreasonable, whereas statute enjoys the stabilizing evidence of parliamentary

[103] Richard Gordon QC for the claimants in the first case. *ibid* [2007] House of Lords UKHL 52
[104] *Countryside Alliance and others v United Kingdom* European Court of Human Rights
[105] Lord Bingham *Regina (Countryside Alliance and others) v Attorney General* UKHL
[106] Countryside Alliance <http://www.countryside-alliance.org/ca/campaigns-hunting> accessed 08/2013
[107] BBC News, 'David Cameron has 'some sympathy' over dog hunting laws'
<http://www.bbc.co.uk/news/uk-wales-24526638> accessed 14th October 2013
[108] Statutory Instruments Act 1946

scrutiny[109]. Human made law, including The Law of 'governing laws' are subject to (re)acceptance and challenge.

Of course, 'laws set by men *not* as political superiors', usually government ministers and judges, enjoy sovereign authority to make commands[110]. Politicians and judges recognise the governing guiding purpose of their vocation. Responsibility for their governing guidance may be less obvious, but as they are setting laws as elected representatives of the people of society and '*not* as political superiors' they are individually and collectively answerable for their conclusions (*agreements* or commands). The overarching dignity of societal community requires 'laws set by men *not* as political superiors' be accounted to their societal community; to pre-reason and explain their reason for law. Austin "by no means disapprove(d)… of judge-made law", on the contrary he rebuked judges for the "timid narrow and piecemeal manner in which judges have legislated, and for legislating under cover of vague and indeterminate phrases"[111]. In 'positive law' people who make law, whether assuming political superiority, or *not*, should be responsible for their law.

I conclude my introduction to 'governing law' by recognising several key points as a pattern in Austin's 'object' of 'human law'.

- First, I agree with Austin's separation of human law. Emergent 'positive law' revealed in the ferment of dignity determination by *continuing* care, coercion or cooperation, of the *alliance agreement* is 'the appropriate matter of jurisprudence'; it can and should be recognised separately from the 'laws set by men *not* as political superiors'. The 'positive law' that is respected and obeyed, not the legacy of law that exists as made, should be 'the appropriate matter of jurisprudence'.

- Second, I agree 'positive law' involves 1, members of independent societies who are habitually obedient to; 2, a sovereign body or bodies. I do not agree the sovereign body or bodies are habitually obedient to no one. I suggest they

[109] The Hunting Act cases n. 70
[110] Austin (n. 7) p. 142 Lec. VI para 231
[111] Austin (n. 7) p. 108 Lec. V para 181

always have to necessarily care, coerce and cooperate to gain and maintain the dignity of their being.

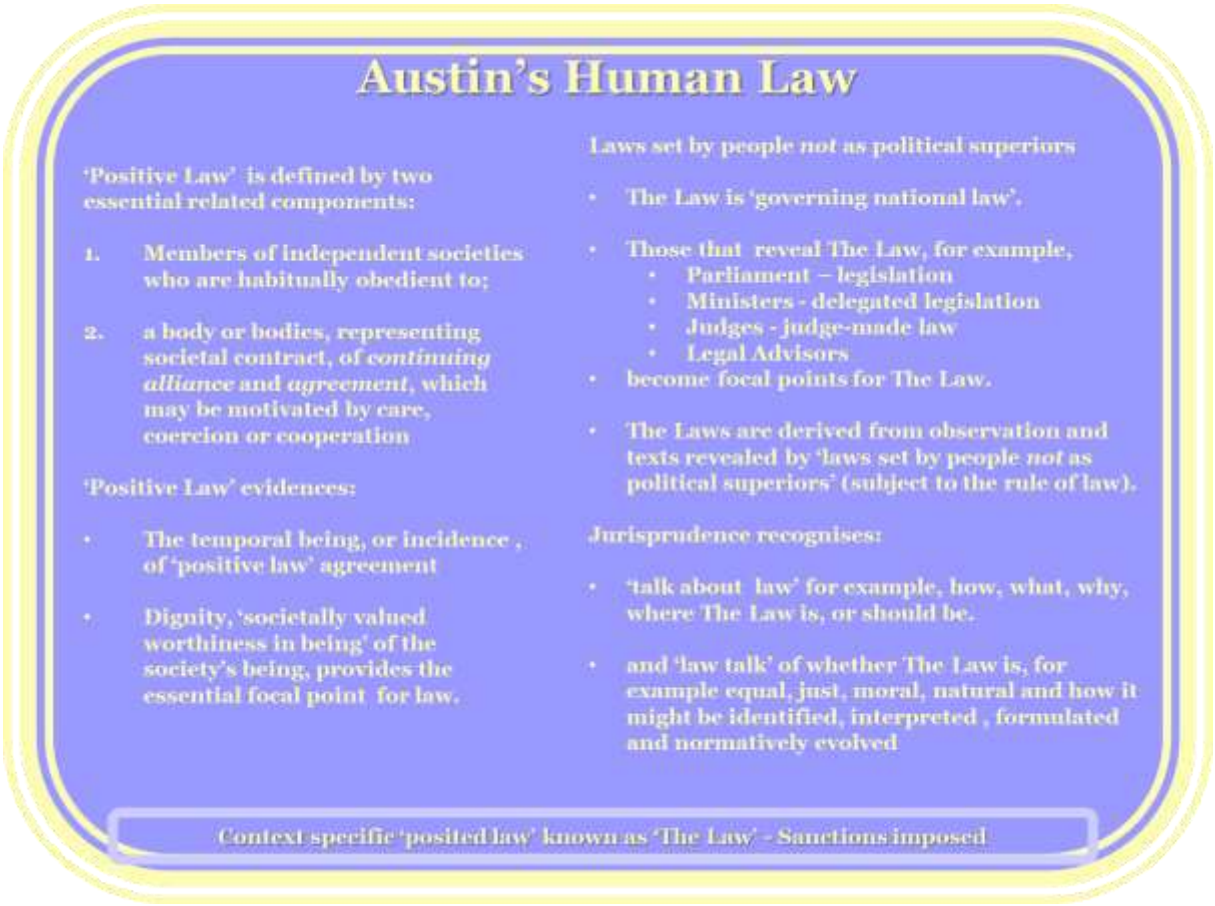
- Third, I depart from Austin's necessity of coercion in obtaining habitual obedience. I suggest habitual obedience historically was, and still is, elicited in societal *agreement* and that the *agreement* is arguably better, stronger and more stable, if premised in care and cooperation, rather than reliance on coercive 'orders backed by threats'.

- Fourth, I suggest that sovereignty, sovereign dignity, recognises a temporal incidence of dignity, and that the dignity rather than the sovereign (or parliament), is the emergent essential focal point for law. Other incidences of dignity, mirrored in law, include the many contestable spheres of dignity and law identified in earlier chapters.

- Fifth, I go beyond Austin's recognition of ministers and judges, to suggest all people who make, introduce and interpret laws in different branches of government make laws as 'people *not* as political superiors'. I suggest all are subject to societal scrutiny for the *continuing* obedience and *alliance* to the being *agreement* of government and law.

- Sixth, the apparent *agreement* motive for governing law's existence, 'human survival and social control', is subject to societally beneficial evidence of 'human survival and social control' for the *continuing alliance* of *agreement* existence.

- Seventh, I recognise the distinction between what Twining calls 'talk about law' and 'law talk'. The general theorising 'talk about law' of how, what, why and where law might be external to law. Whereas, 'law talk' of what particular laws is; in The Law usually asserted as 'governing law' is internal to law. Both internal and external discussions of law might include, for example, talk of law being equal, just, moral or natural. However, talk of how law might be identified, interpreted, formulated and normalised is usually necessarily limited to 'law talk' of a known governance system.



7.3 Law of Religious and Other Beliefs (Austin's Law of God)

The 'law of religious and other beliefs' has been re-named from Austin's 'law of God', to recognise different beliefs and embrace separate needs in contemporary societies. Yet, the 'laws of religious and other beliefs' appear very similar to 'governing law' in having both 'positive law' and 'laws set by men *not* as ~~political~~ [religious] superiors' elements. 'Law of religious and other beliefs' returns us to the idea of meta-physical over-arching, beyond Feldman's species, to the discussion of Hegel and different types of knowledge revealed by Spinoza and Hume. In the 'law of religious and other beliefs' the absolute spirit suggested by Hegel[112] is recognised. For many God is absolute; an over-arching spiritual life force; an omnipresent God who can, and does, complement or subsume the impressions and ideas of many independent groups, individuals and species human spirit.

[112] Georg Hegel *Phenomenology of Spirit* (Miller A.V. tr, OUP 1977) p. 115

Like 'governing law' 'law of religious and other beliefs' is positive and existential. People who hold a belief, recognise, are in *agreement* on, the truth of their belief; an existential motivational coincidence of idea and impression in their belief's being, provides reason for their believing. Religious belief is usually in a pre-existing idea (few people intuit a new religion); while other beliefs might be premised on an extant or evolving impression of knowledge revealing something previously unknown or forgotten. In each case there is a strong coincidence of impression and idea, which while it continues, can be supported by subsequent impressions. Most people accept well-established, pre-existing ideas of religion or belief, which enjoy longevity in dignity creating the most stable impressions. For example, exponents of well-established religious beliefs might side-line more recent manifestations of religious belief. A change in attitude to a religious belief was recently marked by the unanimous decision of the Supreme Court in *R (Hodkin & Anor) v Registrar General of Births, Deaths and Marriages*[113] no longer denying the status of religious belief to the Church of Scientology which had been the case since 1970[114]. I am reminded of the reliability of knowledge in Gallie's 'essentially contested concepts'[115] where any "exotic interpretation ~~must~~ [might] be assigned to the lunatic fringe"[116].

There may well be coercion in the early indoctrination and oppressive insistence of some religious and other beliefs; for those who believe, sharing that belief is an inevitable act of caring and likely one of earliest shared ideas. There is also strong evidence that most 'law of religious and other beliefs' are 'positively' premised in societal agreements involving loving care and cooperation. However, as with 'governing law' people who believe in 'religious and other beliefs' are subject to human frailties; challenged and contested as to how to be, habitually obedient to the 'laws of religious and other beliefs'. The many incidences of different religions evidence focal points for recognition of their different, but maybe not unrelated beliefs; in recognition of absolute overarching spirit or spirits.

Like the other object of 'governing law' the evolving 'positive law' of 'law of religious and other beliefs' is recognised and interpreted by people '*not* as ~~political~~

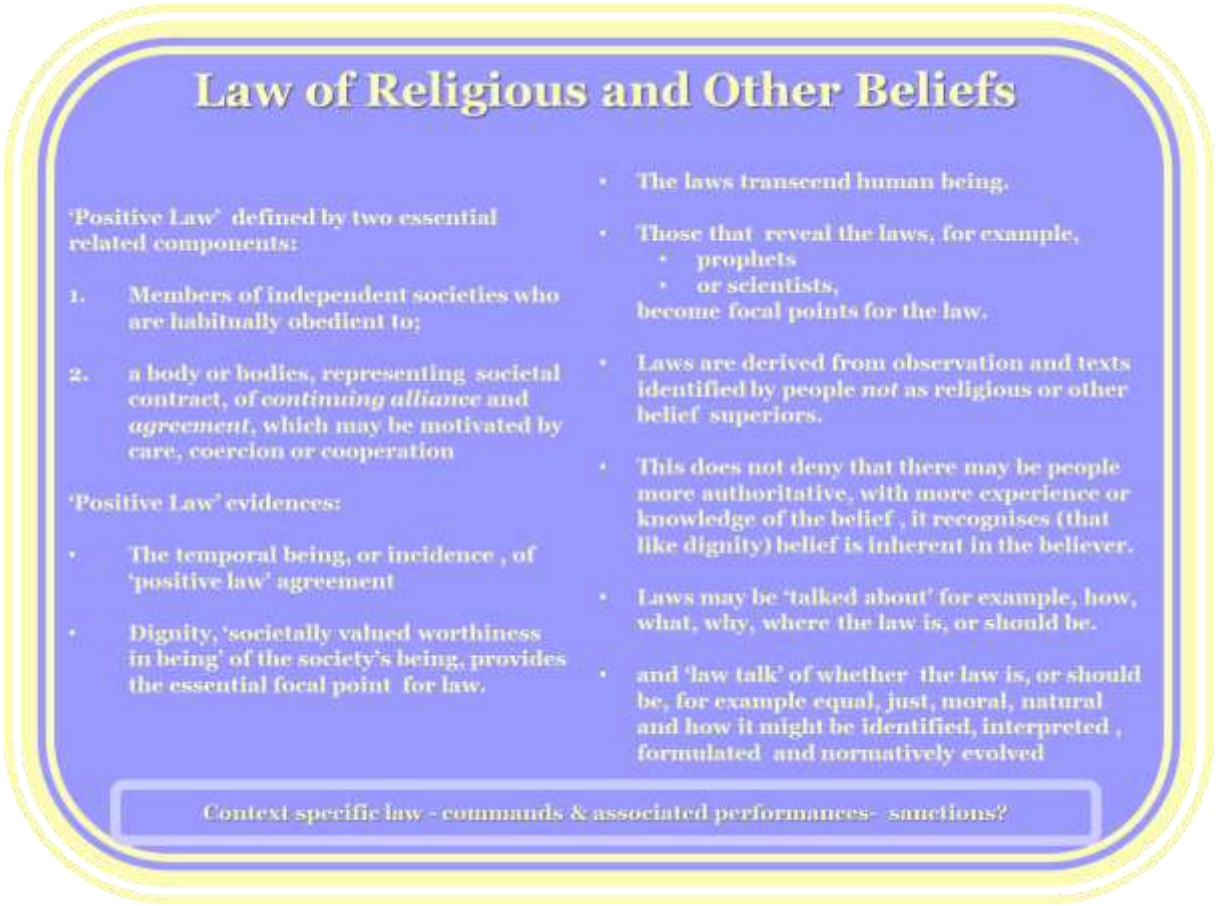
[113] [2013] UKSC 77
[114] *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697
[115] Walter Gallie *Philosophy and the Historical Understanding* (Chatto & Windus London 1964)
[116] *ibid* p.190

[religious or other belief] superiors'. Some people may have stronger belief impressions and some may be more authoritative, have more experience or knowledge of the belief than others, but, as with governing law, the belief is inherent in all those that share the belief. The law is the over-arching law of absolute spirit; the rules, or laws, come from observation and texts, which are interpreted by 'law of religious and other beliefs' asserters and interpreters.

For example, in a shared belief in human exacerbated climate change, the 'positive' belief exists. The belief over-arches individual being and concerns families, groups, nations, supra-nations and the species as a whole. If the belief motivates action it may, at least, inspire the believer to try not to make matters worse. The belief is obedient to no one, but those who do believe may care enough to be motivated to do something individually, cooperatively or coercively (for example through law) to lessen the impacts of climatic change. Those involved in the study of climate change may believe, or not; be 'positive' or sceptical. Climate change is realised by observation of nature; the rules, or laws, are obtained from scientific experimentation and past texts. The 'positive' rules provide best available data that lapse if they prove unreliable. The impressions and ideas of the belief are tested and retested until they become stable, through the continued acceptance of the reliability of the belief. The rules may still be contested and are continuously challenged, interpreted, formulated, and normatively evolved through radical testing by scientists. Science raises just and moral (ethical) questions; societal funding, through governments, logically and necessarily 'positively' biased toward what society values as worthy in being.

Like the rules of 'governing law', the 'law of religious and other beliefs' become contested in the experience of being human. Theological and philosophical 'talk about' the 'law of religious and other beliefs' often reaches beyond the individual, group and species of the particular 'religious and other beliefs' being. Talk of particular 'laws of religious and other beliefs' may involve all sorts of general, 'talk about' the positive, equally applicable, just and moral nature, of 'religious and other beliefs' or introduce particular 'law talk' in rules to help, interpret, formulate, and

normatively evolve the texts; guided by what the 'religious or other belief' societies value as worthy in being.



My own sense is that 'governing law' should necessarily be secular; in order to allow the freedom to articulate multiple different competing beliefs so religious debate can inform 'governing law'. 'Governing law' cannot and should not ignore its societal context, or its close relationship in society with the 'laws of religious or other beliefs'. It is pure folly to suggest that societal law could be blind to the 'positive' societal ferment of the 'laws of religious or other beliefs'. Because this would ignore the profound and fundamental guiding effect of the 'laws of religious or other beliefs', in moulding the beliefs of the people who determine the worthiness of society's habitual obedience to the guiding rules of society's 'governing law'; which is totally unbelievable.

7.4 'Objects improperly but by close analogy termed laws'

The common denominator of 'objects improperly but by close analogy termed laws' is that they are governing laws deemed other than 'governing law', while

acknowledging that they inform other spheres of 'governing law'. This appears to me as a very obvious identification of different spheres and scopes of law. The laws of other independent nations provide the obvious example; of being other than one's own sphere of national 'governing law'. However, perhaps more illuminating are the spheres that exist within and extend beyond other recognisable independent societies. For example, local *agreements* that *ally* people in strongly held *continuing* beliefs in ways to nationally govern: for example, in conservative, liberal and labour oriented governance strategies; or customary (common), municipal, federal, national and international law.

Like the 'law of religious or other beliefs' the society of 'objects improperly but by close analogy termed laws' is recognisably other than national society. And yet, again, the ideas of 'objects improperly but by close analogy termed laws' appear similar to the two earlier 'objects of law' having both 'positive law' and 'laws set by men *not* as political superiors'. In fact, like the 'law of religious or other beliefs', the 'objects improperly but by close analogy termed laws' purport to inform and sometimes subsume other 'governing law' roles, and law rules, in other spheres of 'governing law'. Separating the 'objects of law, we recognise a lack of exclusivity between the 'objects of law'. Being involved in 'objects improperly but by close analogy termed laws', does not exclude one from being involved in other recognisably independent spheres of 'governing law' or 'religious or other belief'.

'Objects improperly but by close analogy termed laws' see people who set 'governing law' '*not* as political superiors', engaged with other independent political societies within and beyond 'governing law'; to either inform or overarch their 'governing law'. For example, people who set 'governing law' '*not* as political superiors' look to the history of their own and other countries, accepted and rejected, laws, in order to understand how issues or incidences were dealt with in the past, to inform their own 'positive' governance strategy.

Beyond local spheres of 'governing law', independent societal bodies can be recognised as 'governing law' *allied* in careful, coercive and co-operative *agreement* to inform and sometimes overarch the local governing spheres. For example, spheres of national governing law may be overarched with wider spheres of bi, supra or

multi-national international 'governing law'. It will be a matter of existential fact whether the people representing the people of independent national societies do, in fact, commit their nation to a careful, coercive or cooperative *alliance agreement* and *continuance* of governing over-arching law; or as the United States of America so often does, change its domestic law to approximate the international *alliance* without the commitment to *continuance* and *agreement*.

Twining's work helps to illuminate the examples, which also coincide with Feldman's international/species, supra and national/group and individual spheres. The 'objects improperly but by close analogy termed' international law include: customary law, for example, comity (courteous dignity jurisdictional recognition accorded by one nation to the laws and institutions of another); international treaty law, (for example, the UN and International Criminal Court). Supra-national law, that includes customary (for example, Common Law) and treaty law (for example, the EU and NAFTA); special groupings of power such as the G7, G8, G20, NATO, Council of Europe (which incorporates the ECHR and the ECtHR); and the evolving agreement in former commonwealths; bi- and multinational treaty law. Within nations there is the guidance of customary law, which in the UK is our constitutional base of Common Law.

Although on first sight 'objects improperly but by close analogy termed laws' appear very governor oriented, I suggest this is because pre-existing custom (experience of being) is already entrenched in The Law as 'positive law' and the emerging experience of being cannot be codified. Nonetheless in overarching 'governing law', governed or governor may appeal to a wider authority beyond 'governing law'. For example, the governed bring attention to the UN *alliance agreement* and actions to the ECtHR to coerce nation's 'governing law' to account for behaviour contrary to the *alliance agreement*; while national 'governing law' might, voluntarily or involuntarily, over-arch national law to increased stability or reinforce internationally recognised, for example, EU norms.

For each of the international 'objects improperly but by close analogy termed laws', I refer back to the idea and examples of the essential existence of 'positive law' agreement. Representative members of the populous of independent national

political societies are empowered to make agreements in the international sphere of law. However, they are just that, representative members, ultimately responsible to the populous of their own societies for agreements made in the international sphere (for example, any referendum on the dignity, societally valued worthiness in being, a member of the EU). 'Positive law' agreement may result in texts (for example, EU legislation and judicial interpretation) that maybe interpreted by the agreement's society or recognised in national courts; the 'laws set by people not as political superiors', as part of national 'governing law'. While the 'positive law' agreement continues to exist in each of the international groupings, the dignity vests in the *continuing* 'positive law' *agreement* and *alliance* of the relevant society. The *continuance* of the *agreement* is encouraged by the care, coercion or cooperation of the *alliance* to 'habitually obey'.

International law may lack coercive means, however, it is inaccurate to say that it "imposes no obligations, is not binding and so not worth the title of law"[117]. The UN endeavour builds on a long history of *continuing alliance agreement*. Bi- and multi-lateral *alliance agreement* between nations has long been recognised; *pacta sunt servanda*, agreements should be kept and treaties observed[118], is the bedrock of customary international law. The aspirational assertions of UN law are not imposed assertions of an oppressive legislator introducing a whimsical new rule and giving it the status of a moral rule by *fiat*, which as Hart suggests would be an imposition "repugnant to the idea of morality". They are what they say they are; the common aspirations of wary, but united nations seeking to find common ground on which to build future trust. We ought to be building on that trust rather than looking for a reason why it will not work[119]. Despite initial concerns[120] and resistance[121] to the UN international law aspiration, new regimes are often quick with assurances of respect

[117] Hart (no. 10) p. 220
[118] Martin E.A. & Law J., 2006 *A Dictionary of Law* (6th Edition) OUP
[119] The weaknesses in international law are recognised and undeniable, but that does not warrant denial of the status of law. Hart is quite right in that any assessment of international law "strength is worth little if it ignores the extent to which the law enforcement provisions of the Charter, admirable on paper, have been paralysed by the veto and the ideological divisions and alliances of the great powers". Hart (no. 10) p. 233
[120] The drafting committee was composed of eight persons, from Australia, Chile, China, France, Lebanon, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America and even as the Declaration was negotiated and declared, "most African and Asian states were absent from the UN because they were European colonies" Makau Wa Mutua The Ideology Of Human Rights *Virginia Journal of International Law* vol. 36 (96) Spr. 1996 p589. Markets and aid may be linked to compliance with international law obligations.
[121] Hart (no. 10) p. 226

for UN obligations, both to appease international markets and with a willingness to conform to the international ideal. For example, indigenous peoples from across the world who were denied franchise[122] and only gained rights under imposed regimes of law as a direct result of international human rights law are generally also willing to embrace international human rights law[123]. International obligations are wielded by international government institutions [124] and NGOs[125] alike to encourage national conformity with international obligations through international peer pressure. "Where international obligations are acknowledged the individual state who wittingly uses these procedures is bound thereby, whether he or it chooses to be bound or not"[126].

In the UK 'objects improperly but by close analogy termed laws' may be more difficult to recognise, because national customary law, which in some societies can be seen as other than national law is often subsumed in UK Common Law. Customary laws derived from the experience of being, within or beyond national law, nonetheless inform national law. Cataloguing a history of 'positive law' revealed by use of the word dignity in law in the UK Dignity Survey outlined the nuances and customary practices that evolved Common Law in a 'positive' ferment of law: from changing authority of sovereigns, nobles and common subjects; to the prerogatives, privileges, rights and duties afforded by law; to the hierarchy of different courts and tribunals (within the UK and beyond); to the language and dress of the court; all worded in dignity, societally valued worthiness in being[127].

UK history reveals customary and sovereign law was once more locally oriented; nations, and counties[128], did, for whatever careful, coercive or cooperative reason, unify under one sovereign[129]. Customary law was recognised as existing prior to sovereign law with corroborated evidence that Common Law was used alongside

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[122] E.g. Canada's First Nations finally got the unfettered right to vote federally in 1960 and provincially in 1969; Australian Aborigines gained voting rights during the same period.
[123] Borrows (no. 69)
[124] E.g. United Nations; Commonwealth
[125] E.g. Amnesty International; International Labour Organisation
[126] Hart (no. 10) p. 225 – Pinochet is a case law example of a Head of State bound by international treaty
[127] Excerpts from UKDS Appendix 2
[128] Kent, my home county, had more than one king in Anglo-Saxon times and is documented as the home of one the first kings of England. See Barbara Yorke *Kings and Kingdoms of Early Anglo-Saxon England* (Routledge, 1997)
[129] Hart (no. 10) p. 221-2

and in default where no sovereign law was declared[130]. Historic spheres of legal, dignity determined, influence recognised sovereign interest in domestic affairs was originally limited; usually to raising revenue and armies[131]. The land owning lord might be obliged to supply revenue and manpower to the sovereign, but he 'habitually answered to no one' in how he exercised local control. Magistrates (Justices of the Peace), whose existence can be traced back to the twelfth century, reflect this history; they were (and still are) local volunteers, appointed by the Crown, historically from the local landowning class or local chiefs, for their knowledge of customary law[132]. UK history suggests competing systems of law were often imposed or introduced[133]. Sensibly some rules were 'positively' lived and enhanced, while others were compromised and lost, with new laws and refinements to existing laws constantly introduced[134]; recognising the changing flux of community. For many people human survival and social control was a local issue, dealt with by local individuals and groups, vested with or controlled by power and offering very limited means for appeal[135].

As the UK developed a more sophisticated 'positive' increasingly statutory system of law, customary laws (of *alliance agreement*) lapsed from view no-longer the authority for law, but the customary law can still be recognised in evolving The Law. Rightly or wrongly, denial of customary law (re)places laws in a pre-law position inferring that the customary law no longer enjoys habitual obedience in 'governing law'. This disabling aspect, evident in all overarching systems of law, caringly, coercively or cooperatively imposed, results in those whose customary law is legally dis-placed, reasserting their claim in 'governing law'. This legal discrimination against individuals and groups requires that those discriminated against re-educate

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130 *ibid.*

131 *ibid.*

132 Beard C. A., *The Office of Justice of the Peace in England*, (reprinted from the 1904 edition University Press of the Pacific Honolulu, Hawaii. 2002)

133 Conquerors are hardly likely to defeat a nation and then succumb to the laws of the defeated nation; and many of the defeated would surely carry on living by the laws they knew until they were asked or forced to do otherwise.

134 For example, international and EU law; The House of Lords, under the guise of the Privy Council, had, and in some cases still have, influence over the laws of British colonies and former colonies. This was initially very much a one way imposition, but the court is increasingly willing to look to other jurisdictions when ruling on 'hard cases'. (The Privy Council still serves as the highest Court of Appeal for some countries)

135 Derek Roebuck 'Customary Law before the Conquest' *A lecture delivered to a joint meeting of the Institute of Advanced Legal Studies and the Institute of Historical Research*, University of London, 27th February 2006

the 'governing law' system; to first, recognise their existence, to gain legal standing, and then to recognise their dignity[136].

The battle for customary law is lost, where customary law's society no longer habitually obeys; where the *alliance agreement* can no longer be said to *continue*. Where the societies of customary law have to appeal to another sphere of 'positive law', they tacitly acknowledge that the *alliance agreement* of customary law is no longer the locus of the *continuing alliance agreement*, but the other 'positive law' may have to change as a result[137]. For example, the statutory and customary law claims of undefeated First Nations in Canada were over-looked for centuries, despite initial negotiations with independent 'nations' or 'tribes'[138], who had their own recognised systems of customary law, which included well established group settlements, organised multi-group seasonal encampments[139] and systems for the distribution of property and rights. The 'customary' methods of land distribution were conveniently not recognised as a prior claim to land[140]. In Australia the colonising law, declared the land as *terra nullius* or 'unoccupied' at the time of occupation[141].

For more than five centuries caring, coercive and cooperative challenges have been brought to law by the people of society in the familiar challenges that laws are observable in nature and ought to be equal, just and moral. These acts of law have long been overlooked: laws lost and found in the 'positive' ferment of law; historic loyalty and morality entrenched and 'positively' taken for granted, but evidenced in the recognition of the subsidiary role afforded to 'positive morality' by Austin. In

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[136] John Borrows (1998) *Re-Living The Present Title, Treaties, and the Trickster in British Columbia* B.C. Studies 99.
[137] For example, In 1973, the Nisga'a people appealed successfully to the Canadian government to negotiate a treaty settlement. Until 1990, the Nisga'a negotiations were conducted on a bilateral basis between Canada and the Nisga'a Tribal Council (NTC). In 1990, the provincial government entered the negotiations already underway between the Nisga'a Tribal Council and the federal government. The parties reached an Agreement in Principle (AIP) in 1996 and a final agreement in 1998. The BC Legislature gave its assent on April 23, 1999. The last step needed to give legal effect to the treaty took place on April 13, 2000, when Parliament passed the Nisga'a Final Agreement Act. Although not part of the British Columbia treaty process, Nisga'a negotiations followed the same tripartite procedure and resulted in the first modern-day treaty in British Columbia. The treaty came into effect on May 11, 2000.
http://www.gov.bc.ca/arr/firstnation/nisgaa/default.html# last accessed 6th April 2013
[138] Five independently negotiating nations were recognised by the declaration of George III relating to the First Nations People of Canada see Borrows J. & Rotman L., (n. 94)
[139] Peter Macnair, Alan L Hoover & Kevin Neary *The Legacy Tradition and Innovation in Northwest Coast Indian Art* (Royal BC Museum 2007)
[140] The case of *Mabo and Others v. Queensland* (No. 2) (1992) 175 CLR 1 F.C. 92/014 The court acceptance of native title replaced a 17th century doctrine of terra nullius (no-one's land) on which British claims to land possession of Australia were based.
[141] *ibid*

the nature of 'positive law' *continuing agreement* and *alliance* exists within nations based in often unrecognised, unwritten, even forgotten, *agreements*. But, when something goes wrong people, either by choice, or because they have no other choice, turn to society and law to challenge, accept guidance, or help to resolve, the problem.

'Objects improperly but by close analogy termed laws' are the 'positive' 'talk about law' where Human Law emerges on the basis of international and national societies agreeing to come together to counter issue specific experientially based human problems. Human Law that may benefit 'governing law' by being informed by the wider community to share and resolve experientially based problems within 'governing law'. Internationally and nationally 'objects improperly but by close analogy termed laws' are 'laws set by people (usually representatives of national governments) *not* as political superiors'; who are answerable both to the society of the agreement and to the national society that they represent. Any texts are interpreted by the society of the agreement, or if recognised in 'governing law' by the national court 'laws set by people *not* as political superiors'. In either case the people who set law '*not* as political superiors' are answerable to both the societies they represent. Within the society of the agreement the laws may be described as natural, moral, equal, just; and be interpreted, formulated and normatively evolved.

7.5 The unrevealing of 'Objects of Law'

The two elements of 'governing law', 'positive law' and 'laws set by people *not* as political superiors' appear to be similar in each of the first three 'objects of law'. With Austin's suggestion of the unrevealed laws of God, being revealed by laws of nature, or natural law[142], blurring the boundary between 'governing law' 'laws of religious or other beliefs', and 'objects improperly but by close analogy termed laws'; because each of the 'objects of law' informs the others. 'Objects improperly but by close analogy termed laws', evolve from the unfolding knowledge of 'religious or other beliefs' and experience of 'governing law' and could become 'law of religious or other beliefs' or 'governing law'. A clearly recognisable difference between 'law of religious or other beliefs' and 'governing law' is the declared 'governing law' endeavour of 'human survival and social control'.

Mindful of Spinoza and Hume the 'objects improperly but by close analogy termed laws' appear to suggest emerging or contested laws that are issue specific. Their

[142] Austin (n. 7) 'Lecture 1. 'Method of Determination' p. 5

contestability may fall short of 'governing law' or create a less than steady impression. The evolving, not yet fully realised, revealing of previously unrevealed laws of God or nature. The experiential knowledge of the legacy of laws emerging from generally agreed 'objects improperly but by close analogy termed laws' could be as important and pertinent to the 'positive law (the appropriate matter of jurisprudence)' of any particular 'governing law' or 'law of religious or other belief' as the historic legacy of The Law of any one nation.

Law revealed in the observance of nature, or experiential knowledge of being, including 'positive morality', shares the characteristics of being intuitively sensed, experienced and reasoned in a growing impression providing guidance to human being. That natural law is not 'governing law' does not make naturally evolving law less important than 'governing law' in guiding human survival and social control; which was recognised by Austin in the equal ranking of his 'objects of law'. 'Objects improperly but by close analogy termed laws', as other than 'law of religious or other beliefs', or Austin's human law, are simply a truism of Austin's schemata. Logically, 'objects improperly but by close analogy termed laws', and 'law of religious or other beliefs' inform 'governing law'; these are the laws that human beings believe in; the experience and reason of being.

Where natural law coincides with 'governing law', the naturalness may vanish from the picture, but the coincidence does not make natural law any less natural. Departing from Austin I suggest the 'objects improperly but by close analogy termed laws' and 'morality', positive or negative, that reflects the intuition, experience and practical reasoning of being, permeate every contestable boundary of Human Law. The unfolding of natural law feeds the positive dignity ferment of 'positive law' in all 'objects of law'.

7.6 'Laws so called by a mere figure of speech'

The 'laws so called by a mere figure of speech', were summarily dismissed from Austin's critique, and are barely admitted in most jurisprudence. And yet, this is perhaps the most important and fertile source of emergent 'positive' law and crucial to the ordering of 'governing law'. What distinguishes the actors in this sphere from the last, 'objects improperly but by close analogy termed laws', is that 'laws so called

by a mere figure of speech' are engaged in specific spheres of governance that do not necessarily concern the 'governing law' endeavour of society. However, they do have profound influence on discrete spheres of society and help to shape the beliefs of the people who determine the worthiness of society's habitual obedience to the guiding rules of society.

Again Twining[143] helps to populate this sphere, and I recognise Feldman's international, species; supra, national and local, groups; as well as, individual laws. International 'laws so called by mere figure of speech' include international soft laws: declarations (for example, the UN Declaration); international protocols (for example, on the environment); and international committees (for example, for humanitarian aid). Humanitarian Law (for example, international, non-governmental organisations (NGOs) like the International Committee of the Red Cross and the International Labour Organisation). Supra-national and national groups include for example: multi-national business and sports regulation; multinational NGOs, (like Amnesty International). National regulation includes: public bodies (for example, Parliament, the National Health Service (NHS) and the Police; and private bodies, for example, businesses (CMR[144] & TIR[145] Conventions), the professions (The Bar Standards Board and The Law Society) and media (Media Standards Trust); national NGOs; crime syndicates - gang culture[146]; peer review (for example, rules of chivalry and etiquette or honour among thieves); rules of fashion; and rules of game play.

Like the other 'objects of law' each 'laws so called by a mere figure of speech' grouping is recognised, and recognisable as other, than 'governing law'; they none the less enjoy 'positive law' characteristics. In discrete spheres of governed order 'laws so called by a mere figure of speech' are 'positive'; *agreements* and *alliances* are forged enjoying *continuing* habitual obedience. *Alliance agreements* are usually premised on the basis of care and co-operation; *continuance* engaging positive reward rather

[143] Twining (n. 9) p.14
[144] UN Convention on the Contract for the International Carriage of Goods by Road - (Geneva, 19 May 1956)
[145] UN Convention on International Transport of Goods Under Cover of TIR Carnets - (Geneva, 14 November 1975 (TIR stands for "Transports Internationaux Routiers" or "International Road Transports")
[146] For example, a gang leader in Honduras shot and buried enemies alive, deliberately leaving them to drown in their own blood to force recognition of claims to supremacy over territory. This is reminiscent of earlier claims to sovereign dignity. Guillermo Galdos , 'A week in the murder capital of the world' (Channel 4 News 15th July 2013) <http://www.channel4.com/news/san-pedro-sula-honduras-murder-capital-gangs> accessed 15th July 2013

than coercive punishment[147]. While 'laws so called by a mere figure of speech' undoubtedly exist independently of judge and ministerial 'laws set by people *not* as political superiors', 'laws so called by a mere figure of speech' are nonetheless 'set by people *not* as political superiors'. Where *agreements* are transgressed or associated *alliance* fall short of *agreement*, the people of a society may appeal to the sphere of 'governing law' and any, criminal and civil law, sanctions afforded.

'Laws so called by a mere figure of speech' include the wholeness of life experience; the holistic spheres of public, private and work life, which Dupré[148] suggested should be brought into 'governing law's' eye view. I agree with Dupré but I suggest the spheres of public, public and private work, and other private life issues, (discussed below) are already covered by Human Law and it is only the tunnel law-locked vision confining 'governing law' to The Law that prevents 'laws set by people *not* as political superiors' from engaging with the other 'objects of law' to feed the 'positive' dignity ferment of 'positive law (the appropriate matter of jurisprudence)'. 'Governing law' is a recognised societal law of last resort. 'Laws so called by a mere figure of speech' guide every aspect of our human being.

7.7 Public and Private Work Spheres - determined by dignity

Dignity has a profound effect on people's working being. People want to be valued by society. People choose to work in certain professions, often involving advanced learning or science[149], to elevate their status and declare their work to be worthy in/to society. Positing professional status has been so successful that the word 'profession' (with the possible exception of 'the oldest profession') is synonymous with 'worthy' professions that are generally valued by society. Law recognised the dignity of professions[150] and that their "dignity and respect needed to be protected"[151]. Members of professions organised themselves into professional bodies and institutions, to take collective responsibility to uphold and maintain the

[147] For example, I heard the Metropolitan Police Commissioner on the Radio 4 Today Programme stating that police regulation was more co-operative than coercive.
[148] Dupré C. 2009 'Unlocking human dignity: towards a theory for the 21st century' *European Human Rights Law Review* 2, 199
[149] 'Profession' OED (n. 63)
[150] Architects in *Crane v Hegeman-Harris Co Inc* - [1939] 1 All ER 662; *Hughes v Architects' Registration Council of The United Kingdom* - [1957] 2 All ER 436; the Bar Council in *Rolph v Marston Valley Brick Co Ltd* [1956] 2 All ER 50 Doctors in *Ritter v. Godfrey* [1920] 2 K.B. 47; *re R. Hampton & Sons* [1964 No. A. 64] [1966] 1 Q.B. 135 & *P & M Kaye Ltd v Hosier & Dickinson Ltd* - [1972] 1 All ER 121
[151] *In re Macdonald, Sons & Co.* - [1894] 1 Ch. 89

dignity of their profession[152], i.e. self-governance, with detailed rules on how their internally looking society and externally facing profession should be.

Subsequently trade unions gave voice to workers in all walks of life: with a strong desire to emulate the upholding of work place dignity: "manual labour" [153] became dignified, the distinction between workers[154], the "dignity of office"[155], and the dignity of adequate remuneration[156]. Through dignity many early employment rights were recognised in law: rights against slavery; the right to receive an unencumbered wage[157]; rights against dismissal[158], modes of dismissal[159]; constructive dismissal[160], reinstatement[161] and of consultation in the redundancy process[162]. Dignity was also important in leaving employment[163]and the implications of enforcing a restrictive covenant[164]. "It is a question of status and a question of dignity, and these matters are not to be treated lightly. They are serious questions which affect good industrial relations"[165].

Public/private professionals and businesses may prefer to self-govern and self-regulate however there is a point at which the 'governing law' of society will intervene; 'governing law' is a societal law of last resort. 'Governing law' motivated by dignity regulates public/private business and professionals, when their own self-

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[152] The General Medical Council; Benchers of the Inns of Court and the Disciplinary Committee of the Law Society and the Chartered Insurance Institute
[153] *Great Western Railway Company v. Bater* - [1922] 2 A.C. 1
[154] *Great Western Railway Company (On Behalf of W. H. Hall, Clerk to the Great Western Railway Company) v. Bater (Surveyor of Taxes)* [1921] 2 K.B. 128
[155] *Majid & Another v Union Bank of the Middle East Ltd; Union Bank of the Middle East Ltd v Majid & Another* CH D 8 July 1988 Official Transcripts (1980-1989)
[156] *Roberts v. Hopwood And Others* - [1925] A.C. 578 [HL] and referred to in *Pickwell V. Camden London Borough Council And Others* [1983] Q.B. 962
[157] Wood V-C in *Liverpool Corp v Wright* (1859) 28 LJ Ch 868 referred to in *Miles v Wakefield Metropolitan District Council* [1985] 1 All ER 905 CA (CD); *In re Cohen, a Bankrupt. Ex parte the Bankrupt v. Trustee of the Property of the Bankrupt. Ex parte Trustee of the property of the Bankrupt. The Bankrupt and Others* [1961] Ch. 246
[158] *Bank of Credit and Commerce International SA (in liquidation) v Ali and others (No 3)* [1999] All ER (D) 677 Ch D
[159] *Colorcon Ltd v Murphy* CA (CD) 25 February 1987 Official Transcripts (1980-1989)
[160] *L V Nixon, R Wheeldon (Applicants) v. Delaney Gallay Ltd., Burton-On-Trent and National Union of Sheet Metal Workers, Coppersmiths, Heating and Domestic Engineers (Respondents) ; R Gillespie, K Pearsall (Applicants) V. Delaney Gallay Ltd. Burton-On-Trent (Respondent)* - [1973] IRLR 69
[161] *Barr& Stroud v. Adair* - 1945 SC 34 High Court of Justiciary 23 November 1944 Session Cases & a tribunal decision in *Radbourne Motors (London) Ltd v Bryant* E.A.T 17 June 1980 Official Transcripts (1980-1989)
[162] Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U.L. Rev 885. *Bank of Credit and Commerce International SA (in liq) v Ali and others* (No 2) [1999] 4 All ER 83 CH D 25 June 1999 & *Powell v Inega Manufacturing Co Ltd* E.A.T 9 July 1980 Official Transcripts (1980-1989)
[163] *Kural* [E00033] - - Pensions Ombudsman Determinations; *Scott and Others (Appellants) v. Coalite Fuels and Chemicals Ltd (Respondents)* - [1988] IRLR 131 EAT 20 January 1988
[164] *Lawrence David Ltd v Ashton* CH D 21 June 1988 Official Transcripts (1980-1989)
[165] *Blackmore and Clarke v Brown & Root (UK) Ltd* E.A.T 25 November 1980 Official Transcripts (1980-1989)

government and self-regulation fails to protect dignity. Business, company, employment, environment, and health and safety regulation are all examples. As is the transition of contract and tort law: from laissez-faire (an expression meaning to leave alone or allow to do) to requirements that contractors act in 'good faith', are 'reasonable actors' and do not impose hidden or particularly 'onerous and unusual' clauses; and to act as responsibly, acknowledging a 'duty of care' not to harm their neighbours. 'Laws so called by a mere figure of speech', are 'laws set by people *not* as political superiors' that order our daily lives. The national 'governing law' of a particular society may intervene to change 'laws so called by a mere figure of speech' when dignity evolves a 'positive law' determination in 'governing law' to challenge the assumption in 'laws so called by a mere figure of speech' in recognition of how we, as a governed society, want to be.

In terms of the declared purpose of strategy for 'human survival and social control' these 'laws so called by a mere figure of speech' often have a profound and influential effect on how to be in the work environment. Professions and businesses offer the best guidance on how to gain, attain and survive in their sphere and the sanctions for non-conformity. For example, the 'governing law' sanction on Chris Huhne, a prominent politician, whose wife took his penalty points at his request for a speeding offence, was a conviction and eight months imprisonment for perverting the course of justice. The political/public sanction was the possibly permanent end of his professional parliamentary career.

There is also the point when public and private professions and businesses might ask 'governing law' to intervene. This is the sphere of civil law. In the mode of the historic petition of rights, which historically mediated against injustice on behalf of the sovereign, this enables 'governing law' to mediate between contracting parties on the basis of justice or fairness, rather than any self-interest. In this way 'governing law' oversees contract and tort law providing a framework for the needs of contractors. Civil law oversees the contractual agreements of members of national societies; including the direct agreements, for example, contracts and property, and indirect, evasive or postponed agreements, such as equity and trusts. The roots of tort law can also be extrapolated from the 'petition of rights' history,

where the keepers of sovereign conscience were responsible for delivery of justice to persons who had suffered harm from the wrongful acts of others through no fault of their own. 'Governing law' may also, by invitation or individual personal request, be asked to act as appellate court against the ruling of a governing body[166].

Short of 'governing law' public and private professions and businesses may agree to publicly initiated, non-regulatory, codes of practice; 'laws so called by a mere figure of speech'. For example, in the international sphere businesses can adopt the UN Global Compact which adopts ten principles in areas of human rights, labour, the environment and anti-corruption derived from societal aspirations in: The Universal Declaration of Human Rights; International Labour Organization's Declaration on Fundamental Principles and Rights at Work; The Rio Declaration on Environment and Development and The United Nations Convention Against Corruption. Publicly accountable privately initiated non-regulatory codes of practice may also appear in response to political and public concern, for example, the Financial Conduct Authority recently set up in the UK following the banking crisis, strengthening the (self) regulatory mechanism failures identified under the previous Financial Services Authority).

Individually, and in groups, people may prefer self-regulation to 'governing law' to determining how to be. People, individually, and in groups, may externalise their self-governing principles, in declarations and codes of practice, intentionally engaging 'positive law' to build a stable impression in others of how the particular society intends to be. If the externalised principles are, in fact (a strong belief) 'positive', the impression will likely be 'positive' and the self-governing 'laws so called by a mere figure of speech' may avoid 'governing law' intervention. However, if the externalised principles prove not to be 'positive' in dignity, societally valued worthiness in being, determination. The externalised principles may introduce contestable boundaries of expectation, which, by their own admission, fall short of the 'positive law' of 'governing law'.

[166] E.g. Against a ruling of a professional association - the Bar Association, Law Society or General Medical Council

Non-governmental action, including positive action, which may extend to rebellion and revolution as well as the criminal acts of individuals, syndicates and gangs, challenge and directly confront 'governing law', because they offer alternative ways to be. They may also be guided by command, enjoy habitual obedience and offer alternative methods of 'human survival and social control'. 'Governing law' may be generally sympathetic or completely outraged. Under the practically reasoned rules of social agreement I am advancing here 'governing law' should intervene when any non-governmental action conflicts with the societally asserted governing law' endeavour of 'human survival and social control'. Acts not tolerable to society, a 'positive law' standard determined by dignity should be 'the appropriate matter of jurisprudence' seen in the care, coercion and cooperative sphere of 'governing law'.

7.7.2 Public Sphere - determined by dignity

International and national public bodies enjoy various levels of self-regulation (including, for example, the EU and national Parliament, the NHS and the Police) with internally administered external and internal 'soft law' guidelines, as to how they should be. For example, the EU[167] and Parliament[168] self-regulate, but individuals found abusing their position may be criminalised[169] and all are answerable to the electorate. Internal 'soft law' guidance is promulgated by various professions both on the behaviour and practice of members and how they deal with their clients, customers and patients, which may come under political and public scrutiny.

The NHS and Police are both covered by a number of UK government NHS and Police Regulations. For example, failures in NHS[170] and Police[171] self-regulation

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[167] Riding Europe's Gravy Train broadcast on Monday 15 November 2010 Channel Four – Dispatches Programme http://www.channel4.com/programmes/dispatches/episode-guide/series-58/episode-4 accessed 9th April 2013

[168] MPs: Are They Still at It? broadcast on Monday 19 November 2012 Channel Four – Dispatches Programme http://www.channel4.com/programmes/dispatches/episode-guide/series-121/episode-1 accessed 9th April 2013

[169] Four MPs and two peers were sent to prison for falsely claiming parliamentary expenses.

[170] The NHS is covered by a number of UK government NHS Regulations and failures in self-regulation lead to public enquiry leading to recommendations, which invite political and public scrutiny, for example, The Francis Report into Mid-Staffordshire NHS Foundation Trust http://www.hiecne.org.uk/commit/robert_francis.asp last accessed 9th April 2013

[171] Like the NHS, the police service is covered by a number of UK government Police Regulations. Complaints about policing led to the establishment of the Independent Police Complaints Commission (IPCC). The police service has also been politicised by the election of Police and Crime Commissioners since 2012.

may lead to public inquiry and to recommendations, which invite political and public scrutiny and may lead to greater, public law, regulation. This continues the contemporary refinement of social contract, which expands and contracts with dignity. In the UK each governance turn from conservative, maintenance of the old status quo, to labour, redistribution of wealth to empower a new status quo, the social contract gets thinner and thicker. The 'positive' impact of dignity ensures considerable consensus around the central ground.

7.7.3 Other private life issues - determined by dignity

The other private life issues which are clearly determined by dignity return us to the beginning of the chapter and the thesis. Because they include all the repetitive dignity topics from the UK Dignity Survey:

> Abuse; association, either forced or restricted; belief, either forced or restricted; care, or lack thereof, where positive care obligations have been undertaken, for example, to care for children, the disabled, elderly, sick or vulnerable, or the dead; defamation; discrimination; dying; education; freedom; harassment; honour; ill, negligent, or unfair treatment, privacy and punishment, relating to all spheres of personal, private and public life.
>
> In the general, rather than individual sphere, this includes domestic and employment issues; justice; medical care, including medical and bio-ethics, treatment and negligence; privacy; slavery; and torture.

Again in extreme cases that conflict with the 'governing law' endeavour of 'human survival and social control' acts may engage criminal law sanction and civil law compensation. Large scale failures in self-regulation, like those of public bodies, invite political and public scrutiny, leading to public inquiry recommendations and may lead to greater, 'governing law' public regulation. For example, the Francis Report, into failings of The Mid Staffordshire NHS Foundation Trust[172] led to a number of recommendations to 'governing law' for the ordering of the NHS. The Leveson Inquiry into the culture, practices and ethics of the press, in particular, the

[172] Chaired by Robert Francis QC, 'The Mid Staffordshire NHS Foundation Trust' (2013) <http://www.midstaffspublicinquiry.com/report> accessed August 2013

relationship of the press with the public, police and politicians now has government agreement to introduce an independent regulator, set up by royal charter[173]. Yet, the current standoff between The Press, who are refusing to acknowledge the royal charter, and The Government demonstrates a lack of obedience by The Press to those who set law '*not* as political superiors' in the sphere of 'governing law'

Rules of fashion may be 'laws so called by a mere figure of speech' but undoubtedly help human beings to define who, what, and how they are and want to be. Attracting a mate, correct business dress, court room attire of criminal, victim and practitioners[174], the rules of fashion determine public and private success. Unless rules of fashion stray into the realm of 'positive morality' or 'governing law', for example, public nudity[175] or the wearing of the Burqa in Belgium[176] and France[177] they may be 'mere' influential rules.

Rules of chivalry and honour order society and undeniably pervade into all 'objects of law' including 'governing law'. Historically the Court of Chivalry intervened to prevent a generation of young men duelling to death[178]. Modern day gang culture, similarly premised and empowered by real and perceived slights of respect or honour, is also limited by criminal sanctions in 'governing law'. The careful, co-operation of peer review, rules of etiquette and of game play, for example, strategic games of chess are standard fare in jurisprudential texts, used analogously in law, to inform The Law.

However, The Law in any context is only a guide to future law. By analogous example, when William Webb Ellis with "fine disregard for the rules of football as played in his time first took the ball in his arms and ran with it thus originating the distinctive feature of the rugby game"[179], he ceased to play football and invented a

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[173] Press regulation deal struck by parties 18 March 2013 http://www.bbc.co.uk/news/uk-21825823
[174] Helena Kennedy *Eve was Framed* (1992 revised ed. Vintage Books, 2005)
[175] Davina Cooper 12 April 2010 *Stripping the Public Bare: Theorising the Politics of In/Equality from Nudist Encounters* University of Sydney Lunchtime Seminar Series; Steven Brocklehurst, 'Naked Rambler: The UK's oddest legal stand-off' (BBC News 2012) <http://www.bbc.co.uk/news/magazine-19625542> accessed August 2013
[176] 30 Apr 2010
[177] French National Assembly voted 335/1 in favour of outlawing the burka and the niqab 12th July 2010
[178] George Squibb 1959 The High Court of Chivalry: A Study of the Civil Law in England, Oxford.
[179] Eric Dunning & Kenneth Sheard *Football in the early-nineteenth-century public schools". Barbarians, gentlemen and players: a sociological study of the development of rugby football* (2nd ed.). Oxon: Routledge. 2005. pp. 52–53

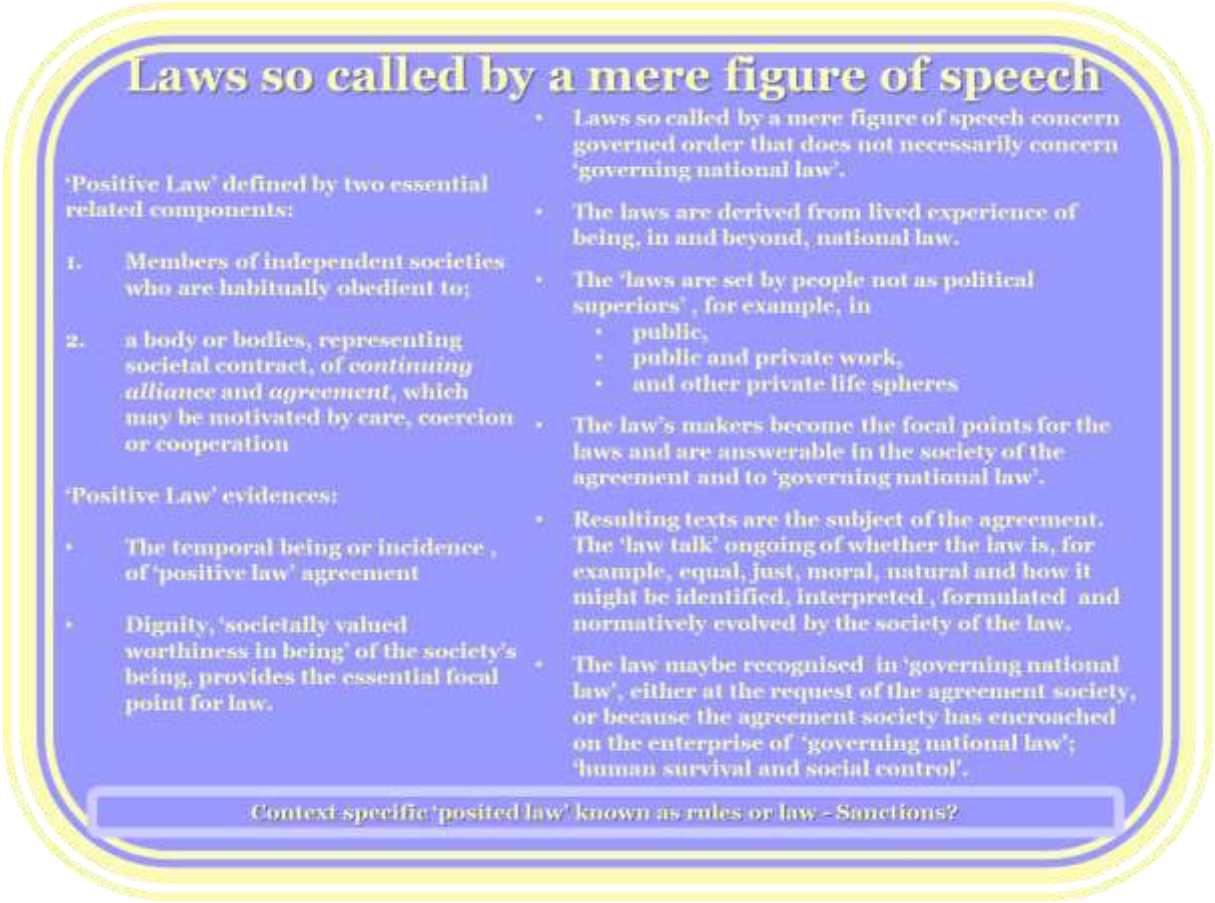
new game. A new 'positive law' emerged, which distinguished the rules of rugby from the rules of football.

Even rules of sports 'positively' evolve in line with the society of their particular sphere, for example, The Fédération Internationale de Football Association (FIFA) bought new laws into being with the introduction of goal-line technology to some events from 2013 and it will provide the definitive answer on goal line decisions in the 2014 Brazilian world cup[180]. And even in sport there are some incidents deemed beyond the competence of sports governing bodies, because they concern 'governing law'[181]. The line between the two spheres of law becomes another contestable boundary of law, ultimately determined by dignity, societally valued worthiness in being of the intervention of 'governing law'.

Each sphere of 'laws so called by a mere figure of speech' carves out a governance sphere that resists being taken over. Where *agreements continually* premise *alliances* on 'laws so called by a mere figure of speech' set by people '*not* as political superiors' in spheres of governed order independent of 'governing law'. Where the *agreements* do not meet the societal standards of 'governing law's' endeavour of 'human survival and social control' the issues may come under public and political scrutiny, in 'governing law'; revealing a contestable boundary for 'governing law'. Where issues of 'public', 'public and private work' and 'other private life issues' stray into the sphere of 'governing law', The Law of 'governing law' is poised to respond to the extent determined by the challenge raised in 'governing law' by the society of The Law; dignity, societally valued worthiness in being.

[180] Charles Reynolds, 'Goal line technology: Has anyone noticed Fifa making the most of their new toy? ' (The Independent 2014) <http://www.independent.co.uk/sport/football/worldcup/goal-line-technology-has-anyone-noticed-fifa-making-the-most-of-their-new-toy-9537482.html> accessed 14 June 2014

[181] I am thinking of the work of a Southampton PhD colleague Alison Boeree



7.8 The Re-Pictured 'Objects of Law'

Building on the suggestion of spheres of dignity, from Chapter Three, from the smallest family sphere, to small and large groups asserting 'laws so called by a mere figure of speech', to 'governing law', to over-arching 'religious and other beliefs', and 'objects improperly but by close analogy termed laws', all the 'objects of law', share two consistent features 'positive law' and 'laws set by people *not* as political superiors'. Human beings are constantly bombarded from every quarter with 'positive' information on good ways to be; urged and encouraged in law's enterprise of 'human survival and social control'. To be a 'legal nationalist' one needs to recognise all 'objects of law' contribute to the beliefs and experiences of human being. I suggest care, coercion and cooperation tempered by dignity make law a better strategy for human being, than one of fear or war. Human beings have thousands of years of experience of practically reasoned 'positive' history that we can learn from, rather than repeating the mistakes in 'governing law'.

In true Aristotelian style, recognising incidences of dignity in 'governing law' does not need to deny the continuum of dignity in individual, group, species or beyond. On the contrary, dignity recognises dignity as answerable to the whole wider society of human being. From individual, to group, to species and beyond, every contestable boundary invites a choice between different spheres of dignity. In the sphere of 'governing law' the choice: between individual (autonomy) and national (paternalism); between national (UK) and supra national (EU) influence; between inter-national and human species dignity. The evolving legacy of thousands of years of 'positive' experience and newly revealed innovation suggest we should pay attention to the common sense in the 'objects of law' before we make any choice; to inform that choice.

For example, whether we beat, educate, or beat to educate our children, rape our wives, enslave, cheat, steal from and murder our neighbours or even care for and nurture them, has gradually become UK national society's business, because dignity has determined that is the sort of society we want to be. I wish that the wisdom learnt in the national public sphere that guided and informed our private life sphere, be extended to our actions, public and private, beyond the national sphere. The wish is action based on experiential knowledge of a way to be in the world; it does not insist it is the only way for all to be in the world. However, in national relationships with the larger world, we are, and should be, guided by our national way of being. Providing weapons and military might to kill and torture people is worthy of societal discussion[182]; as is responsibility for the health of people and the environmental care of the places we impact. The future stability of 'governing law' is dependent on realising the promise of human dignity in 'human survival and social control'. As evidenced by the 9/11 and 7/7 bombings and the brutal murder of soldier Lee Rigby in the UK, societies can be held publicly accessible and accountable for the international neglect of human dignity[183].

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[182] BBC News 'Syria crisis: Cameron loses Commons vote on Syria action' (30th August 2013) <http://www.bbc.co.uk/news/uk-politics-23892783> accessed November 2013

[183] Union Carbide settled claims for the Bhopal gas disaster in 1984 with the Indian government. Subsequent claims from the victims were denied forum in America under the notion of *forum non convenes*. ***Lubbe*** *v Cape plc* [2000] 4 All ER 268 was the first UK case to provide a forum for plaintiffs from South Africa who would otherwise have had no resort to justice against corporate crimes recognised as putting the plaintiffs in known danger of asbestosis; In 2011 the United Nations Environment Programme report suggested the Ogoni

7.9 Human Law

I suggest the re-pictured 'objects of law' make up the broad picture of human asserted Human Law. 'Laws of religious and other beliefs', 'governing law' 'objects improperly but by close analogy termed laws' and 'laws so called by a mere figure of speech' were all ranked equally in Austin's 'objects of law'. I suggest that this is correct, as all the 'objects of law' *continually* premise the *agreement* and *alliance* of different spheres of 'positive law'.

Of course, The Law of nations and societies 'governing law' provides guidance and is indicative of how people should be in order to conform to the norms of a particular 'governing law' society. However, the evolving information, challenge and critique of 'positive' 'governing law' rose from every 'objects of law'. When The Laws 'set by people *not* as political superiors' are challenged, the people who set laws '*not* as political superiors' should be wise and consider the representations being made. The 'positive agreement' of 'positive' Human Law embraces each re-pictured 'object of law' maintained by *continuing alliance* and *agreement*, whether by care, coercion or cooperation.

Just like all the other 'objects of law' the 'positive law' of 'governing law' requires that out of date laws lapse if they do not conform to contemporary societal dignity. Reticence on the part of people who refuse to set laws '*not* as political superiors'; ministers and judges, who insist on applying rather than (re)interpreting law do not do 'positive law' and do Human Law a disservice. Applying The Law over-looks the 'positive' ferment of societal desire leaving society disenfranchised in over reliance on historic morality concretised or frozen in an out of date law. The challenge of human dignity questions the protectionism of historic orientations of dignity and demands re-consideration of The Law.

The challenge of human dignity may be elusive in the severed domain of 'law set by people *not* as political superiors' in 'governing law', however, human dignity pervades every aspect of every 'object of law'. Human dignity drives every innovation and challenge in the (re)affirmation of 'positive' emergent law through

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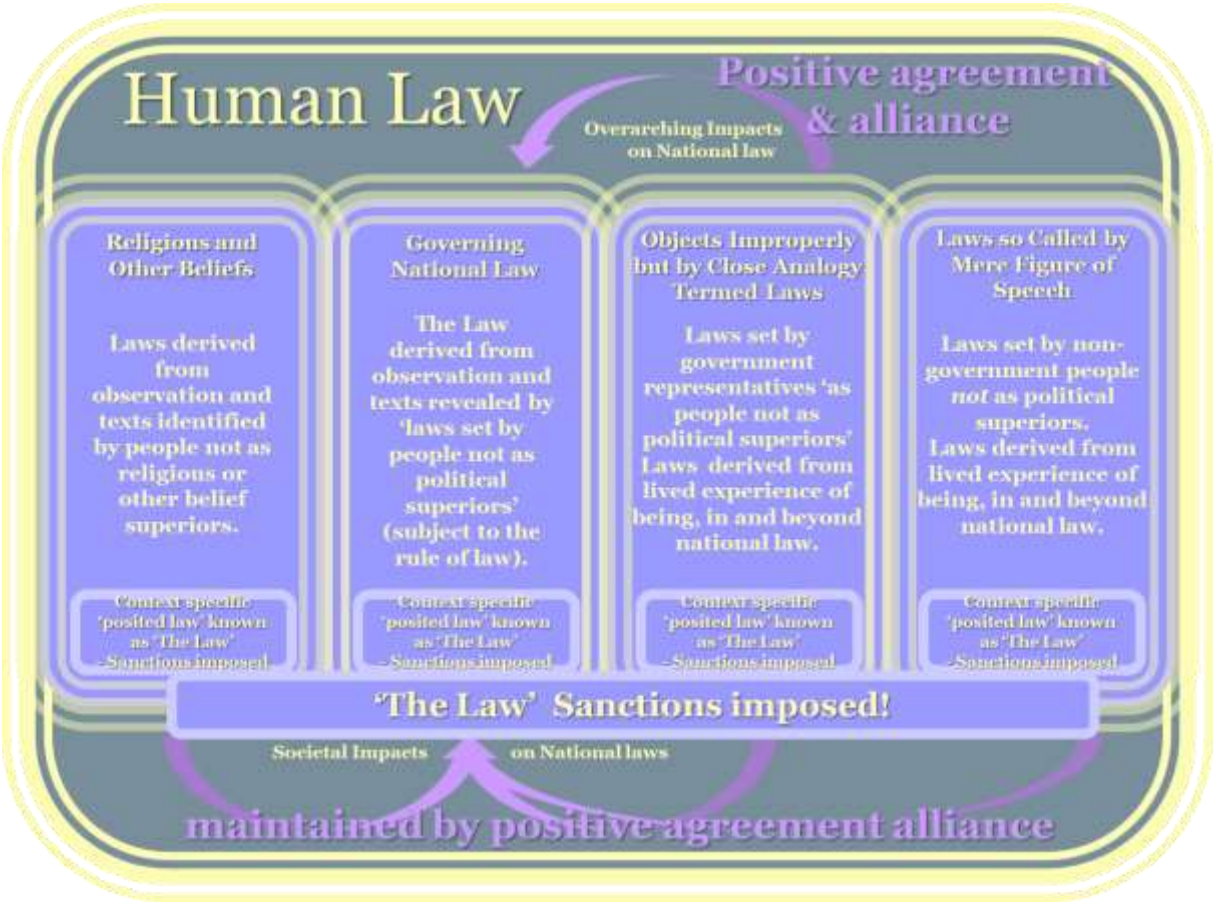
people in Nigeria might bring an action against Shell (www.channel4.com/.../nigeria-oil-clean-up-could-be-worlds-biggest- 4 Aug 2011) against massive polluting spills from their oil pipeline.

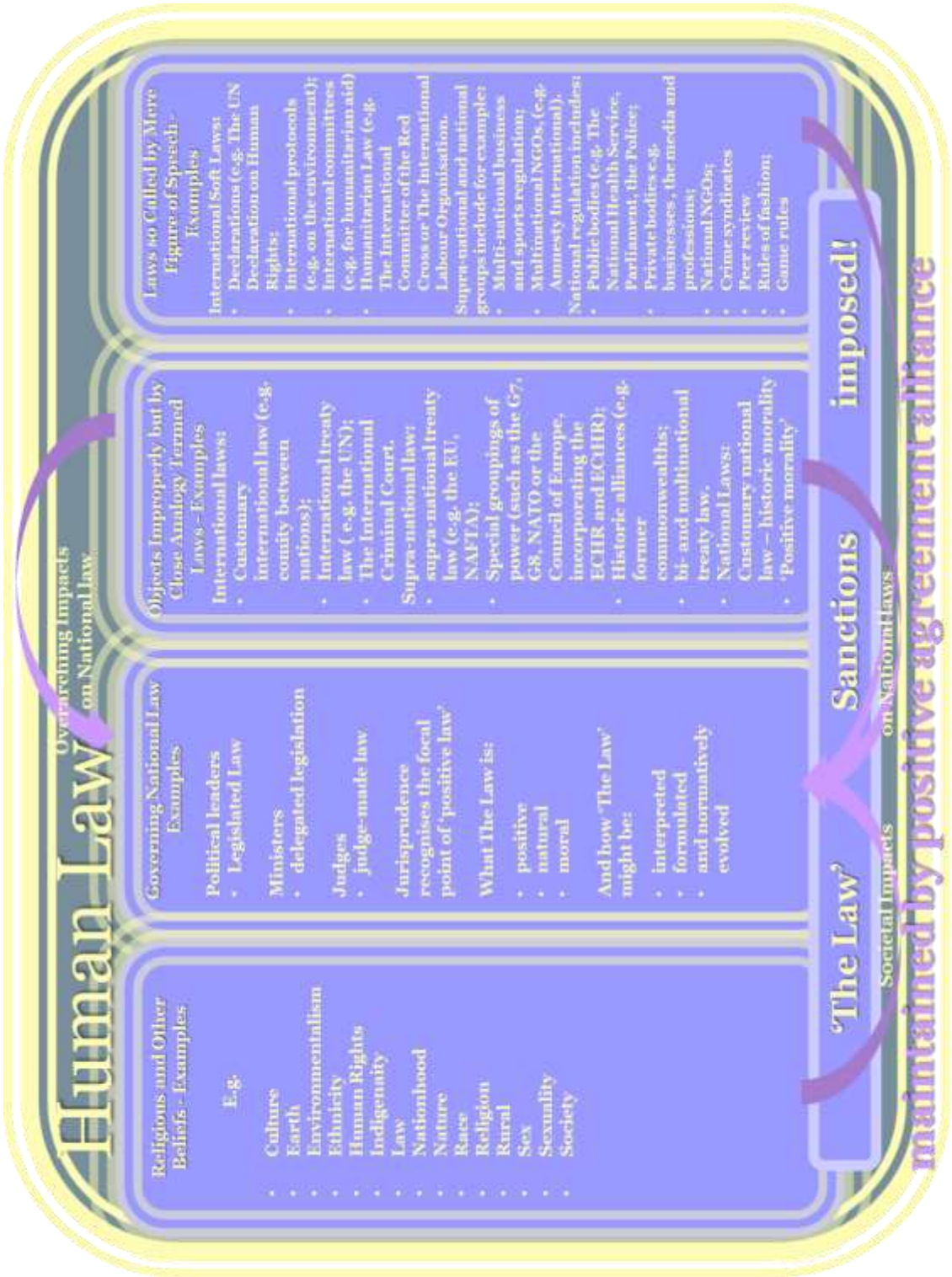
'laws of religious and other beliefs', 'objects improperly but by close analogy termed laws' and 'laws so called by a mere figure of speech' creating a 'positive ferment' in the 'positive law' of society.

A positive ferment that continues until it reaches the critical level of unavoidable conflict, at which point the members of society with no access to law, may resort to something else. If the ferment of 'positive law' is left unabated, the ferment goes on 'positively' churning. People become disillusioned with inaccessibility to, or lack of recognition in The Law and The Law becomes less stable. People lose faith, their belief, in the 'people who set laws *not* as political superiors'; the administrators of law, including ministers and judges. Ultimately, if the ferment of 'positive law' is not resolved, society becomes de-stabilised and The Law is overthrown. I am not suggesting that the 'positive law (the appropriate matter of jurisprudence)' can or should end. I am suggesting 'people who set laws *not* as political superiors' should pay attention to the human society of law.

The challenges brought to law are made on the basis of what is important to people in society. The challenges are necessarily context specific and have to have enough appeal to the values of a particular society, to gain societal support and attain the status of 'governing law'. I am not suggesting that everyone has to share the same values. I am suggesting that enough members of society must be willing to tolerate those values; a balance of 'positive law' morality that the governed of society will tolerate, as much as, that which governors of society may impose.

The re-pictured Human Law should be the 'appropriate matter of jurisprudence'; where the 'laws set by people *not* as political superiors' recognise as the law, The Law that is habitually obeyed by the people of society; the 'positive law' of contemporary society. In this way The Law is natural, because, for example, contemporary appeals, that The Law is equal, just or moral, will coincide with contemporary society's assertion that The Law be equal, just or moral and thereby coincides with society's nature.


Human Law
Positive agreement & alliance
Overarching Impacts on National law
Religious and Other Beliefs
Laws derived from observation and texts identified by people not as religious or other belief superiors.
Governing National Law
The Law derived from observation and texts revealed by 'laws set by people not as political superiors' (subject to the rule of law).
Objects Improperly but by Close Analogy Termed Laws
Laws set by government representatives 'as people not as political superiors' Laws derived from lived experience of being, in and beyond national law.
Laws so Called by Mere Figure of Speech
Laws set by non-government people *not* as political superiors. Laws derived from lived experience of being, in and beyond national law.
Context specific 'posited law' known as 'The Law' -Sanctions imposed
Context specific 'posited law' known as 'The Law' -Sanctions imposed
Context specific 'posited law' known as 'The Law' -Sanctions imposed
Context specific 'posited law' known as 'The Law' -Sanctions imposed
'The Law' Sanctions imposed!
Societal Impacts on National laws
maintained by positive agreement alliance



Examples in the re-pictured Human Law

7.10 The Natural Law Continuum

I suggest the 'objects' taken from Austin/Locke's 'objects of law', re-pictured to include multiple spheres of dignity including the categories suggested by Twining provide a useful general picture and separation of particulars within Human Law. A Human Law that allows us, in true Heraclitian/Aristotelian style, to recognise unity in Human Law and still recognise different elemental 'objects of law': 'religious and other beliefs', 'governing law' 'objects improperly but by close analogy termed laws' and 'laws so called by a mere figure of speech' without resorting to mystery. I suggest Human Law is a continuum; an ever changing body of law, populated by recognised incidences of dignity. The Law is a local impression of a 'governing law' the last resort of a particular society at a particular time.

'Positive law' (the appropriate matter of jurisprudence) requires that The Law of each 'object of law' be repeatedly re-determined to recognise emergence and (re)acceptance of the 'laws (temporarily) set by people *not* as political superiors'. Laws can only temporarily exist, because we live in a changing world where people only temporarily exist. From the wisdom of Spinoza and Hume human beings understand that subsequent generations have to (re)cognise the laws of their being as a coincidence of law's ideas with their own impressions of being. The emergence or revealing of previously unrevealed knowledge, be that of Earth or God's nature, introduces 'objects of law' into the determination of how, we, human beings, should be. The more stable the coincidence of an idea with an impression, the stronger our belief, including in other 'objects of law' belief.

All the 'objects of law', concentrate on different elemental discussions of how human beings should and might be within the society of an object: for example, a belief, custom, God, 'governing law', international law, nation, public, private or work life rule, or the rules of fashion and game play. People are subject to 'essentially contested concepts'; they are the experience of being human. Many people do find coincidence in thrown/gifted guiding ideas of being and their own impressions of what is a good way to be. The confluence of being, dignity and law may be confusing and contestable but many people (including most of the dignity theorists) recognise dignity, societally valued worthiness in being, and 'governing

law's' endeavour of 'human survival and social control' to be societally valued as worthy of being; a 'positive law'.

In re-picturing the elemental 'objects of law' I recognise natural law in continuum in a hierarchical trilogy of laws; The Natural Law Continuum.

The Natural Law Continuum includes**:** –

- **Earth Law**
- **Human Law**
- **The Law**

7.10.1 The Law

The law is the temporary product of **Human Law** fabricated within the various objects and spheres of **Human law**. **The Law** is existential, historic and value specific. **The Law** is thrown into being, with the guiding parameters of its being, by those people who set **The Law** '*not* as ~~political~~ [human] superiors'. Acknowledging **The Law** of **Human Law** does not deny similar observations and texts, which may, in fact, be called **The Law**, mirroring *agreement alliance continuing* in other objects of **Human Law**. For many the 'governing law' of national societies may appear as **The Law** of last resort.

7.10.2 Human Law

Human Law has been outlined through the 'objects of Human law' and embraces the legal contestation evolved in the human world. The claims to law formed in different spheres of human being, fabricated into existence by, and for the guidance of, human beings. The re-pictured 'objects of Human law' populated by Twining and a multitude of, context specific determinations of law, routinely made on a regular basis. Ranked, reasoned and spiritually guided by dignity informs the human interpreters of human being in the formation of Human Law.

7.10.3 Earth Law

Earth Law reveals different spheres/species of being, dignity and law in sensible objects over-arching physical, reasoning spiritual human being; the revealed and

unrevealed laws of Earth's nature. Even **Earth Law** has recognisable limits, contextually set in a universe that circles the sun. **Earth Law** reveals the natural cycle of Earth within a universe that embraces the world of human existence; over which human beings have very little or no control. The separable natural realm of Earth does not deny the universe, infinity or any physical, mental or spiritual potentiality beyond Earth. The Earth and universe may be of God's creation. However, human beings cannot see beyond Earth; **Earth Law** limits are part of the unknowingness and contestability of human being. Human beings do think that matter is contained by other matter, and knowledge is contained by other knowledge; so perhaps spirit is contained by another spirit? Who knows?

Earth Law provides every object, reasoned thought and sense of impression to physical, spiritual and reasoning human being; a being physically constituted in "air, water, soil and sunlight"[184]. **Earth Law** contains and reveals the physical laws of Earth's nature; the objects of sense and reason, which human beings observe, experience and react to, as part of human nature within Earth nature. Earth's immortal laws are thrown, or gifted, to the mental, physical and spiritual being, informing mortal human Earth being. **Earth Law** contains our mortal human existence and immortal destiny; whatever they may be.

Earth Law is beyond the scope of human being. Human beings have to work with the impressions and ideas they are gifted or thrown[185]. The idea that human beings are in some way superior to other beings, or control Earth just does not stand scrutiny. The guiding authority of **Earth Law** whether a belief in creationism in a universal God or scientific understanding of the physical limits of Earth as a human life sustaining planet, suggest that human beings needs to act collectively in careful, coercive, cooperation in order to live a good life; and avoid an unhappy consumption into oblivion, like so many other senseless beasts. Even the royal

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[184] Dr David Suzuki – geneticists see Suzuki D., 2007 *The Sacred Balance Rediscovering Our Place in Nature* GreyStone Books Vancouver p. 17

[185] The title has fluctuated between Earth Law and Immortal Law. After hearing Richard Dawkins (on The BBC's Life Science program on the 4th September 2012) suggest 'the immortal gene' might have been a better title for his book 'The Selfish Gene', because apparently people misunderstood the primacy of the gene, in making altruistic choices beyond its reasoning human host, in genetic adaptation selection. As I suggest something similar for dignity, in human dignity reasoning beyond the selfish self-interest of its immediate reasoning host, I wondered if Immortal Law might be a better description than Earth Law for what guides Human Law. However, there are so many religious overtones in Immortal law I have settled on Earth Law

authority, of those who once claimed the right to rule suggests that we are sleep walking into environmental catastrophe[186]. The human race appears to be ignoring all signs and guiding wisdom[187]. And yet, one way or another, it seems the age of careless, uncooperative ill-conceived exploitation and extraction of Earth's resources will come to an end. **Earth Law** illuminating all the signs.

I believe human beings are fast approaching a Mirandola[188] milestone; a humanitarian choice of valuing human above other dignity, or not; the latter choice implying a return to the behaviour of senseless, and inevitably warring, beasts. Investment in this revealed **Earth Law** guides the **Human Law** of the human species, in the sort of beings humans want to be. I also believe that **Human Law** choice should be informed and reasoned at the widest sphere of 'governing law', currently the UN, to inform the reasoning of more limited (including Western) spheres. If human beings choose to follow the earlier UN reasoning, individually and nationally, we need to start being respectful of human dignity living the golden rule of reciprocity and actively supporting the human dignity assertion.

The ability to see the future of human being, and the limits Earth's resources place on humanity, puts even greater emphasis on the UN post-war **Human Law** decision. Human beings already recognise in **Earth's Law**; that we need to seek a global solution to the limits on global resources in order to avoid an inevitable return to the battlefield. Individual nations may no longer be inflamed by post-war impression or motivated to fulfil their post war promise. However, the international community would be stupidly abdicating 'governing law' responsibility to the 'positive' ferment of 'human survival and societal control' in human being if the human dignity assertion is allowed to slop around in an apparently toothless artifice of UN power, while the same international community recognise a new world of national and corporate powers carving out self-serving empires that disregard human dignity in their pursuit of economic wealth.

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[186] Prince Charles speech to the Rio summit on climate change Rio+20: Prince Charles in climate change warning http://www.bbc.co.uk/news/uk-18479724 accessed 22nd November 2012

[187] I attended a fascinating Symposium: Anthropology and the Ends of Worlds 25/ 26 March 2010 University of Sydney where these issues were discussed. The proceedings are now available online at http://anthroendsofworlds.wordpress.com/proceedings/ last accessed December 2013.

[188] Giovanni Pico della Mirandola, 'On the Dignity of Man' (1486) <www.wsu.edu/~wldciv/world_civ_reader/world_civ.../pico.html> accessed 9th April 2010

If we, as human beings and lawyers, care about 'human survival and social control' we need to 'talk about' **Earth Law**. Recognition that Earth, air, water and sunlight are the physical limits to human survival means future availability of accessible forms of these elements; food, breathable oxygen, uncontaminated fresh water and accumulation of accessible sunlight (fuel) will be determined by **Human Law** or human war. Even if we ignore the evidence of climate change, the fact that drought withered and flood ravaged corn crops are being fed to machines, to avoid further depletion of already limited fossil fuels stock, while people starve, leaves (forgive me) a very bad taste… an unresolved human dilemma that is not going to get any better, with continued deforestation creating more desert sands, to bury our heads in. But that is another thesis!

The UN may have limited legal ability, but this need not jeopardise the internationally recognisable concept of human dignity. The UN affords a foundation for so much more than overseeing and administering, human catastrophes, such as, starvation and war. The nations who came together, and continue to join the UN *alliance agreement* can be required to live, at home and abroad, up to the promise of that *agreement*. Resentment against the powerful nations of the UN's slow paced approach to human created catastrophe builds destabilising resentment between those who enjoy the benefits of UN security and those who do not. UN benefactors may bask in the possible reduction of global threats of war temporarily abated, with cold wars subsumed and global threats forced into fighting (and training) in far distanced places, but as was evident in the bombing acts of 9/11 and 7/7 the resentment is there. If we want Global peace we cannot be complacent and allow the selfish return to contemplations limited to new spheres of dominance.

The following illustration can obviously not be drawn to scale; as we cannot know the scope of Earth law, but it is meant to set revealed Human law in the massive unknown context of the unrevealed overarching law of Earth law (you are not expected to be able to read the text of Human Law, which is the same Human Law illustration given earlier).

The Natural Law Continuum
Earth Law
(Immortal Law – Natural Law – For believers, Law of a religious Nature)
The source of human being; the source of all sensed, observed and reasoned knowledge the 'positive law' much of which we cannot know, but that we cannot know unless we know and cannot un-know once we know.
Human Law
'The Law'
Sanctions
imposed!

Chapter Eight – Applied Judicial, and Other, Reasoning

8.1 Human Law: the Law Pro and Anti Law

The broad picture of law suggested in Chapter Seven is all well and theoretically good, but, as Aristotle[1] rightly observed, a theory of everything is a theory of nothing. The recognisable confluence of contestable spheres of being, dignity and law in twenty-first century generally abstracted 'talk about law' in Chapters Five to Seven are still separate and largely irrelevant philosophical reflections on being, dignity and law if they are not recognised and accessible in the particular 'law talk' that applies and administers 'the law' in the 'governing law' of Chapter Seven. In this chapter I introduce a model that allows for the separation of particular incidents of national governing law and the further reduction of The Law to its particular rights elements. Still keeping the sensible, reasonable, thoughtful picture of general human dignity, societally valued worthiness in being, in mind I suggest dignity can and should be meaningful applied to/in law in addressing the final question raised in response to Feldman.

The competition between the many exponents of how to be, in multiple spheres of different incidences of dignity and each 'object of Human Law' merely displays the constant barrage of idea and impression options that bombard human being. The Human Law market positively bustles with the momentous excitement of how and why human beings could and should be; all offering guidance one way or another of how to be. Yet, I find myself drawn to the collective idea of Human Law, to the guiding idea of 'governing law', to share my experience, observation and practically reasoned impression of a better way for human being to be. Even though the recognised endeavour of 'governing law', stated as 'human survival and social control'[2], is on the first point impossible, we all die, which should be admitted, and on the second unlikely; I, like so many before me, am drawn by the noise from the Great Juristic Bazaar[3]. I want to engage in 'law talk' [4] to see if the dignity challenges

[1] Aristotle., Physics (Bostock D. & Waterfield R. tr, OUP, 2008)p. 12
[2] See 'human survival and social control' Appendix (n. 5)
[3] William Twining 2002 *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* Dartmouth pp. 365-381
[4] William Twining & David Miers *How To Do Things With Rules* (Cambridge University Press 1999) Appendix III p.422-3

to The Law of 'governing law' raised in 'talk about law' can be revealed in the 'law talk' of national and international 'governing law'.

8.1.2 Human Relationships

Throughout the last four chapters I have consistently maintained the saying of dignity arising from the empirical and theoretical study of the combined research strategy in Chapter Two. I have suggested that from the impressionable state of being born human, a complex dynamic of different relational spheres emerges. Human influence radiates to and from each dignity asserting/claiming human being; positing a necessarily external idea of a sensed impression from an internal idea, in the relational scope between the influencer and the influenced. Dignity is the essential prerequisite of law because without it there is no guidance as to the worthiness of the idea from the asserter. The experiential wisdom of elders and intimate concern of those who have gone before, offers guidance, whether experienced, or offered, as guidance, through care, coercion or cooperation. All human experience provides potential guidance to help guide human beings, in assessing the good, and bad, impressions of the way to be.

8.1.3 Human Relationships and Contestable Boundaries of Law

Individually it undoubtedly makes reassuring sense to turn to those we trust; to our families, groups, societies, nations and even supra-nations for guidance on how to be within them. Our impressions and ideas are far more likely to coincide with those of family and chosen circles of friends who share similar values. Even so, from the narrowest two person social sphere, contestation arises; we do not share an impression, even though we might have similar impressions, based on a shared idea. We are not the same together as we are individually, or the same with each different person. For example, even in couples: child, parent; employee, employer; partners; friends, depending on the social circumstance, might behave quite differently towards a parent, employer or lover. The public face of every relationship changes our internal and external being; what we want to be and what we want to portray. Being diverts being into different spheres of experience, with each diversion into different spheres of social being, requiring re-alignment of the way to be. As we

continue emerging into the world, individually and in groups, the dignity evaluation takes place in numerous different and contentious spheres.

At the opposite end of the human being range Human (species) Law is best informed by the widest possible range of human knowledge. The experiential uniqueness of being is best informed by the greatest diversity in human beings, which like the biotic diversity of Earth, can only inform (and be enjoyed) by recognising and sharing in its existence. In the declared endeavour of 'governing law', 'human survival and social control', the concern for 'survival and social control' should not be so different from one national society to another. This is true even of societies where 'human survival and social control' is not the declared endeavour of law; if, for example, national 'governing law' coincides with the 'law of religion or other belief'. The national 'governing law' would still have a better understanding of 'human survival and social control' and others 'governing law' if, despite its law motive, it too engaged with the breadth of information and opinion the Human Law community had to offer; this is a universal truism.

Widening the scope of 'human survival and social control' to wider spheres of 'governing law' requires care and cooperation across the broadest species sphere of being to help to determine the way for governing law to be. While some might argue for predominately coercive means, I suggest, that as this always means a suspension of care and co-operation, which is a retrograde step, that coercion should only be imposed with the utmost cooperative care.

Logically, any wider sphere of 'governing law' community should be informed by the wider society of 'governing law'; again this is a logical truism. Global opinion should inform the ferment of international 'positive law' to provide the best informed guidance to the various national 'governing laws' who are existentially influentially placed, within the caring, coercive, cooperative, architecture of the UN to make the best informed choices about global and national governance. Of course, at any level of law there is potential for corruption, and any society should be mindful of this, but that is no reason to abandon the common endeavour.

Over-arching spheres of global UN governance undoubtedly add confusion and contestation to national 'governing law', as well as, Human Law. Yet, evidence of societies disengaged from international spheres of Human Law suggest ever more localised concentration on narrow spheres of dignity in the governing law of nation, group, family and even individual law. The resulting law often reminiscent of law's historic, exclusionary, past; with stifling, oppressive, interpretations of law. In addition, for the reasons outlined above, local laws are ill-equipped to deal with the emerging contestation in the international sphere of being, dignity and law unless they engage directly in the shared knowledge of international society.

To have the best human dignity outcome, the greatest complementarity, between individual, group and species ideas of dignity, in the collective *continuing agreement* and *alliance* we need to be able to recognise human dignity in the different spheres of the human societal range in whatever context a decision is being made. Using the water analogy whether a puddle, pond or ocean; individual, group, species; we should not lose sight of the elemental character of water (H_2O) or (human) law power. I suggest the mechanism is already in place: in the *continuing agreement* and *alliance* of the UN and existing societal arrangements of 'laws set by people not as political superiors' to resolve disputes in 'governing national law'. The 'positive law' of Chapter Six 'travels quite well'; playing to its positive strengths: individual impressions can be reassured by the familiarity of *agreements* made by those who enjoy local positions of societal trust and habitual *alliance* obedience; who also contribute to, and are guided by, the over-arching care, coercive, and cooperative knowledge informing the Global communal sense of habitual *alliance* obedience in the UN *agreement*. I recognise every sphere of societal actuality is a compromise of care, coercion and cooperation; from individual to group(s) to species and beyond.

I am not suggesting a global sphere of governing law is necessary, attainable or desirable. I recognise that few states are ready to relinquish sovereign dignity just yet and that many individuals and groups yearn for the efficient familiarity of local governance control. However, I do follow the founding leap of faith in a relational compromise of care, coercion and cooperation and nations' *continuing* commitment to the overarching *alliance agreement* of the UN to inform species, groups (including

national groups) and individuals in the way to be. The dignity, societally valued worthiness in being of the UN, introduced and maintains the UN cause and ethos of peace; and I see this as a good thing.

Whether states are ready to relinquish sovereign dignity, or not, international recognition of human, rather than any other dignity, introduces 'positive law' objects of Human Law, to reveal contestable boundaries across The Law legacy of different national, including UK, 'objects of law'. The continuing 'positive law' commitment of UK 'governing law' to the UN *agreement* recognises human dignity, and introduces a challenge to previous 'positive' national 'governing law' recognition of incidences of dignity solely in the sovereign and or parliament.

All branches of national 'governing law' recognise and, are recognised in, the *continuing alliance* to the over-arching *agreement* of the UN. The Human Law recognition of global species dignity, vested inherently in individual human being, has been powerfully manifested in the nations' repeated commitment to the UN, recognised in the Charter[5], Declaration[6] and subsequent international human rights treaty instruments[7]. The recognition of human dignity in the judicial sphere of national 'governing law' is therefore entirely justifiable and justified.

In the evolving continuum of emerging and acceptable 'positive law', 'laws set by people not as political superiors' need to recognise the UN commitment to human dignity. At the very least, this requires: 1, the 'laws set by people not as political superiors' to consider individual human dignity challenges based on affronts to individual human dignity; this is recognition of a dignity assertion once exclusively reserved to the sovereign or parliament. Evidently the dignity assertion may also be manifested by individuals in groups, for example, refugees or care of vulnerable people; and 2, re-cognition of laws no longer compatible with the contemporary evaluation of dignity, societally valued worthiness in being, because they respond to the dignity and societal mores of a society that no longer exists and should be allowed to lapse as no longer 'habitually obeyed', for example, marital rape.

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[5] The UN Charter is available at www.un.org/en/documents/charter accessed on the19th August 2010
[6] The UN Declaration is available at www.un.org/en/documents/udhr/ accessed 19th Aug 2010
[7] There are nine core international human rights treaties available at *Office of the United Nations High Commissioner for Human Rights* http://www2.ohchr.org/english/law/ accessed 5th January 2013

I recognise this as the continuous Herculean task placed on society, particularly 'laws set by people not as political superiors', by emerging human knowledge. In reality the growing Human law concern waits fairly patiently for the law to evolve. However, in the wake of emerging knowledge dignity in individual, group, species and beyond human being is revealed as at stake. I am apparently more impatient than others to recognise Austin's assumption of the electorate as an 'extraordinary legislator'; that "in a democracy the electorate and not their representatives in the legislature, constitute or form part of the sovereign body"[8].

8.1.4 Recognising Human Dignity in Different Spheres of Societal Scope

Recognising human dignity as elemental in the different spheres of (UN informed) human societal range; reveals the coincidence of international species dignity, with group(s), including nations, and individual dignity. The scope of the Heraclitan path may well appear the same up and down, but that does not mean features on the path are inseparable. Parts of the path may require more care; the steep parts different care to the gentler inclines. As Aristotle recognised separating a part (of the path) may help human beings to better understand the part and thereby help us to better understand the whole. However, separating the part (path) does not deny it is part of a continuous path; it may mean that each part can be managed more precisely responding to local exigencies within a complex whole.

Heraclitus also recognised ever present change. In the water/law analogy, the water/law becomes so dissipated at both top and bottom that it is hard to grasp with any sense. The right of a human (a droplet of water), sovereign dignity, or individual dignity bearer, lacks power without its relational context. We could abstract a general experimental idea recognising Aristotle's truism that we sense particulars, while reason provides understanding of general concepts[9]. However, with explaining the relationship of the individual to the whole it makes no sense. The universal idea is challenged from its inception by the contestable nature of being, dignity and law. Universalism is reasoned idea, without impression, as

[8] John Austin *Lectures On Jurisprudence Or The Philosophy Of Positive Law Volume. 1.* (Campbell R (Ed) Reproduced by Bibliolife, Amazon.co.uk, Ltd., Marston Gate, 1885) Lecture VI, pp 222-33 and 245-51
[9] Aristotle (n. 1) p. 22

Hume[10] recognised; a proxy 'impression' idea that requires the coincidence of actual impression for the experiment to work. It also results in majoritarian imposition; an inadequate impression viewed from individual dignity.

8.1.5 The Resort to 'Governing Law'

The multiple impressions that guide individual being do not necessarily coincide with a generalised international idea. When individual and international ideas do coincide, all well and good; we have a working example of Hegelian unity. When the uncomfortable pairing of international (species) or national (group) sense does not coincide with individual impressions of how to be, individuals cannot evade their impression. Individuals must either accept the wrong and live with it, or try to alter, inform or challenge the other impression or, if neither is possible, perhaps find another society more tolerant of the impression. Challenge may involve any sphere of being and level of law and include resort to any object of Human Law.

A place of resort may be a realisable, or sympathetic, forum of national 'governing law'. Where emergence of 'positive' governing law can be momentarily influenced and recognised in 'laws set by people not as political superiors' in the national 'governing law's' parliamentary or judicial process. Here, the cutting-edge practice of 'governing law' requires participants to take the wisdom of often very old well-established ideas in The Law and fuse them in a momentous contemporary incidence of dignity impression, based on context specific evidential facts arising in 'positive law'. I turn to the guiding jurisprudential 'law talk' of Hohfeld (refined by Halpin) and MacCormick to better explain my subsequent reasoning.

8.2 Hohfeld's - "Fundamental Legal Conceptions"

Again taking a lead from Twining[11], I looked at Hohfeld's model of "Fundamental Legal Conceptions"[12] to illuminate the place of dignity determination or 'positive law'. Hohfeld recognised rights in all jural relations; analysing the "loose" legal use of "rights", by judges and academics, and identifying specific meaning in eight

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[10] David Hume *A Treatise of Human Nature* (((1739) reprinted from 1777 edition) L. A. Selby-Bigge ed. Oxford Clarendon Press 1896)

[11] To use WilliamTwining's metaphoric terminology Twining W. *General Jurisprudence* (Cambridge University Press 2009) p 49-54

[12] Hohfeld W.N., 'Fundamental Legal Conceptions as Applied in Judicial Reasoning I' 1919 in Cook W.W., (ed.)*Fundamental Legal Conceptions* (Yale University Press, New Haven) pp. 23-64

different right assertions. Hohfeld reduced the rights to a basic elemental design for use in interpreting The Law; producing a formalistic rights matrix that could be used to recognise separate legal (right) relationships from a composite bundle. Separate legal relationships were identified, allowing each legal issue to be dealt with, within a composite bundle rights. The identified rights brought clarity to the legal issue, without necessarily losing sight of the whole. The rights matrix could be used consistently in all areas and objects of law; applied in judicial reasoning[13].

Hohfeld's analysis of 'loose' legal use of rights language derived from the actual assertion and conferment of rights recognised in the theory and practice of law proves reminiscent of my own combined research strategy to pin down the 'loose' talk of ephemerality in dignity. This makes Hohfeld's matrix a good starting point for understanding dignity. A matrix of Hohfeld identified rights can reveal the fundamental claim I make for dignity in the process of reasoning The Law.

It should be borne in mind that although Hohfeld's matrix was intended for use in 'law talk'; to be applied in judicial reasoning, I suggest it can also be used to 'talk about law' in general. The model can be applied *in* any of the 'objects of law', and might also be applied *to* contestable boundaries between the different 'objects of law' within any sphere of Human Law. The model 'travels well' across different contexts[14] and is well-placed to illuminate the 'fundamental legal conceptions' of both dignity and rights and to discuss both across a variety of legal systems.

8.2.1 Hohfeld's Fundamental Legal Conceptions

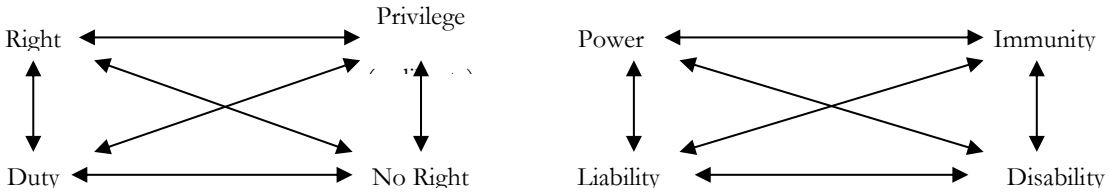
Hohfeld's background was in chemistry and he used an elementary mathematic strategy, familiar in academia and applied in other sciences, to reduce The Law, to its lowest common denominators, which he suggested revealed identifiable rights, as the basic elements of law. Hohfeld explained the model with "a homely metaphor": of fractions (1/3, 2/5, etc.) that may, superficially, seem so different from one another, as to defy comparison. If, however, they are expressed in terms of their

[13] Hohfeld (n. 12) p. 23-64
[14] Twining (n. 11) p. 44

lowest common nominators (5/15, 6/15, etc.) comparison becomes easy, and the fundamental similarity can be discovered[15].

Hohfeld analysed the use of various manifestations of rights in law to identify the basic elements of law, naming them "fundamental legal conceptions". Here they will be described as 'elements' or 'basic elements' and used interchangeably to describe the eight component parts of Hohfeld's model. The changed naming of the elements/basic elements as legal right terms, rather than 'fundamental legal conceptions' recognises that the abstracted conception of different general rights, extrapolated from the elements identified through particular practices of law, are currently grounded in, and can be easily recognised, as concretised particular incidences of rights readily identifiable in, and fundamental to, law. This part of Hohfeld's experimental design of rights based law appears to work[16]; the different rights can be recognised as separate, or separable from, the generic term rights[17].

Hohfeld's model is commonly depicted in two squares of basic elements[18]:



Hohfeld was able to distinguish each legal right as a single relationship determined by its relationship with both a corresponding 'jural opposite' and 'jural correlative'. This allowed greater precision to inform the 'loose' use of the word right distinguishing between different legal rights; and legal rights from other rights used in law. The elements in the top line of each box are connected with a vertical line to their jural opposite and a diagonal line to their jural correlative:

- a right has the opposite of no right, and the correlative of a duty;

[15] Hohfeld (n. 12) p. 64
[16] The resilience of Hohfeld's model stands as testament to his theory. Hohfeld proposed that if the theory is "theoretically correct" it will work; if it will not work, it is "theoretically incorrect". Cook's 'Introduction' to Hohfeld (n. 12) p. 21
[17] Again recognising the debt to Aristotle (n. 1) of learning from the relationship between the general and the particular; in better understanding the whole of a thing, in this case rights, by separating and expanding different right ideas within the whole.
[18] Twining (n. 11) p. 50

- a privilege has the opposite of a duty, and the correlative of no right;
- a power has the opposite of a disability, and the correlative of a liability;
- immunity has the opposite of a liability and the correlative of a disability.

Each right is viewed as a single relationship, which can, and usually will, be found in a complex of other rights relationships, a compound bundle, jointly separately recognisable in law. By using the rights model Hohfeld sought to limit the word 'right' to express a single issue concept, excluding all the other common usages of the word.[19] A legal relationship could be described from the standpoints of two individuals, for example, the right and duty correlatives describe two ends of a single relationship. Kramer suggests[20] Hohfeld's rights correlatives can be envisaged as a slope; viewed from the top as a downward slope and from the bottom as an upward slope; sounding very reminiscent of the path of Heraclitus.

Hohfeld's eight elements were introduced as their opposite pairs[21] and analysed by reference to their correlatives, with Anglo American case law illuminating the precise meaning of each element. The rights/duties discussion was a mere two pages of explanation, whereas privilege and no-right ran to twelve, powers and liabilities to ten and immunities and disabilities to three. I mention this, because the significance of the different elements will be emphasised later on. The purpose was to elucidate not only the intrinsic meaning and scope of each legal right, but also their relationship to one another. The resultant clarity in each individuated term, in its relationship to other terms, afforded a method to distinguish rights for their application, in judicial reasoning, to solve concrete problems in litigation[22].

Hohfeld's observation that 'as the bulk of statute and case law becomes greater and greater, these classifications are constantly increasing in their practical importance: not only because of their intrinsic value as mental tools for the comprehending and systematising of our complex legal materials, but also because of the fact that the

[19] Corbin A. L. 1919 Foreword to Hohfeld (n. 12) p. ix
[20] Kramer M.H., 'Rights without Trimmings' in Kramer M.H., Simmonds N.E. and Steiner H., *A Debate over Rights* (OUP 1998) p. 24
[21] Hohfeld (n. 12) Rights and duties from p. 36; Privilege and no-right from p. 38 powers and liabilities from p. 50 immunities and disabilities from p. 60-63
[22] Hohfeld (n. 12) p. 63

opposing ideas and terms involved are at the present time, more than ever before, constituting part of the formal foundation of judicial reasoning and decision'[23]. This is ever truer, almost a hundred years later, in the evident lack of understanding of rights, in a human right asserting world.

Hohfeld appears visionary, seeing the relationships in rights in all spheres of law; he sought to include discussion of, at least, the following: "relations *in personam*, and relations *in rem*; common (or general) relations and special (or particular) relations; consensual relations and constructive relations; primary relations and secondary relations; substantive relations and adjective relations; perfect relations and imperfect relations; concurrent relations (i.e., relations concurrently legal and equitable) and exclusive relations (i.e., relations exclusively equitable)". These relationships are declared to be 'as Applied in Judicial Reasoning' and are intended to be viewed from the perspective of the legal profession[24]. But an address upon a *Vital School of Jurisprudence and Law* indicated Hohfeld's goal was more than preparing individuals for the purpose of earning a living "practising law" and included training "for the larger duties of the profession, so that they may play their part as judges, as legislators, as members of the administrative commissions, and finally as citizens, in so shaping and adjusting our law that it will be a living, vital thing, growing with society and adjusting itself to the mores of the times"[25].

Hohfeld died young, before he had time to fully illuminate his thesis; his intention had been to produce the analytical model, outlined above, through which to view law. Hohfeld undoubtedly intended a more rigorous and detailed discussion of other rights relationships in law. The only detailed discussion, that of claim rights, started to expand the idea of the model in a subsequent paper[26]. Yet in the subsequent paper Hohfeld's attempts to classify the rights categories prejudiced the elemental succinctness of the initial model.

This sounds familiar, in attempting to 'pin down' particular rights the evaluative (dignity) process within the model is overlooked. The first paper had clearly stated

[23] *ibid* p. 67
[24] *ibid*
[25] Hohfeld (n. 12) p. 21
[26] Outlined in the narrative of this chapter and taken from Hohfeld W.N., 1919 'Fundamental Legal Conceptions as Applied in Judicial Reasoning II' pp. 65-114 see particularly p. 67 & 71

that "fundamental legal relations are, after all, *sui generis*; and … attempts at formal definition are always unsatisfactory, if not altogether useless"[27]. Detailed work on rights, privileges, powers and immunities[28] are also easier categories to discuss from a legal view point. Getting to the correlative root of no right, duty, liability and disability, as other than opposites in law, is far more problematic and far more probative of general 'talk about law' questions. The general language of human dignity demands more particular scrutiny of who has and can impose no right, duty, liability and disability alongside the rights, privileges, powers and immunities.

After Hohfeld's death his classifications of rights appears to provide the starting point object, rather than be the subject of, subsequent discussion. Although there has been some criticism of the naming of the model, of particular rights and the hierarchy and importance of different categories of rights[29], no attempt seems to have been made to reconsider the basis of his classification of rights. Much of the work that follows Hohfeld's careful analysis misunderstands the legal clarity goal achieved in the precise detail of the original model. Instead legal theory seizes upon the claim rights discussion to use the model to distinguish different theories of rights[30] or to enhance rights[31], rather than to view the rights (jural) relationships in The Law. The discussion, along with Hohfeld's subsequent attempts to quantify rights, led to misunderstanding of the separation of rights classifications, and may justify Twining's criticism of the parochial parameters of the rights model, set as it was, in the limitations of early twentieth-century Anglo-American jurisprudence[32].

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[27] Hohfeld (n. 12)p. 36

[28] *ibid* outlined on p. 71

[29] For example: Llewellyn seized upon *right* or claim, *privilege* or liberty and *power* Karl N. Llewellyn *The Bramble Bush: The Classic Lectures to Law and Law Schools* (OUP, USA, 2008) p. 84. Andrew Halpin sought to reduce Hohfeld's model of rights back to *right* and *duty* in Hohfeld's Conceptions: From Eight to Two (1985) 44 (3) *Cambridge Law Journal* pp. 435-457; later prioritising *duty* and *power* in The Concept of a Legal Power (1996) 16 (1) *Oxford Journal of Legal Studies* pp. 129-152. Peter Jaffey argued for 'Duties and Liabilities in Private Law' 12 *Legal Theory* 2006p. 137 and Eleanor Curran, Blinded by the light of Hohfeld: Hobbes's notion of liberty 2010 1*Jurisprudence* 85–104 argued Hobbes's idea of liberty is more synonymous with a claim-right than Hohfeld's designation of liberty as privilege; Wenar, L., The Nature of Rights (2005)*Philosophy & Public Affairs*, 33: 223–252 attempts to bridge the interest/choice theory gap.

[30] 'Interest' theorists include: Neil MacCormick in Hacker PMS and Raz J., 1977 (eds.), *Law, Morality and Society*: *Essays in Honour of H.L.A. Hart* Clarendon Press, Oxford and Mathew Kramer 'Rights without Trimmings' in Kramer M.H., Simmonds N.E. and Steiner H., 1998 *A Debate over Rights* OUP. 'Choice' theorists: Herbert Hart (*ibid* Hacker above), Simmonds and Steiner (See Kramer above).

[31] *Ibid* and Joseph Raz 1980 *The Concept of a Legal System* Clarendon; Jeremy Waldron Ed. 1984 *'Theories of Rights'* OUP

[32] Twining (n. 11) p. 49

8.2.2 The Continuing "Loose" Talk of Rights Talk in Rights Theories

Almost a hundred years later it is rather tragic that discussion is still preoccupied with the "widespread misunderstanding, different interpretations, criticism, refinements and extensions"[33] instead of the clarifying brilliance of Hohfeld's scheme. Of the continuing dialogue around the model much appears to be based in theories of rights, particularly between interest and will theories of rights. The 'interest' (benefit theory) and (will) 'choice theory' are two established schools of thought attempting to provide an explanation of rights[34]. However, each theory reveals the (re)emergent tension of being, dignity and law; the lack of coincidence between normative general ideas of right and local particular impressions. Again I am forced to set out on my own; my discussion informed by Hohfeldian scholars.

8.2.3 Back to Hohfeld Basics

In much the same way as I recognise ambiguity in dignity, Hohfeld recognised the ambiguity in differing rights language and sought to distinguish discrete rights identities from the rights language as a whole. Looking back through Hohfeld's example, the fact that 5/15, 6/15, etc. are expressed in terms of their lowest common nominators does not prevent them from individually being reduced to the fractions 1/3, 2/5, etc. What it does, is make them appear "so different from one another as to defy comparison[35]. To apply the example, I used earlier, the taxonomy of being within human; distinguishing, sperm, egg, foetus, baby, infant, immature, mature, elderly, corpse, are all nonetheless human. Hohfeld did not reduce rights, to empower *claim* rights; on the contrary, he sought to bring clarity to rights language by illuminating basic elemental difference in legal rights *given*.

Hohfeld laid out the jural opposites and correlatives in two lines with no arrows:

Jural Opposites	Right	Privilege	Power	Immunity
	No right	Duty	Disability	Liability

[33] Twining (n. 11) p. 50
[34] Kramer (n. 31) p. 24
[35] Hohfeld (n. 12) p.64

	Right	Privilege	Power	Immunity
Jural Correlatives {				
	Duty	No right	Liability	Disability

The issue was not that each right brought their opposite into obvious being, (the general or different particulars) but that each right claimed could be determined by an opposite and correlative right, which could be identified as a jural relationship; usually within a composite bundle. The right claim is an existential assertion of an actual (rather than theoretical metaphysical) right; the opposites and correlatives fixed by the parameters of the case; the context of law. I recognise the context as societal spheres of being in various levels and objects of law. The model reveals that determinations of dignity, societally valued worthiness in being, of who is included or excluded from law are applied to fix, or temporarily pin down the elusiveness in dignity, and the particular law. To momentously recognise the dignity in a particular incident of law, practically reasoned within the societal community rather than mystically floating in the 'loose' general sphere.

For example, my claims of no-right to be sovereign of America, disability to be prime minister, and liability and duty to repay my student loan, arise from the facts and context of the case. I have no-right to be America's sovereign because, quite apart from not being American, there is no such right: America quite deliberately does not have a sovereign; the right (opposite) does not exist, there is a no legal privilege (correlative) to be the sovereign of America. I am legally disabled from being prime minister, because I am not an elected MP I do not meet the criteria, I am immune (correlative) from, the power (opposite) to become prime minister. I am under a duty to repay my student loan because my debt is legally privileged (opposite); the student loan company have a (correlative) right that I repay. I am liable to the student loan company, because I have no immunity (opposite) from the legal power (correlative). In each instance the legal issue (jural relationship) can be identified from the facts and the respective term used more clearly identifies the legal issue than the 'loose' use of the word right.

8.2.4 Law as an Intervener

Most jurisprudential theory accepts the 'law talk' of 'governing law' is about direct relationships, either between two independent parties, or as a one-sided governing command of The Law. From Hohfeld through subsequent writings; Llewellyn, Hart, Finnis, Waldron, Kramer, Simmonds, Twining, Halpin and back through Hohfeld to Austin and Bentham, all appear to see "the relationhip is identical; the only difference is in the point of observation[36]. I suggest they are wrong.

There appears to be a very obvious 'elephant in the room[37]; the evaluative process (dignity) of The Law that naturally evolves in the various objects of Human Law that intervene on the human (Heraclitan) path of being. "If you look at the man whom the court may smite, you see it as a duty. If you look at the man who may call upon the court to smite the other, you see it as a right. You see the same elephant, in either case, whether he look like a wall or like a tree"[38]. The elephant is not the relational, same up and down, pathway, but the intervening 'objects of Human Law'. The elephant is not the other end of the jural relationship scope, but The Law means to a desired end; the separable and subsumable locus of the positive ferment of law power to change peoples' reasons for doing things.

The right claimed objectifies the legal claim; the opposite, which may mirror the right claim of another extant party, provides an objectified negation to the claim and the correlative provides the parameters of other possible alternative outcomes of The Law; the three punctuating jural decision. Acknowledging the intervention of 'governing law' explains the indeterminate ambiguity recognised in the model[39]; opposites of extreme, negation or alternative position are the options available to the intervening 'governing law', not to the parties of the original agreement.

At the heart of national 'governing law' as Austin recognised relationships are 'positive law' challenge and 'laws set by people not as political superiors': "If B has a

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[36] Llewellyn (n. 29)

[37] Herbert Hart *The Concept of Law*, (2nd Ed, first published 1961, OUP 1994)
p. 14 In trying to explaining the difficulty of defining law refers to the man who says 'I can recognise an elephant when I see one but I cannot define it.' The same predicament was expressed by some famous words of St Augustine about the notion of time. 'What then is time? If no one asks me I know; if I wish to explain it to one that asks I know not.'

[38] Llewellyn (n. 29) p. 84

[39] Halpin 1985 (n. 30) p. 440-1

[legal] duty to A to do something, that means that, should he fail to do it, A can *get the court* to make trouble for B"[40] the 'elephant' that A and B see is not one another but the power of 'governing law' to intervene. No one appears to recognise that 'governing law' acts as an intervener between the parties, when surely this is precisely what 'governing law' is? If A and B know and carry out their rights and duties under an *agreement* The Law is redundant, each party knows what it must do. If A and B know their rights and duties under an *agreement*, but do not carry out them out, there might be some action or sanction against them; again the legal issue is not in dispute, a determination of fact rather than The Law may be necessary, but The Law will appear as a, straight up and down, relational pathway. It is only when A and B do not see eye to eye that 'governing law' is called upon to identify the jural *relationships*; 'law talk' is engaged and the process will be recognised by 'laws set by people not as political superiors' in The Law.

Recognising evaluation in the legal determination (the elephant of dignity) in the law picture can also explain an apparent ambiguity[41] in the unsatisfactory opposition of duty and privilege; which may be characterised as duty (not) privilege and privilege (not) duty. In a straight line relationship duty and privilege are not obvious opposites, but from the perspective of The Law the conferring of privilege or duty comes with a legal relational opposition of upholding that privilege or duty. The privilege or duty exists while upheld in The Law and only ceases to exist by negation of the privilege, no longer recognised or subsequently removed from The Law.

I recognise Hohfeld's original design accepts, or assumes, that The Law is either a direct relationship of national 'governing law', or between two independent parties overseen by national 'governing law', with only law makers, 'laws set by people *not* as political superiors', having any power to alter or change the rules. However, I suggest the model nonetheless reveals the positive ferment challenges of dignity in the ingenuity of combining the jural opposites with jural correlatives. In each jural relationship the elusive indeterminacy of the right claimed is recognised.

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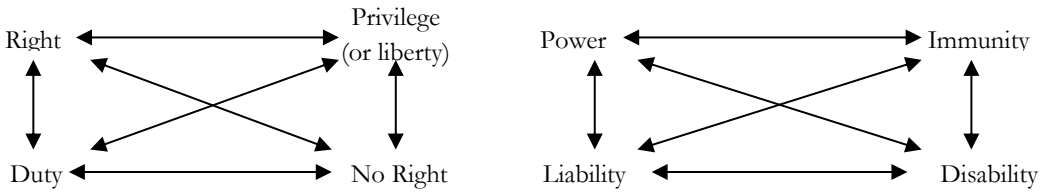
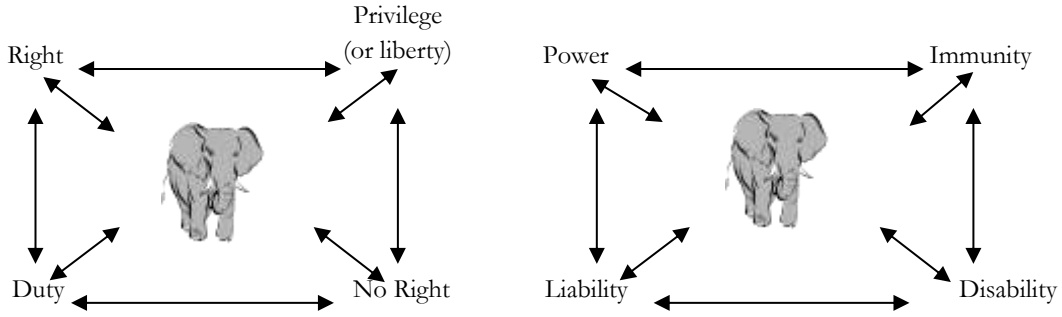
[40] Llewellyn (n. 29)

[41] This follows from Halpin acceptance of the deontic operator as fundamental to law "where the legal deontic operator is capable of advancing the position of others". Halpin 1985 (n. 47) p. 50 - 51



So if A and B know, and accept, their right/no-rights, privileges/duties, power/ disability, and immunity/liability; i.e. they recognise their opposites, the law is not at issue. If they do not the correlative affords a vision of the counter claim.

However, with The Law as an intervener the simple straight line Heraclitan slope (the pathway up the same as the pathway down) that could once be viewed from either end, has now become separated. Each of the divided ends has now become an evidential object that can be viewed from many angles. The original two ends now have to contend with a positive dignity ferment centred in 'governing law'; either the reasoning of new law in parliament informed by society or in a judgement informed by The Laws made by parliament in response to society's needs. 'Governing law' holds the separated ends of the jural relationship and can alter the perspectives of the parties, which may become obscured from one another[42].



Breaking Hohfeld's model down further recognises truisms in the potential legal responses to the eight 'basic element' claims to law: a right, privilege, power, immunity, duty, no-right, liability or disability claim raised can either be confirmed or negated by 'governing law'; if the claim is negated the correlative power (in the second square) reveals the legally determined outcome. No-right, no-privilege, no-power, no-immunity, no-duty, no-liability or no-disability provide the mirror image negation of 'governing law'. True to natural laws of mathematics, negation of no-right, means no-no right, (two minuses equal a plus; a right) and 'governing law'

[42] Straight lines often appear obscured in refracted light and flat Earth can be shown to be a sphere.

thereby imposes, or confers a right on someone who claims not to have one. I hope the no-right I currently claim to be called doctor might soon be denied.

The 'governing law' as intervener capable of changing the path of The Law adds an either/or, third dimension to the jural relations[43]. Halpin, without recognising laws interventionist role, acknowledges three undetermined (dignity) possibilities for each duty or right decision: the duty to, duty not to, or no duty to or not to; or the right to, no right to, or neither right, nor no right to; in/to each activity or omission as a single jural relationship. Halpin suggests that this tripartite decision can be determined from any one of three positions: the claimant; as required by existing law; or determined by the intended outcome of law, and therefore future law[44]. I accept Halpin's loci and high light the motive of interest parties, but not as points of determination.

The claimant is either asserting or denying a view of a right, in Halpin's example a duty or a right; the oppositional position arising in the contestation (if there was agreement there would be no claim) is provided either by an extant incident of a rule or The Law being challenged, or by another party offering a counter claim; the final indeterminate position is the ferment of 'positive law' reflected in the decision of 'people *not* as political superiors'. The lumbering elephant of an 'object of law' has entered the picture to interrupt the flow of the relationships. During the process of law the claim; the existing incident of The Law and the intended outcome of law are recognised as contested and indeterminate; they are external to the extant relationship either between governors and governed or the independent counter-claiming parties.

The dual aspects of the dignity ferment ('positive law' reflected in the decision of 'people *not* as political superiors') in any of the 'objects of law' introduces the third aspect to the existing straight line relationship. 'Positive law' bringing the practical reasoning of dignity, societally valued worthiness in being, in to the jural relativism

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[43] Halpin A., Fundamental Legal Conceptions Reconsidered (2003) 16 *Canadian journal of law and Jurisprudence* pp. 41-54;

[44] This follows from Halpin's acceptance of the deontic operator as fundamental to law "where the legal deontic operator is capable of advancing the position of others". Halpin 1985 (n. 47) p. 50 - 51

of a pre-existing societal relationship. The 'object of law' challenge in the right claim is held in check by The Law and the dignity ferment within the 'object of law'. The historically accurate, self-interested governor oriented bias, none the less mediated by the positive ferment occurring between the governors and governed.

It is worth noting that a legal decision can also be considered from each claimants position in a bilateral act or omission between two independent parties, therefore a further tripartite decision might be observed; as both the winning and losing positions provide 'positive law' reasoning to 'object of law's' determination. We therefore have nine (or twelve) alternatives that need to coincide at three (or four) points in reasoning the law. Of which, two (or three) appear 'external' to the extant incident of The Law of the model; two (or three) in the legal challenge or dispute raised by one, or both, of two independent actors, and one, in the political 'positive law' consideration of the future law that should be habitually obeyed.

Halpin relies upon deontic logic, the guiding symbolic logic of pre-determined permission/obligation, in our case The Law, that reveals the coincidence of legal assertion, with one or other side of a legal claim, to confirm the truth or break the stalemate of two conflicted right (dignity) claims. However, I think Halpin over-plays the pre-determined role of The Law, which by his own analysis only makes up one (three alternatives) of the three (or possibly four) 'positive law' reasoning points, each with three alternatives that must coincide to (re)determine The Law.

Of course, Halpin is right if both or even one side agrees with the pre-determined permission/obligation, deontic logic does bring greater clarity to the case in hand. If both parties agree with The Law nine of the possible alternatives crystallise into a coincidence of three points of agreement and the case is one of fact rather than the law; the alternate possibilities in future law, are unlikely to arise in such a decision. However, if only one side coincides (three alternatives) with The (existing) Law (three alternatives), the other side introduces a clear 'positive law' challenge (three alternatives) and requires the clarity of judicial determination in respect of 'positive law' and consideration of the future law (three alternatives).

'Positive law' challenge is crucial to a democratic system of governance, for the people by the people; recognising human, rather than sovereign or parliamentary, dignity. Because it recognises that if the side that coincides with The Law (three alternatives) is 'governing law' (three alternatives), the 'positive law' challenge (three alternatives) and future law determination (three alternatives) of the judicial arm of 'governing law' is a necessary check on the societal balance that maintains stability in the care and co-operative obedience between governor and governed.

The re-expansion of Hohfeld's model to three or four triangles, each bearing three coinciding possibilities, is much more nuanced and sophisticated, than the original model. Halpin's 'triangles of possibilities' recognise the indeterminate feature of the ferment of 'positive law', in the indeterminacy of an external aspect of law, which remains absolutely crucial to the evolution of law. The reflection I offered on the triangles provides greater clarity to the dignity contesting desire (motive) happening in each triangle. I suggest the triangular model provides an effective analytical tool for use within 'law talk' and that recognition of Halpin's right and duty can be broadened to encompass the other rights identified by Hohfeld.

There is no obvious reason to relegate the ferment of 'positive law' to an obscured 'external' aspect of law. I therefore offer an original remodelling of Hohfeld's matrix, incorporating the important insights from Halpin, to reveal my own model capable of revealing the alternatives available in 'positive law' from the 'law talk' perspective of claimant and judge to the 'talk about law' of societal interest.

8. 3 Mastering Hohfeld's Design

I suggest an alternative foundation for Hohfeld's rights categories, which remain loyal to his model as applied human (not just judicial) reasoning. In keeping with the simple logic of Hohfeld's initial analysis I make no attempt to define individual rights. I agree Halpin's triangulation of rights is an effective 'law centric' way of looking through Hohfeld's model at different angles to consider various outcomes possible within a legal relationship. However, I also recognise that the model can be used to 'talk about law' more generally. Recognising that in practice, law not only deals with known outcomes of The Law, but also deals with changes in The Law, and is known to be capable of altering the relationship between parties.

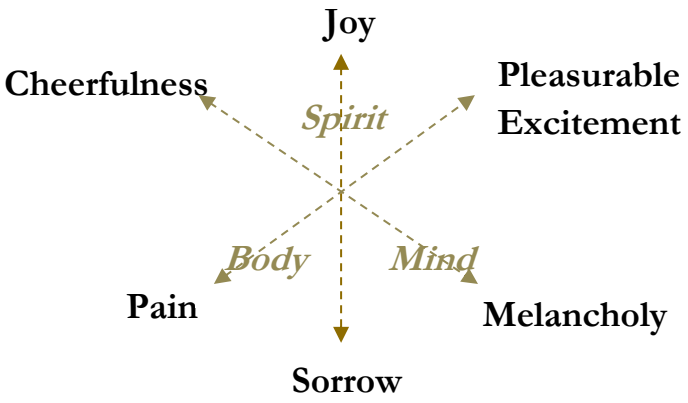
The usefulness of Hohfeld's model is that it allows one to deconstruct the human societal relationships of *continuing alliance agreement*, including any elusive 'societal contract', to the basic human elements and constituent guiding governing parts in the 'objects of law'. In attempting to maintain human dignity in different spheres of UN informed, human societal law, we have recognised one of many influential group dignities, national 'governing law', which has undeniable power to influence species and individual dignity. The national 'governing law' of a society that commands habitual obedience of the governed, whether by care, coercion or co-operation, provides a contestable boundary in the whole of Human Law. Where The Law coincides with dignity, societally valued worthiness in being, society and The Law agree and The Law appears whole. However, where The Law does not coincide with dignity, societally valued worthiness in being, every challenge to 'governing law' reveals the lack of agreement. The intersection of wider society, with the reduced parameter of national 'governing law', illuminates a contestable boundary for the positive dignity determination of 'positive law' at the intersectional crux of the *continuing alliance agreement* of national governance.

Again I specifically recognise the driving force of individual human desire and the human power to manipulate other human beings by understanding the malleability of human desire illuminated by Spinoza. I recognise that reason can change desire; so that, anything which might increase, diminish, help or limit the body's power of action; the idea of that thing will increase, diminish, help or limit the body's power of thought[45]. This power of control over the human mind is used and facilitated through-out the various 'objects of Human Law'. Spinoza recognised the basic elements of desire from which dignity impressions determine 'societally valued worthiness in being'. Individual desires, and society's toleration of them, are determined by the same basic elements in whatever sphere of being and at whatever level of law; intuitive spiritual joy – sorrow; physically sensed pain – pleasurable excitement; and mediated mindful cheerfulness – melancholy. The desires of individual actors can be seen in the claimants of 'positive law' challenge (three or six alternatives) and the positive ferment of future law determination (three alternatives) and therefore six or nine of the alternatives of the twelve possible outcomes of law.

[45] Spinoza B. *Ethics* (White W. H. and Stirling A.H. tr. Wordsworth Editions, 2001) p. 107

The coinciding balance of individual desires, with society's toleration of them and future plan, leads to teleology of Bentham's aspiration of the 'greatest happiness to the greatest number'.

Matrix of Desire – based on the philosophy of Spinoza



8.3.1 Re-figuring Hohfeld - Eight to One; One to Eight - 8 – 7 = 1 (*power*)

The following re-figuring of Hohfeld is a departure from Hohfeld. The strength of Hohfeld's model, and reason for its attraction, lies in the deconstruction of rights elements from a pre-existing *alliance agreement*. The *continuing* role of *alliance agreement* brought into *agreement* question (no longer in *alliance*), by a challenge or lack of obedience to The Law observable in the practice, or practical reasoning, of any 'object of law'. The new model can be applied to any object of Human Law. Where necessary to illuminate the reason of 'law talk' I focus on 'governing law'.

I suggest that human *power* subsumed in objects of Human Law, whether by care, coercion or co-operation determines all of the remaining component elements of; right, no-right, duty, privilege, immunity, liability and disability. *Power* being the combined spiritual, mental and physical societal *power* to change human being's reasons for doing things[46]. Less power completes the dynamic of *power* and *less power* to reveal a societally visible of range of governing legal power. Actual power now vests in The Elephant holding the separate ends on a punctuated Heraclitan path. From The Elephant we can identify manifest examples of different group and individual *power*; moving The Elephant on a separable balance or sliding scale.

[46] *ibid*

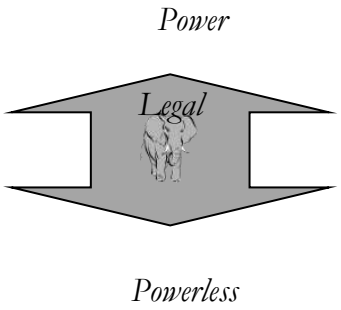
8.3.2 Re-figuring Hohfeld 1+1 (*powerless*)

Power or lack thereof, is a matter of actual or perceived actual object of Human Law power. Human 'governing law' power to manipulate other human beings, whether by care, coercion or co-operation, understood by governor and governed on the basis of human desire; though this may be obscured by law. *Power* can only come into existence through living beings; all human beings have *power*. Power cannot exist in a relationship with no power; a hypothetical power line that starts and finishes at the same point does not exist. Therefore, the extreme opposite of *power*, the position of no power, or negation of power, cannot, or ceases to, exist. Human power and dignity exist and may transcend life in being. For example, the *powerless*, no longer existent murder victim, still has power and dignity, societally valued worthiness in being, if society cares to remember the victim and reprimand (coerce) the murderer to conform to, *ally* with, the societal *agreement* of how to be.

I also recognise that we are talking about society's people; human beings in groups in societal relationships and therefore more than individual. The interdependent grouping of human beings, who are born and remain naturally vulnerable; in body, mind and spirit, to joy, cheerfulness, pleasure, pain, melancholy and sorrow, as well as, death. I use *less-power (or powerless)*, rather than no power to recognise that human beings all share these human traits; even the most powerful. The *powerless* have *power*, which death may, or may not, extinguish. I suggest *power* is the one, in the eight to one. The Elephant of societal power subsumed for careful, coercive and co-operative reason. No power the negation of *power*, on a less power scale, to *powerless*. *Power* existing while there are humans in being

The dynamic Elephant of societal *power* moves within 'governing law', revealing the transience and variability of societal *power*, within the positive ferment of the *continuing agreement* and *alliance*, determined by dignity, societally valued worthiness in being, in 'positive law'. Societal *power* affords a changing dignity locus for assertions or claims of rights in a compromising dynamic of *power* relationships, played out between governors and governed that can result in changes in the law. Legal authority coincides with The Elephant of societal *power* to recognise the impression, or perceived actuality, of the coincidence of 'governing law' power with the

assertion or claim determined on the *power* to *powerless* scale. For example, incidences of dignity roles and rights, particular 'laws set by people *not* as political superiors' or examples of The Law, can be recognised anywhere on the scale between the most and least powerful, the emergent 'positive law' coinciding with *legal authority* to determine The Law.



8.3.3 Re-figuring Hohfeld 1+1+2 (*legal power* & *legal disability*)

The definition of *power* is a departure from Hohfeld's designation of power, which for the moment I will term a *legal power*. Hohfeld named the opposite of *legal power* as disability and I will similarly oppose *legal power* with *legal disability*. I make the distinction between disability and *legal disability* to recognise that *legal disability* does not relate to any individual attribute, but is a simple statement of legal ability. I remove any suggestion of an inherent, less than equal legal ability, to deliberately recognise: 1, the historic assertion of oppressive and God given right to rule, is a subsumption of others legal ability; and 2, that a *legal disability* may not be negative and may result from lack of opportunity, or desire, to overcome the disadvantage of subsumed legal ability. For example, uncritical acceptance of The Law places an oppressive legacy of disadvantage (*legal disability*) on people disempowered by the law, even though the disempowerment may now be admitted to have been wrong, for example sex and race discrimination. My *legal disability* to be president or prime minister is a factual lack of opportunity; I am too radical to be popular and a complete lack of interest in either role.

Like all the relationships of power to come, the independence of *legal power* and *legal disability* from actual or perceived *power* and *disability* is important, as it retains transparent fluidity in the indeterminate changeability between bi-lateral opposites. Legal authority can recognise that positions of *legal power* and *legal disability* can

change. The exciting thing about the independent Elephant of *legal authority* is that the overarching sense of societal community means the less legally able can be empowered in law to become more legally able, so far as society will allow.

In nature, nature determines power; the law of the jungle, the *powerless* at the mercy of the *power*-full. The playground bully provides evidence enough. Natural *Power* remains the source of human *power*. The power of being inherent in human being, the power in objects of Human Law to subsume human *power* determined by desire in dignity, societally valued worthiness in being. The sum of human *power* in society is always greater than that in any object of Human Law, and this ultimately determines and mediates excesses of *power*. Tyranny in empire, governor, employer or parent can be brought down and will expire naturally. As suggested, even in social pairing, as a couple; human beings intuitively react to assertions of power.

For the moment the opposites remain Hohfeld's rights observations and I have just added a new *power-powerless* designation**.** I suggest the remaining six elements are all correlatives of *power*. I retain Hohfeld's rights variables, in their oppositional pairings of opposites and correlatives, to maintain the triangle-ability suggested by Halpin. The rights illuminated by Hohfeld, informed by Austin, and influenced by Anglo-American legal/philosophic tradition, emerge from, and speak of, societal understanding of assumed hierarchy in unilateral national 'governing law'. The rights reveal relational bonds, reflected in law, that recognise a historic hierarchical position. The opposites and correlatives of The Law did appear to flow naturally as commands in law, because they pre-existed in the legacy of commands in the language of law that flowed from commanding hierarchic positions. The right, privilege, legal power, immunity, appear natural; as do their familiar opposites of, no right, obligation of duty, subordination of legal disability and imposition of liability, which were used in the opposite propositions to bring to clarity right.

However, rather than simply accepting Hohfeld's designations of the rights, I want to recognise the distinguishing process of law that brought these rights into being. The dignity, societally valued worthiness in being, that gave very specific names to these rights. The pre-law impression of power on which these rights assertions where made. The historic position of *legal authority* can explain the right names as a

coincidence of law, asserted, gifted, claimed, created and applied by, or in the name of, sovereign dignity. Recognising a time when the sovereign dignity did have the *power* of *legal authority*; the *power* to determine The Law.

If we recognise the emergence of 'positive law' where The Law can be recognised in the societal reflection of 'law set by people *not* as political superiors', then in national societies that have expanded to almost universal franchise, including the Anglo-American society of Hohfeld, we have out-grown the understanding of sovereign law. Sovereign law is historic and is no longer fit for the contemporary purpose; we need a new model for law. However, Hohfeld's model focussed on jural relationships does reveal a dignity ferment of 'positive law'. An adaptation to the model can be used to show an increasingly independent authority of the *continuing agreement* and *alliance* of society, determined by dignity, and asserted in national 'governing law' as revealed on a scale or balance from *power* to *powerless*.

Hohfeld's matrix of legally reflected rights adopted the rights language intending to bring clarity and uniformity to interpretation of The Law as 'applied to judicial reasoning'. The *rights* were identified by distinguishing ambiguities contextually mapped by their linguistic difference and or determined in the factual matrix by pre-existing understandings of law. Hohfeld recognised from the very first words of his paper that his endeavour to distinguish and bring clarity to rights recognised their legal and equitable distinction; a debate that continues to this day between what the law is and what the law ought to be[47]. The sovereign or state locus of dignity was taken as a given; a realistic 'law talk' reflection of Anglo-American 'governing law' in Hohfeld's time.

However, the enormous potential I recognise in Hohfeld's model is that it reveals so much more than the 'law talk' judicial determination of a particular system. Looking back through the model one can illuminate a reflection on any object of Human Law, including 'governing law' to 'talk about law' in sovereign, post sovereign, for example, crown or state, or equal human dignity. The model can reveal how less-powerful *right* bearers can become empowered in law, by engaging the collective *power* of reason in contemporary society to enable them to change 'other' peoples

[47] Hohfeld (n. 12) from p. 23

'reasons for doing things' and 'making conduct required or not', by enhancing their 'authority' in law through pre-recognised societal approval[48]. I need to deconstruct rights further before I can continue reconfiguring the model.

8.3.4 Rights asserted and conferred - Royal Prerogative and Petitions of Right

In the UK Dignity Survey[49] a case law history of rights emerges that demonstrates human *power* and desire subsumed in the rights of a royal sovereign. In the earlier part of the survey the only legal rights were asserted or conferred by the sovereign, once claimed in the 'divine right of kings' as the God given right to rule. The royal prerogative[50], which still provides a basis for some residual rights accorded to the UK sovereign today, were tempered by the 'petition of right' mechanism whereby an equitable remedy was granted by the sovereign, to mitigate against injustices done by the sovereign to their subjects.

Royal prerogative is a right exclusive to a particular individual or class and in UK law is theoretically subject to no restriction. The right has been slowly whittled away over the last 500 years from the asserted divine right of the sovereign to rule over everything. The assertion of royal dignity protected the sovereign dignity in every aspect of life, including: in the person of the crown, royal dignities, actions inconsistent with the dignity and comfort of a sovereign and those which offend the dignity and privacy of the sovereign in keeping with the requirements of feudal *alliance*. Dignity extended to the realm, courts, properties, subjects and servants of the sovereign. Royal dignity included the right to wage war; to set rules relating to other sovereigns, dignities and states and to make reciprocal arrangements regarding the ships and embassies of other states, including the 'prizes' of war[51].

The 'petition of right' enabled subjects to gain recognition, a hearing and possible remedy. The 'right' existed only for the purpose of reconciling the dignity of the Crown and the rights of the subject; protecting the latter against injury arising from

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[48] Spinoza (n. 46) p. 107

[49] See Appendix 2 Sovereign Dignity

[50] OED Origin: late Middle English: via Old French from Latin praerogativa '(the verdict of) the political division which was chosen to vote first in the assembly', feminine (used as noun) of praerogativus 'asked first', from prae 'before' + rogare 'ask'
http://oxforddictionaries.com/definition/english/prerogative?q=prerogative

[51] See Appendix 2 Sovereign Dignity

the Acts of the former, but it was no part of its object to enlarge or alter those rights[52]. Any remedy was only that deemed reasonable by the Crown. The 'petition of right' was designed to ascertain the legal relations existing between the subject and the sovereign in a manner consistent with the dignity of the sovereign.

Dating back to at least the reign of William the Conqueror (1066-87), well before the advent of parliamentary democracy, or any recognised separation of powers, there was a position of Keeper of the King's Conscience in the British judiciary. For many centuries the person who held the position was high in the church hierarchy, usually a bishop. The Keeper of the King's Conscience was responsible for overseeing the international affairs of the monarch and for delivering domestic justice on behalf of the king. The position became that of Lord Chancellor[53].

Rights fit the language of law, because they evolve from rights 'positively' asserted and granted in law. Rights evolved from an existing asserted claim/granted right dynamic within 'positive law' attempting to maintain and *continue* the *agreement* and *alliance* of society, whether by caring, coercive and or cooperative means. Rights always require a judgement; whichever way you twist and turn the word right, it comes back to somebody to evaluate the right. I have suggested throughout this thesis that the ferment of 'positive law', of dignity, societally valued worthiness in being, should be allowed to provide that judgement: "in accordance with what is good, proper, or just; in conformity with fact, reason, truth, or some standard or principle; correct in, opinion, or action; appropriate or fitting; most convenient, desirable, or favourable"[54]. Law provides a judgement forum between individual and societal group, in the dignity determination between governors and governed.

8.3.5 Re-figuring Hohfeld 4+2 (*right* & *privilege*)

Now we have a fuller picture of the dynamism within rights, I continue with the outline of the remaining elements in the new model as correlative products of natural Human Law *power*. First I distinguish between a right '*right',* as a *claim to a*

[52] *Lord Cottenham in Monckton v Attorney-General* (1850), 2 Mac & G 402, at p 412
[53] Bryan A. Garner *Garner's Dictionary of Legal Usage* (Oxford University Press, 2011). p. 510.
[54] 'Right' http://dictionary.reference.com

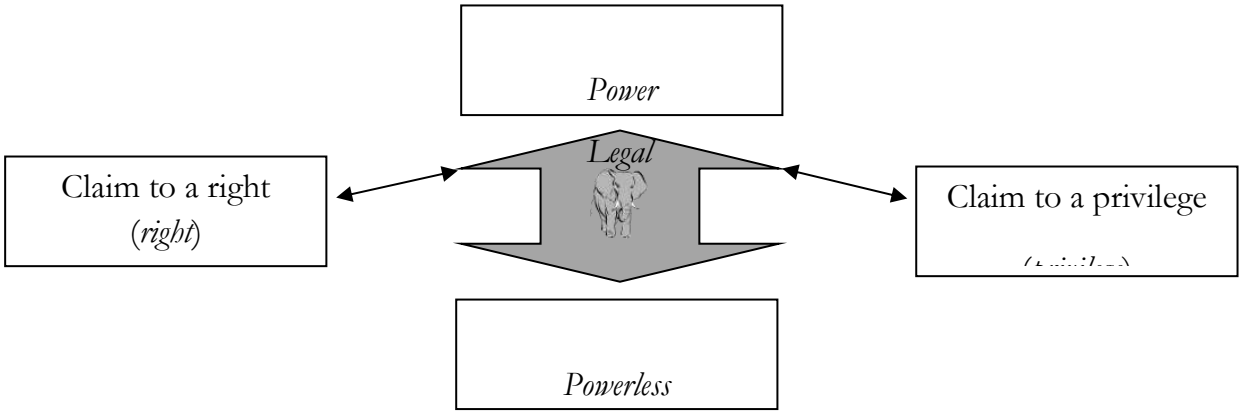
right asserted from an undeniable position of actual or perceived *power* and a *privilege* '*privilege'* as a *claim to a privilege* claim conferred by an existing *power*.

A *right* is admitted in a given society when one (individual or group) has sufficient societal *power* that on the assertion of the *right* claim it will be tolerated by society, whether secured and maintained by care, coercion and or cooperation, even if it is not accepted outright. For example, the individual and or group victor in an election (cooperative care) or battle (coercive care) can claim the *right* to rule; the asserted *right* pre-determined by the victory in societal *power*, determining the rules acceptance by society. However, as evidenced in the UK election of 2010, victory is not necessarily that straight forward. The victor may be required to co-operate to secure a sufficient majority to claim the authority of societal *agreement* of *power*.

A *privilege* is not an assertion of inherent power, but the acceptance of a legal right conferred or granted from a position of *power* empowered by *legal authority* in the societal perception of actual, pre-existing *power*. The conferring or granting of *privilege* is something recognised through history and supports the assertion I have been making throughout this thesis; that the *continuance* of societal *agreement* and *alliance* is maintained by a combination of care, coercion and or cooperation. I do not suggest that all *privileges* granted or conferred are necessarily favourable[55]. I suggest that the societal *power* to confer or grant *privilege* pre-exists independently of conferee or grantee. As with the *right,* the *power* to grant *privilege* is admitted by a given society, in recognition of one (individual or group) having sufficient societal *power* that on the assertion of the *privilege* it will be tolerated by society, whether secured and maintained by care, coercion and or cooperation, even if it is not accepted outright. For example, the *power* of the current UK sovereign, Queen Elizabeth II to grant dignity honours, usually (not always[56]) on recommendations from Parliament, in UK national 'governing law' is a position of *legal authority* empowered by the societal perception of actual, pre-existing, sovereign *power*. The

[55] I am thinking of people privileged into service, where the obligation is oppressive.
[56] For example, the Queen was free to confer the dignity of/to the Duke and Duchess of Cambridge.

power of the *privilege* does not move from the Queen to the *privilegee*; the *privilege* is dependent on the continuing supportive *power* of the sovereign[57].



Law recognised in a role or rule of pre-reasoned reason, distinguishable on a scale from power to powerless and recognised in legal authority at the crux of perceived societal power.

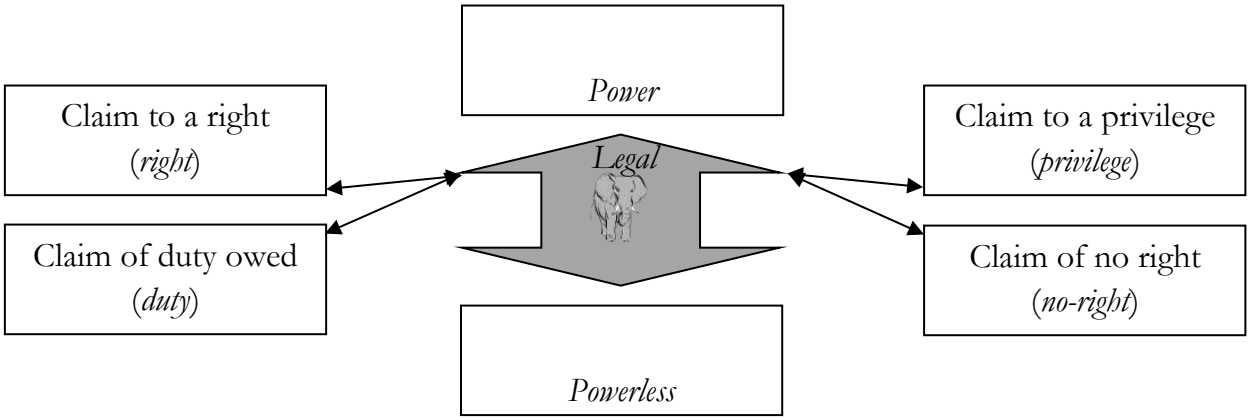
Distinguishing *rights* and *privileges* in this way reveals them as very different rights. In re-introducing *right* and *privilege* to the model I have placed the asserted *rights* to the left of power and the conferred or granted *privileges* to the right. This highlights the different position of each of the claims being made, while recognising *right* and *privilege* is equally dependant on the pre-existing societal perception of actual *power*; a reason to change other human being's reasons for doing things[58].

8.3.6 Re-figuring Hohfeld 6+2 (*no-right* & *duty*)

The remaining opposites, now all appearing as *power* correlatives, reveal a truth of law, which was previously obscured in the uncomfortable pairing of *right, duty, privilege* and *no right*. In a society of asserted *rights* and conferred *privileges* these may be afforded at other peoples' expense. 'Positive law' favours those who claim rights, whether by directly asserted right claim or granted/conferred *privilege*.

[57] For example: British banker Fred Goodwin and Zimbabwean President Robert Mugabe were once considered worthy of dignities in the UK, however, in light of following events those dignities were subsequently removed.
[58] *ibid*

Imposing a claim of no right '*no-right*' or a claim of duty owed '*duty*' on one person or group, attempts to entrench the 'positive' *rights* and *privilege* of other people and groups admitted by recognition of perceived *power*. However, from the perception of negative *no-right* or *duty* bearers the *legally authoritative* decision has subsumed the societal power, often from the weakest and most vulnerable and *powerless* people of society; secured and maintained by care, coercion and or cooperation. From this position the *right*, *privilege, duty* and *no-right* may never have been *agreed*, choice of *alliance* assumed by the assertions of those more powerful and *continuing* acceptance qualified by lack of choice. The lack of *agreement* in the powerful imposition of *no-right* and *duty* creates an inherent negative resistance potential in the 'positive law' model that is too often ignored. The *power* to resist society remains inherent in human beings and provides the acceptance, challenge, ignorance and undermining threats to The Law that belie habitual obedience. Societal *power* shaped by human agreement and resistance to societal care, coercion and or cooperation.



The claims of *rights, privileges, duties and no right* are all power dependent assertions seeking recognition in society (the double headed arrow recognising the bilateral relationship)

8.3.7 Re-figuring Hohfeld 8-2 (*legal power* & *legal disability*)

Hohfeld's former power, temporarily named a *legal power*, is a power conferred or granted as a *privilege* by an existing *power* and can now be subsumed in that category as a *privilege*. While *legal disability* remains the opposite of *power*; seen in the disabling of people in the oppression of colonisation, slavery and servitude, in the *powerless-ness* of individuals and groups *legally disabled* and denied societal forum, including that of law. *Legal disability* can be recognised in the power opposite of *powerless*.

When societal *legal authority* is concentrated in an individual or group it is a truism to suggest fewer people have more *power* and more people have *less power*. It is also logical to suggest that those people who have more *power* can assert and claim more *rights*. However, those in *power* are wise (as the role of 'keeper of the kings conscience' recognises) to maintain enough support in society, by conferring /granting *privilege*, or by sufficient care, coercion and cooperation in/of society, to keep society stable; to stop society wanting to undermine, or over-throw, the subsumed *legal authority* of 'governing law'. It is also logical to suggest that societal *power* in asserted *rights* and conferred *privileges*, concentrates around those who actually have the most power, because powerful people pose the greatest societal threat. *Rights* and *privileges* are therefore positioned closest to *power*, the traditional position of *legal authority* recognising the coincidence of *power* in *legal authority*.

Natural power need not involve law. Power permits that power may be asserted or imposed, e.g. 'orders can be backed by threats'. Murderer, gunman and rapist all have temporal power that law cannot pre-empt. Rights and privileges may be straight forward assertion and acceptance of power, or the negotiated compromise of anticipated provisions to deal with a series of acts and omissions entered into voluntarily by individuals and groups. Rights asserted and declined willingly and duties and privileges imposed on both the willing and unwilling without necessary recourse to law. Historically the sovereign may have agreed to use their power to organise protection of the nation[59]; nobles may have agreed to provide an army and funding may have been required from either or both sides, with dignities promised as rewards, but all of this could be done voluntarily without invoking the law.

Servant/master relationships and modern contracts can equally be determined by rights asserted and duties voluntarily undertaken. Discrimination, something all humans do, allocating space to specific individuals and groups, especially at family or kinship level, deny 'other' groups and individuals access to certain areas, again without necessary recourse to law. A non-legal privilege can also be a denial; for example, voluntary or religious abstinence. No-rights may be an advantage, or no disadvantage; e.g. no right to be royal. The royal privilege precludes common

[59] Derek Roebuck 'Customary Law before the Conquest' *A lecture delivered to a joint meeting of the Institute of Advanced Legal Studies and the Institute of Historical Research*, University of London, 27th February 2006

existence; the no right to be royal denies many privileges, but affords a freedom unattainable by some royalty[60]. Relationships occur in law where *no rights* are asserted or *privileges* conferred. For example, a generation of young men employed in industries crucial to the war effort had *no right* to go to war[61], because a legal *duty* imposed by society's law trumped individual *rights* with a *duty* to maintain those industries. Finally, there are occasions of only legal *no right,* where opposites or correlatives do not make sense, because a *right* claim currently makes no sense. For example, there is *no right,* legal, or other, to be the sovereign in the United States of America; there is no such legal role.

The difference between other power relationships and those that rely on the *legal authority* is the recourse to, or blinding recourse of, national 'governing law'. I say blinding because sometimes the legal position is so powerfully and convincingly asserted that it is almost impossible to deny. For example, I consider myself to be a careful and cooperative societally aware reasonably compliant English, British, European citizen of the world; I resent the assertion that I am a subject of the UK sovereign, although, as a British passport holder, it is almost impossible to deny. (I recognise that the royal family performs societally beneficial functions).

Legal authority can acknowledge any *right*, *privilege*, *duty* or *no right,* but may also deny or reverse any of those positions. Law as the arbiter of *power* in a defined society is able to reflect changes in *power*: to acknowledge new and mediate or deny old *rights* and to confer new and mediate or remove old *privileges* in light of changes in *power*. The goal of *right* assertion in national 'governing law' is the recognition of societal *power* coinciding with *legal authority* to confer or grant a *privilege* of the right asserted. The *rights* are sometimes called 'claim rights', to acknowledge that the aim is to claim a right, which recognises the *power* in society as the *legal authority,* to confer or grant it; to *privilege* it. Legal challenges all start as assertions (ideas) which, dignity, societally

[60] For example, the choice of Edward VIII, forced to abdicate in order to live a commoner life-style.
[61] In 1915 'essential war workers' including those with telegraph and morse code skills were denied active service. In 1938 a Schedule of Reserved Occupations was drawn up, exempting certain skilled key workers. From 1943 mine workers were conscripted and became known as Bevan Boys after Bevan the minister of labour responsible for the act. BBC, 'WW2 People's War' <http://www.bbc.co.uk/history/ww2people swar/timeline /factfiles/nonflash/a6652019.shtml> accessed August 2013

valued worthiness in being, willing, (an impression) are recognised in The Law as a *privilege*; a coincidence of the idea with impression[62].

For example, transsexuals once asserted rights claims that are now *privileged* by national 'governing law' affording recognition of *legal authority* for their societal right and *privileged* protection of that right. Rights claims that are not subsequently conferred with a *privilege,* hold no such *privileged* position, as they are unsupported in societal recognition, and do not have *legal authority*; they have *no right.* The cases for assisted suicide and body dismorphia, for example, where an individual's wish to be assisted in their suicide, or to remove or paralyse healthy limbs, are deemed a *no right.* Without societal support for the *right,* no *privilege* has been conferred or *duty* afforded to protect that *right*; the right is a *no right* and does not exist.

A right claim once asserted is either conferred with a *privilege* or denied as *no right*; the accepted assertion may therefore appear as a *right* assertion and subsequently as a *privilege*. The blurring of the *right/privilege* language is precisely the 'loose' sort of language Hohfeld sought to overcome. Hohfeld recognised a difference in rights claims; a taxonomy of right claims that revealed a right asserted, and a right granted, are not the same thing. I am not suggesting that Hohfeld necessarily saw the assertion of *right* and grant of *privilege*. I am suggesting that he would have recognised the resultant rights as I do, as clearly either a *right* or *privilege*.

Privileges, including *privileges* conferred without *right* assertions being made, can be seen as creating a related oppositional *duty* imposed by law. For example, the *privilege* of lordship is the *privilege* to lord over something, such as a property or estate, which in the UK once included the *power* over the *duty* of workers to the estate. The conferring of dignity honours often recognises care and cooperative, effort, above and beyond, societal *duty*; using a chess analogy, if the lowly pawn makes it across the board in restricted, single step, multi-directional moves, it can become a bishop, castle, knight or queen. The pawn has followed the rules and done a recognised *duty* and can expect the corresponding *privilege*. The pawn remains a pawn until the moment the rules recognise it as other than a pawn on completion of the passage

[62] In this I recognise Cook's differentiation of "exclusive" and "concurrent" rights in Hohfeld (n. 8) p. 19

(*duty*) across the board. *Rights* are only assertions, until conferred with a *privilege* on a *right,* or deemed a *no right* through the process of law.

8.3.8 Re-figuring Hohfeld 6+2=8 (*immunity* & *liability*)

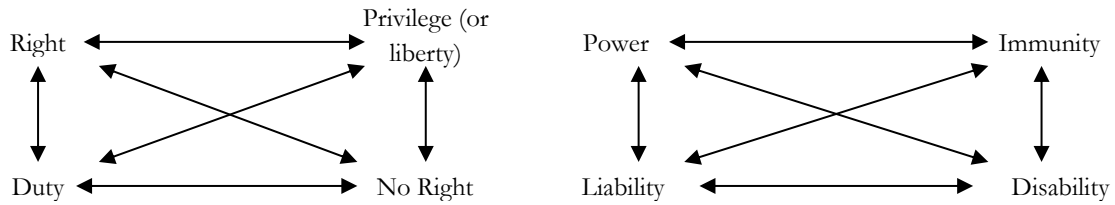
The correlative claim opposites of immunity '*immunity'* and liability '*liability'* also take colour from being conferred or imposed by *legal authority* afforded by societal *power*. Like the other *power* correlatives of *right*, *duty*, *privilege* or *no right* they are determined by the coincidence of *legal authority* in the *power* dynamic. *Immunity* and *liability* are refined constructs of law. Keepers of societal conscience, securing and maintaining subsumed societal cohesion by (pre)reasoning careful, coercive or cooperative mechanisms used to mediate the societal balance of *continuing agreement* and *alliance* in 'governing laws' enterprise of 'human survival and social control'.

8.3.9 Re-configuring Hohfeld

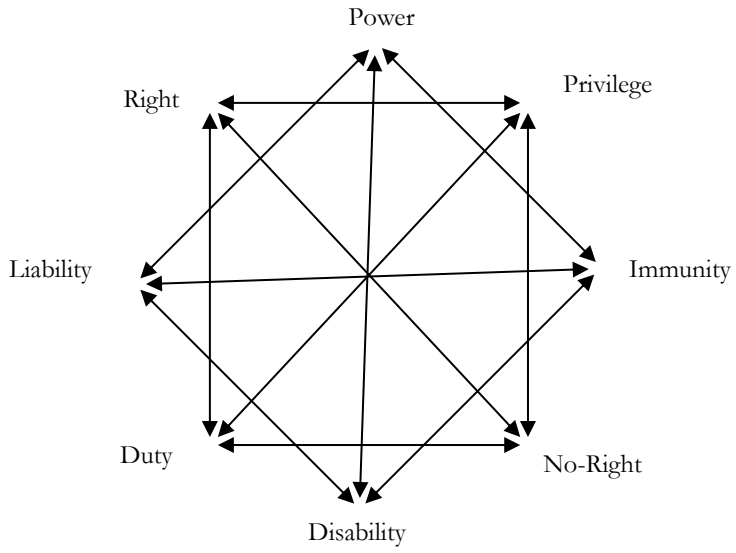
The close proximity of *power* to *rights* and *privileges* can give the impression of *power* vested in a *right* or a *privilege*. As suggested, this can be explained as the temporary coincidence of societal *power* with *legal authority* with historic incidences of power*,* for example, recognised in the sovereign or parliament. Indeed there is strong evidence in the historic coincidence of *power* and *legal authority* that suggests the bias of *power* toward *power*. Again the bias is a self-fulfilling (positive) truism; those most powerful do govern and logically society should want those most able, to govern society. Of course, the two are not the same, but those that want to govern do have to gain the perception of societal *power* and *legal authority* to do so; the most powerful always do govern. Yet, this important distinction between *rights, privileges* and the *power* to govern recognises indeterminate nature of dignity that the *right/privilege* determination is affected by the locus of *legal authority* on the *power* scale; the fact of *legal authority* to *power* is the crucial aspect of 'positive law'.

Having refined and redefined Hohfeld's basic elements, human beings rather than rights are now revealed as the basic elements of law. Human attributes determine individual *power* and *power* within the societal group. The basic elements of human power, being; the mental, physical and spiritual power, joy to sorrow, cheerfulness to melancholy, and pleasurable excitement to pain, of being. The pre-existence of collective societal being determines that individual *power* is always subsumed and

tempered by group *power* to accept or alter that *power*. For posterity, *power* may be left as a legacy of *power*; e.g. in a legacy of hereditary powers, a status hierarchy, or in a currency of *power,* currently property and money. The evident opposite being to dis-empower opposition seen in most historic societies who did enslave people of other societies and eliminate people societally valued unworthy of being.

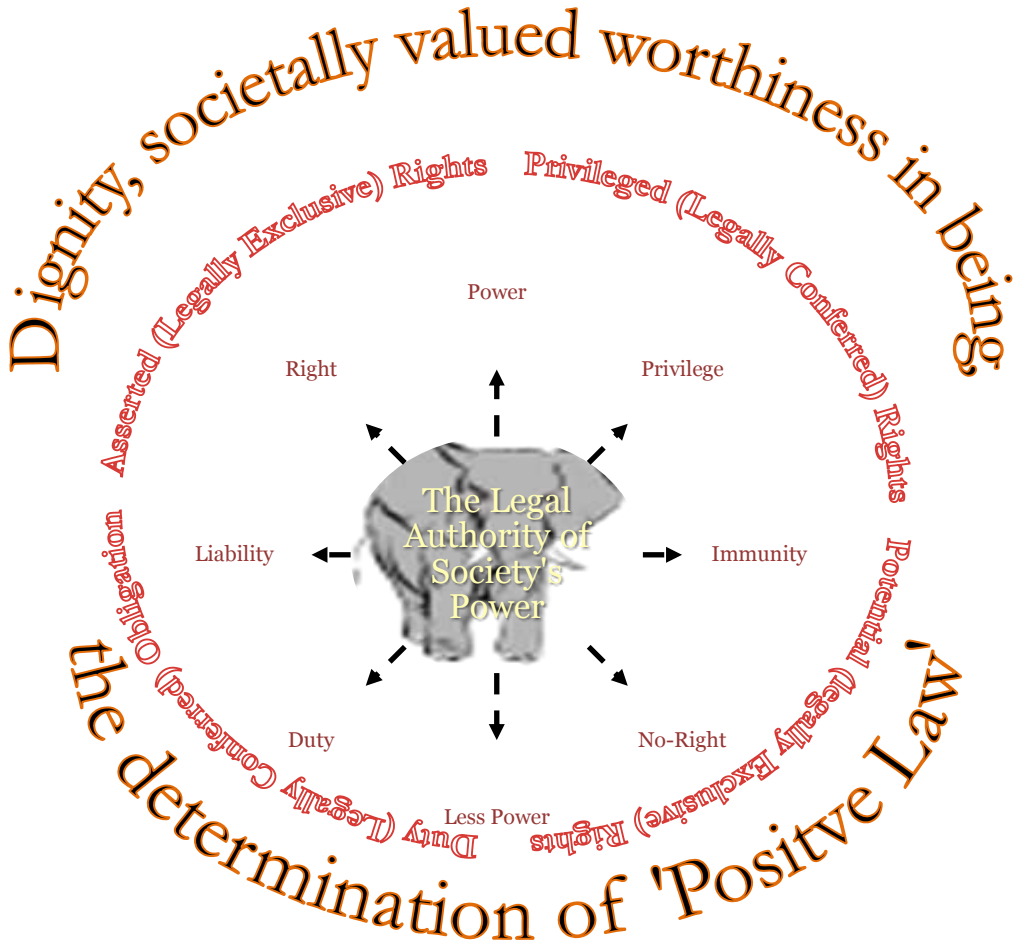


Taking the common depiction of two squares of basic Hohfeld elements and superimposing one square at an angle over the other, placing *power* at the top; the redefined basic elements are revealed in a new rights matrix based on power recognised in a *legal authority* relationship between the *power*ful and the *powerless*.



Hohfeld's opposites are now recognised as statements of legal potentiality, revealing all elements apart from *power* as correlatives of *power*. So the oppositional lines can be removed and The Elephant of 'positive law' revealed at the midst of jural power.

New Model of 'Governing Law'



8.3.10 Asserted and Potential Rights

The 'New Model Of Governing Law' is a model of extant rights in actual law that helps to bring clarity to any legal position by revealing the character of the right from any perspective; including, for example, those of claimant or judge, but also any other interested party, pro or anti, law. Asserted *rights* and *liabilities* that appear above the *liability-immunity* line, in the Asserted (Legally Exclusive) Rights of the top right quadrant are the domain of emergent 'positive law'; the *rights* that seek to claim societal approval that are external to The Law. A *liability, right or power* may be claimed that is not yet acknowledged in The Law. The closer the *right* to the *legal authority* of societal *power*, both in the spectrum of *liability* to *power* and in *right* to *no-right,* the stronger the right assertion. For example, the right of Prince Charles to become King of the UK is almost undeniable; the right to even royal privacy (a repeated right claim in the UK Dignity Survey) far less certain.

The opposite is true in the Potential (Legally Exclusive) Rights quarter. There is no *immunity, no-right* and with *less power* over *legal authority* less chance of The Law's acknowledgement. The further the *right* from the *legal authority* of societal *power*, both in the spectrum of *less power* to *immunity* and in *no-right* to *right,* the weaker the right assertion. For example, the repeated claim for legal immunity for people who assist another's suicide. There is no existing law in any UK rights quarter that allows one to assist suicide. In the Asserted (Legally Exclusive) Rights quarter the *right* can be seen to have been claimed, but, so far, *no right* has been recognised. The *no-right* has received judicial reasoning, but not the *privileging* of The Law. Societal *power* is evident in repeated acceptance (and continuance) of the assisted suicide *right* claim. Judicial reasoning feeds the 'positive ferment' of dignity, societal valued worthiness in being, which affords the opportunity to re-group, with alternatively reasoned and informed challenge, and to re-*power*, with the realisation that the issue is not yet perceived to have enough societal support.

8.3.11 Privilege and Duty Rights

The top left and bottom right quadrants are the domain of extant law. The Laws previously 'set by people', who claimed the political superiority of societal *power* in *legal authority*, but can now be recognised '*not* as political superiors'. In the top right quarter *privileges* and positive *immunities* that appear above the *liability-immunity* line are Privileged (Legally Conferred) Rights already enjoying societal recognition and the protection of The Law. The proximity of the *privilege* or positive *immunity* to the perceived societal *power* in *legal authority*, determines the strength or weakness of the *privilege* or *immunity* claim. The same is true of *duties*, whether a *duty* or negative *liability,* appearing below the *liability-immunity* line. The Duty (Legally Conferred) Obligation is recognised by society and it too enjoys the protection of The Law. Again the proximity of the *duty* or negative *liability* to the *power* of *legal authority*, determines the strength or weakness of the *duty* or negative *liability* claim.

Hohfeld's power, renamed *legal power* and removed earlier could be recognised anywhere in the top half of the model. If the *power* was an asserted actual or perceived actual, but legally unrecognised societal *power*, it would appear in the Asserted (Legally Exclusive) Right quadrant as an emerging power. If it was an

extant *power* it would appear in the Privileged (Legally Conferred) Right quadrant. The *legal power* would not appear in the bottom left quadrant, unless it was, in fact, a Duty (Legally Conferred) Obligation. The *legal power* would not appear in the bottom right quadrant, precisely because Potential (Legally Exclusive) Rights either lack sufficient *legal power,* or do not seek or require legal endorsement.

Disability renamed *legal disability* and removed earlier, could now be recognised anywhere in the bottom half of the model. It would be in the Duty (Legally Conferred) Obligation quadrant if it was, in fact, an existing negative *liability* or *duty*, for example, the *liability* to pay taxes or the *duty* to maintain official secrets or industries crucial to war effort. Or it would be in the Potential (Legally Exclusive) Rights quadrant if it was an emerging *legal disability*. For example, financial or legal standing may place *legal disability* on some people's right to pursue a claim creating an effective *no-right* through legal disability.

8.3.12 Importance of Asserted/Potential Rights over Privilege/Duty Rights

Most Hohfeld scholars, including Halpin, consider the extant law of the duty and privilege quadrants to be the most important. While I agree the duty and privilege quadrants help to bring clarity to recognised 'law talk' of an object of 'governing law'. I suggest it is just as important to recognise the legal challenges arising in the asserted and potential quadrants that inform the 'talk about' what law should be. The Law may have previously conferred a *privilege* or *duty*, but as Halpin[63] suggests the judicial function is to determine The Law: the claim, The Law history and the future oriented desired legal outcome require consideration of the claim asserted and potential claim quadrants. The past determination of 'laws set by people not as political superiors' are insufficient to determine The Law; the emergent domain of 'positive law' remains 'the appropriate matter of jurisprudence'.

The privilege/duty models illuminate what The Law is; a punctuated example of The Law. However, in the hard cases when The Law requires a novel or different outcome the asserted/potential quadrants of emergent 'positive law (the appropriate matter of jurisprudence)' must be engaged. Every innovation and challenge to extant law, whether raised by Parliament, societal (civil) disobedience or judicial

[63] Halpin (n. 4)

review places the extant 'laws set by people *not* as political superiors', in the uncertain position of negative challenge and in to (re)emerging 'positive law'; even if on judgement The Law simply confirms the pre-existing extant position.

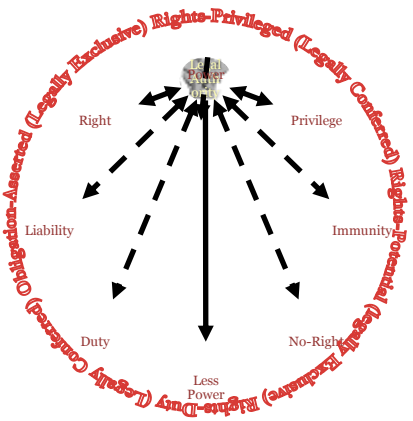
The 'New Model of Governing Law' reveals the picture of national 'governing law' as a relationship; the common society of 'human survival and social control' as a 'positive law' endeavour, a *power* trade balance between national 'governing law' and 'governing law's' society. *Legal authority* no longer automatically vests in or coincides with the most *power*ful, but allows the law to be used to mediate between different individuals and groups on the basis of dignity, societally valued worthiness in being. The coincidence of societal *power* and *legal authority* on the *power* to *powerless* scale is the locus of 'positive law', the crux of recognition of the transient locus of law's dignity; the place to temporarily pin down dignity.

The revised model overcomes some of the ambiguities in Hohfeld's matrix, by recognising them as temporary incidences of law that attempt to maintain false positions of *power* that may no longer exist, for example, the assumed uncritical acceptance of pre-existing *privilege*. The attempt to entrench rights, (*privileged*) in the model rather than simply apply it to judicial reasoning, as Hohfeld initially intended, suggests a reason for contestation, and drawing distinctions between, *rights* assertions in the model. In fact, the extant factual position allows the model to 'travel well' to reflect The Laws of any society in judicial or any other reasoning.

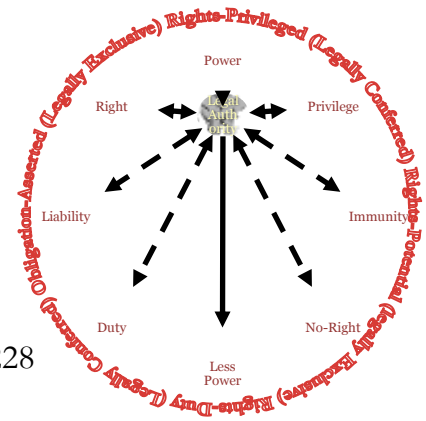
New Model of Governing Law

Dignity, societally valued worthiness in being

Sovereign Power

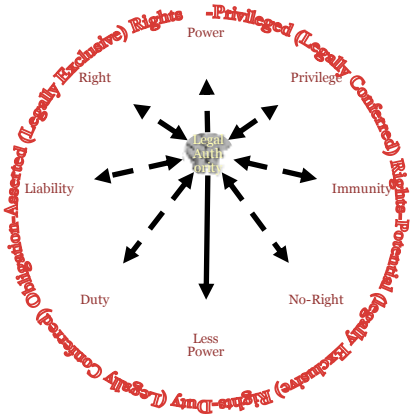


Elite Power



Franchised Power

Equal Power



the determination of 'Positive Law'

The sovereign, elite, representative and equal positions shown on the 'New Model of Governing Law' reveal societal *power* subsumed in recognisable positions of national 'governing law'. Each position secured and maintained by care, coercion and or cooperation in the hands of a minority of people who set The Law '*not* as political superiors'. The positions show an uncomfortable reality; that the role of 'positive law' within the dynamic of 'governing law' is an existential fact of human power in the society into which we are thrown. In a society that claims equal, rather than elite, hierarchic or sovereign dignity, the 'positive law' ferment recognises that human beings have an equal, free will, choice in accepting or rejecting the guiding extant law. For example, in the UK, the choice may be raised to a representative authority, like Parliament, in societal (civil) disobedience or by way of judicial review. Even so societal *power* concerning 'human survival and societal control' is nearly always subsumed in a collective 'governing law'.

The 'New Model of Governing Law' is not a model of extant actual power, but recognition of a perceived collective of societal *power*. *Legal authority* provides a locus for claimed and maintained societal *agreement* tweaking a tolerable balance of societal law by careful, coercive and cooperative means over-looking consideration of majoritarian support. Even the most stable forms of representative governance

subsume societal power; that is the point of its being representative. For example, in the UK Parliament the 363 (of 645) Members of Parliament who make up the Conservative/Liberal Democrat coalition claim *legal authority* to govern. They were voted for by 17.5 million of the 29.7 votes cast[64], from the 46.4 million people now entitled to vote. The Government claim representative *legal authority* to govern the estimated 63.7 million people in the UK population[65].

The Elephant of *legal authority* symbolises the coincidence of the dynamic tension in and of 'governing law'. The model is 'positive'; if *legal authority* falls below the positive/negative balance of the *liability/immunity* line, societal *power* is technically insufficient either in the *agreement* of 'laws set by people *not* as political superiors' or the societal 'positive law' commitment to *continuing* societal *alliance*, which causes instability in The Law. This does not mean the society is about to plunge into anarchy; it means that The Law needs to rise to the challenge in or of The Law instability in the *continuing alliance* of societal *agreement*.

The 'New Model of Governing Law' therefore suggests a human dignity reason why societal rule, should be in the people of society's interests. The basic human elements of human societal *power* are revealed as disparate distinguished asserted and conferred *right* claims that govern societal *power* through societal toleration of tolerable *right* claims through the medium of 'governing law'. The 'New Model of Governing Law' harnesses the yes or no answer to societal tolerability of the claim in *legal authority*; at the opposite end of the claim (*right, no-right; privilege, no-privilege; immunity, no-immunity; duty, no-duty; liability, no-liability*). The fact that the claim is being made reveals the *alliance* investment in societal *power* and acknowledgement of *continuing agreement* located in the *legal authority*. The arrow in each end of rights assertion and negation reveals the guiding/guided nature of 'governing law'.

The positional opposites (suggested by Hohfeld now appear diagonally opposite) and may well identify direct factual relationships, which, without intervention of, or change in, 'governing law', can be viewed from the top as a downward slope and the

[64] 2010 General Election Results <http://www.general-election-2010.co.uk/2010-general-election-results.html> accessed October 2013
[65] Office for National Statistics, 'Population' (2013) <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Population> accessed October 2013

bottom as an upward slope[66]; for example, employer/employee lord/ bondsman, master/servant,. However, the basic elements in human and legal relationships are now revealed as human beings and the legal relationships of jural *rights* now recognised as vested in societal *power*. There are no human rights. Legal and other rights are recognised precisely because of the punctuating intervention of, and recourse to, the collective power of an object of Human Law.

Where any sphere of national 'governing law' is a realisable option, The Law requires a subjective dignity judgement, influenced by 'positive law', to inform the 'laws set by people not as political superiors'. Societal *power,* by reference to *legal authority*, empowers 'governing law' to interrupt the line between two ultimately related parameters. The intervention of 'governing law' offering care, coercion and or cooperation to reason change in behaviour, in human being, has to at least appear to optimise law's task of 'human survival and societal control'. The Law supported choice may be a miserable, painful one, but still preferable to death.

The reason why societal rule, should be in society's interests is because the *power* of dignity is inherent in human being. No matter what sort of government is in place; elite, equal, representative, sovereign, tyrannical, individuals make their own dignity determination by the same elemental (Spinoza suggested) desires. That dignity vests in societal being cannot promise equality, fairness, justice or a fixed idea of morality, but offers hope for them all. What dignity uniquely offers is the collective determination of 'societally valued worthiness in being' in 'positive law'.

In a land of fairy tales, where every care is catered for and every task performed in friendly co-operation, there would be no need for *rights, privileges, immunities, duties* or *liabilities*. However, if, due to the unavoidability of dignity, societally valued worthiness in being, one is of the impression of *no-right, no-privilege, no-power, no-immunity,* and only *duties, liabilities* and *disabilities* imposed, one might question the worthiness of the being of law and society. In a life destined to be 'nasty brutish short'[67] one may consider ideas to improve that melancholic, pain and sorrowful

[66] Kramer (n. 31) p. 24
[67] Hobbes T., *Leviathan* ((1651) Macpherson C. B. ed, 1968, reprinted in Penguin Classics, 1985) p. 190

impression. 'Governing law's' task of 'human survival and social control' has to be a nuanced balance to avoid being undermined by such ill-impression.

Hohfeld's straight-line correlatives suggest the historic reality of *rights* imposed and *privileges* conferred from a top-down all powerful governance position. Without further intervention The Law may well be viewed from both ends as a one-sided imposition of law. Uncritical acceptance of *right* over *duty*, *privilege* over *no right, power* over *liability* and *immunity* over *powerless*, reflects the law of the jungle; the *powerless* at the mercy of the *power* full. Without societal em*power*ment in/of *legal authority* through 'governing law' it makes no sense to suggest the *powerless* have any relational influence on *immunity*, or *duty* bearers over *right*, or *no right* bearers over *privilege,* or *liability* over *power*. And yet, Hohfeld did recognise individual/group *power* to positively influence collective societal order, by aligning with the *right/ privilege* model to voluntarily take on *duties* and *liabilities* with respect to others (*rights*) claims and (*immunities*) freedoms, noticeably in contract law, to build societal cohesion around and within a centralised societal *legal authority*[68].

Fortunately for some, 'governing law' has evolved to recognise the transference of societal *power* to representative *power* vesting in the people, shifting the locus of *legal authority* away from the high-powered assertions of a sovereign or elite. The 'New Model of Governing Law' can be used to recognise that 'governing law' can, and does, confer or reaffirm *privilege* on claimed *rights* of anyone in society; choose between two or more competing *privileged* claims, and afford alternative resolutions from the basic element correlatives of law found in Hohfeld's original model.

The stability of 'governing law' is dependent on The Law meeting the 'positive law' dignity standard in the light of reasoned consideration of extant *and* future law[69]. 'Governing law' has become more representative of society and can embrace the innovation and challenges to The Law seen in the 'New Model of Governing Law' as a means of evolving The Law. In parts of the contemporary world where the societal *power* of 'governing law' can intervene with *legal authority* to mediate between people from positions of *power*ful to *powerless*, *legal authority* can empower the most

[68] Hohfeld (n. 12) see p. 59 for the discussion of the contract norms afforded by liability and immunity
[69] Halpin (n. 44)

disabled people with *power* in law. For example, even people in persistent vegetative state may be afforded some societal of their physical integrity and societal consideration of their spiritual and physical being.

The role of societal 'governing law' judgement, whether by Parliament or judge, is to consider the subject in legal issue and determine the best legal outcome for the legal endeavour of 'governing law' of 'human survival and social control' through reasoned consideration of extant *and* future law. The 'New Model of Governing Law' allows anyone; claimant and judge, or other societally interested person to consider 'law talk' of The Law. The 'New Model of Governing Law' can be used by lawyer or layman to consider the possible outcomes of a legal challenge by reference to the base elements and correlative parameters arising from the legal assertion or issue; these can be known to, and applied by, anyone in society.

In this way both the *power*ful and *powerless* can be empowered to make assertive *rights* claims, leading to the potential of *privilege* and *immunity*. As Hohfeld quite rightly identified; *immunity* and *privilege* can be surrendered, and submission to the *less-power rights* of *duty* and *liability* voluntarily undertaken, in full knowledge of *power* and locus of *legal authority*[70]. 'Positive law', rather than the most, or least, *power*ful, determines the legal outcome; law imposing the *less-power rights* of *duty*, *no right* or *liability* on willing participants in resolution of a common societal endeavour.

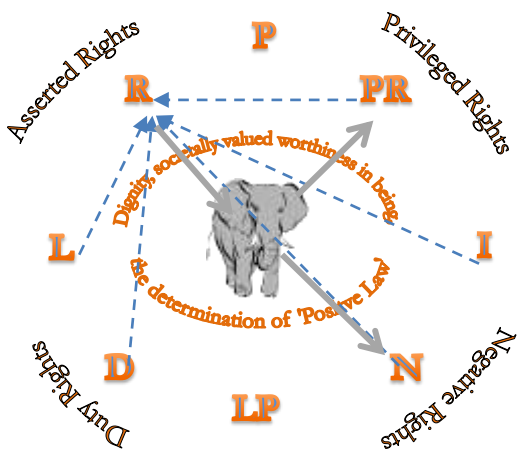
The 'New Model of Governing Law' allows *legal authority* to be viewed as a tool of societal governance, which can be analogised to the financial instrument of a fixed and floating charge; societal *power* existing potential held in *legal authority* between the *powerful* and *powerless* in society. The law that has been previously determined can be viewed as *privileged* or temporarily fixed; a law "that without more fastens on ascertained and definite property or property capable of being ascertained and defined"[71]. The floating remainder of law where *rights* are asserted is "ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and

[70] Hohfeld (n. 12) see p. 59 for the discussion of the contract norms afforded by liability and immunity
[71] The difference between fixed and floating charges over business assets was outlined by Lord Macnaghten in *Illingworth v Houldsworth* [1904] AC 355

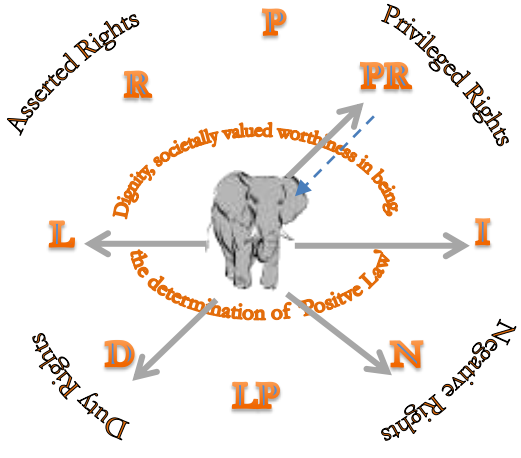
grasp"[72]. When a *right* is asserted, whether novel or challenging, the *right*ness of extant law is questioned; a "crystallisation" moment occurs, crystallising into determinable legal right issues or claims and correlative potential outcomes.

From the whole bundle of legal relationships that we know to potentially exist, an event or challenge distinguishes the pertinent legal relationships to be considered in judicial and other reasoning. Discrete legal relationships are clearly identified and other potential relationships can be seen to fall away as not relevant to the case in hand. To return to the ephemeral analogy I used earlier, the mayfly we see for the brief adult life phase of an hour or so on a spring day, when they emerge in fine colours to mate and die, identifies a particular mayfly who mates with an- other particular mayfly, from a swarm of potential mates, on a particular day. That the other life phases are less evident does not mean they do not exist, or that we do not see the imminent arising of their immanent being.

The 'New Model of Governing Law'



Right



Privilege

Every new right claimed or challenge to a privilege previously conferred engages the two aspects of national 'governing law': first, a 'positive law' dignity judgment, and if, the claim is judged 'societally valued worthiness in being'; second, the claim

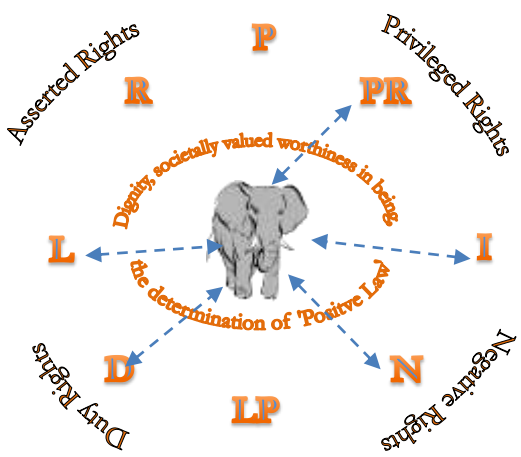
[72] *ibid*

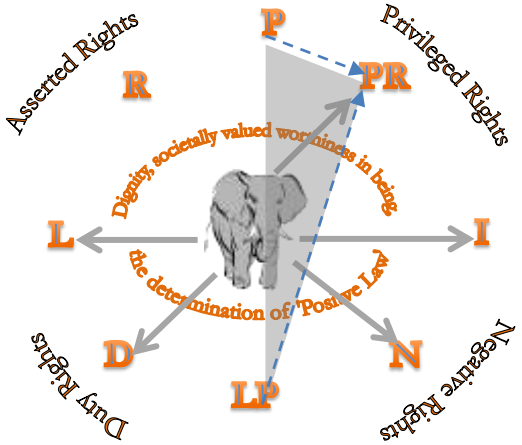
(re)*privileg*ed in 'laws set by people not as political superiors'. An unsuccessful *right* assertion or successful *privilege* challenge means the dignity of the *right* or *privilege* weighed unfavourably in the societal balance are not, or are no longer, recognised in The Law; that is the nature of 'positive law'. However, a dignity is recognised in *legal authority* in the moment of The Law's emergence. The right claimed had to be previously determined in order to make the claim naming and raising the contested legal issue. The *right, privilege, immunity, no-right, duty, or liability* asserted or claimed becomes one legal issue, the severed end of a legal claim or one of two competing alternatives recognisable in a straight line claim. Competing claims may identify the claim as two separate legal issues; for example, a single breach of contract giving rise to a right to repudiate and to claim damages and could be one of several legal issues claimed. Each of the rights claimed will either be conferred with a privilege if accepted by law; or deemed a *no-right*. The privileging of a *rights* claim means that, as far as the law is capable, it will protect the right. If the rights claim is rejected there is *no-right*; the negation of the *right* claim. A claim of *privilege* is a claim of conferred recognition. 'Governing law' will, as far as possible, protect the *privilege, immunity, no-right, duty, or liability* claimed, or afford redress to rebalance societal relationships where 'governing law' is unable to protect the *privileged right*. The claim may be that the *privileged right* is being challenged, that the *privilege* is unclear or misunderstood, or that there is competition between two or more *privileged right*s. The *right*, or if more than one, each of the *rights,* require arbitration, explanation, prioritisation or reconsideration to re-determine the dignity, societally valued worthiness in being, of a previously *privileged* right. The *legal authority* of the judgment is empowered by the *agreement* of societal *power* in an extant relationship between the governed and governor.

Human beings do not resolve all their disputes separately, but come together to form a collective idea of the right way to be. The 'positive law', rather than the most *power*ful people, may seek consensus in considering the 'governing law' or two parties interests in the context of the society and temporarily change the bi-lateral relationship between the two original parties into a multi-lateral one in consideration of society's best interest. Societal rights are reduced to the individual legal

relationships of the parties concerned with the right preference, perhaps right and wrong of the legal issue to be determined.

The 'New Model of Governing Law' accommodates Halpin's triangulation in a more nuanced model that can now be revealed, as the judgment in favour of either party's *right* assertion or a different position deemed more appropriate by national 'governing law'. The multi-lateral consideration of law, which engages with 'other' societal interests, should not be relegated as 'external' to law[73], or presented as elusive gaps in The Law[74]. It should be revealed as the necessary indeterminacy of the elusivity of dignity in the process of law and encouraged as recognition of the 'positive' and transparent evolution of law.





Claimed Right
Discrete *rights* recognised (in the arrow) by the claim asserted

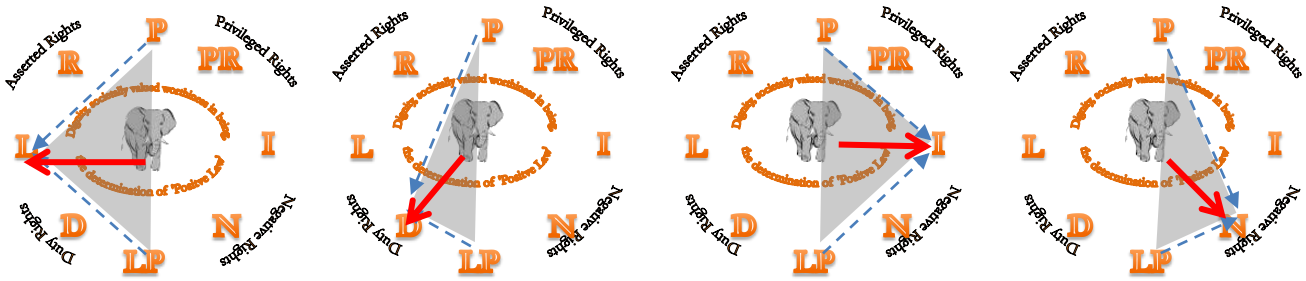
Conferred Right
Discrete rights recognised (in the triangle) as engaging *legal authority* from a dignity determination, carrying the weight of *legal authority* from society's agreement.

Once a right is recognised as a *privileged* right and afforded the *privilege* of legal recognition of the former claim; *privilege, immunity, no-right, duty,* or *liability,* the *privileged* can be claimed with a presumption of The Law's acceptance. Privileged *rights* claims may be seen by the correlative opposite and measured by The Law's

[73] Hart (n. 38)
[74] Raz Joseph, (1979) *The Authority of Law*, reprinted 2002 OUP

position. Parties can willingly assert *privileges*, *immunities* and *no-rights* or undertake *duties* and *liabilities* with a presumption premised on pre-reasoned *legal authority* seen in relation to the *right*. This recognises a straight line idea of law, but underutilises even Hohfeld's model, as it only reveals the presumption and fails to recognise the other options available in the two-step process of national 'governing law'.

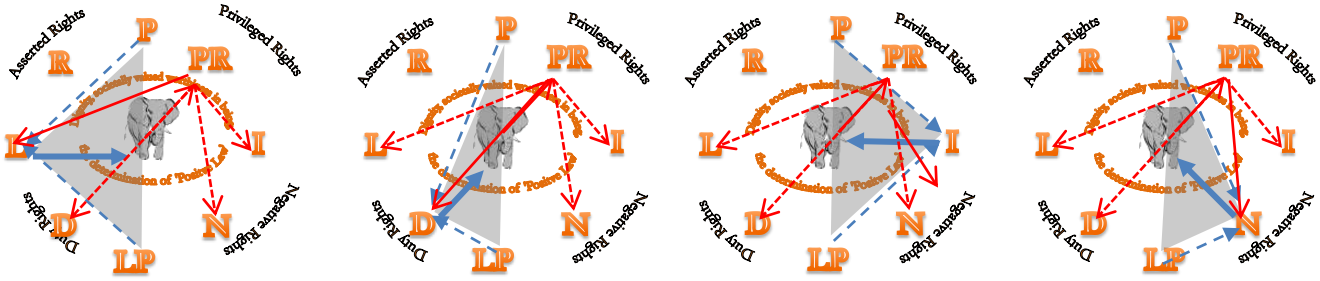
The process of the 'New Model of Governing Law' is far more revealing of national 'governing law' and indeed The Law of 'laws set by people *not* as political superiors'. The *right* claimed is made by a human being, who may be personally situated anywhere within the *power dynamic,* from the *less* to most *power* full making any assertion. *Rights* asserted and existing *privileges* are claimed positively as though already recognised in The Law. If the court agrees, the 'laws set by people not as political superiors' will (re)confirm the *privilege, immunity, no right, duty, liability* on the *right* claimed. The *right* claimed may include action to redress the balance of societal relationships if national 'governing law' was unable to protect a *privilege*.



In the diagram the grey shadow outlined in blue illuminates the legal parameters identified by the claim; the red line confirms the dignity of the claim

However, if the issue is a question of innovation or challenge to the existing law and not a matter of agreeing with an assertion or reconfirming an extant legal interest, the fact, that the issue has made it to Parliament or a court suggests there is sufficient uncertainty within the right claimed that the right clearly requires further action. The ferment of 'positive law' entreats The Law's 'people *not* as political superiors' to consider the claim, which might need, for example, arbitration, explanation, prioritisation or reconsideration in light of the legal challenge. The decision may be looked upon as a *right* claimed then *privileged* or negated; or recognised as the more nuanced consideration of other societal interests raised in

the ferment of 'positive law' and reasoned by laws people doing their jobs '*not* as political superiors' to determine The Law. The legal issue does not come to an end with a determination of The Law; any new privileging in The Law is subject to the *continuing* 'positive law' *agreement alliance* of national 'governing law'. The Parliamentary or judicial determination has to stand the *continual* test of societal judgment *agreement*; and may be challenged in the societal *alliance*.



The diagram now reveals a fuller picture of the process of the claim. The grey shadow outlined in blue illuminates the legal parameters identified by the claim now coming to the authority of law for a legal determination. The solid red line goes first to the privileging point, then confirms the dignity of the claim, but now the other options available to law are all temporarily (I explain why temporarily shortly) in the picture of law

The 'New Model of Governing Law' accepts the dignity assertion of a right or the claim of a *privileged* conferred in to the dignity ferment of 'positive law' the subtle compromise of societies' people and the reason and reflection on how they might be. Of course there are some who are only interested pursuing their own selfish rights, but there are many who seek equality and fairness. Good, honest, just people, who reason and reflect in societal cooperation and feel a duty of care to their neighbours (and workers). Trying to resolve conflicts in (dis)agreements, with individuals and societal groups, including national groups, allocating risks, mitigating losses and not able to claim or impose damages that appear too remote.

The 'New Model of Governing Law' maintains Hohfeld's design that each legal relationship may be viewed from the perspective of two parties, but now recognises that even with societal pre-approval in the form of *privileged rights* national 'governing law' can intervene to change human beings reasons for doing things. This complements the triangulation in Halpin's model, the intervention of law identified in the legal relationship and determining the unknown between the other two of the three possibilities in Halpin's decision: duty or right to; duty or right not to; duty or right neither to or not to; on each activity or omission. The right claimed can be

revealed in the 'New Model of Governing Law', as a request for a legal determination, requiring a legal judgement to confer, confirm or deny.

Human beings can claim *rights* as individuals in their own right, or on behalf of other individuals, groups, or entities; a human being must make the human *rights* claim. The *right* is a legal assertion and needs a human representative for the *right* claimed, whether *privileged* or not at determination. The claimant can accept or re-challenge the judgement now better informed by reasoned argument; or turn away from the *power* of societal support, with the destabilising effect of disengagement.

The 'New Model of Governing Law' suggests the 'positive law' impression is the challenging societal spirit to the reasoning mind ideas of 'laws set by people not as political superiors' in 'governing law', the physical remainder of the body of The Law provides a focal point for future contestation of 'governing law'. 'Governing law' can have regard to societal cohesion and mutual social benefits, which may be afforded through care, coercion and or cooperation in conferred and empowered *privilege* and *legal powers* of enforcement. The Law can offer challengeable governed guided governance of a way for society to be. 'Governing law' cannot prevent the acts that conferred or empowered *privilege* seeks to avoid from happening, and this brings alternative society (re)stabilising outcomes in to (re)balance The Law.

The 'New Model of Governing Law' can be applied to third party *rights* and the *rights* of the legally incompetent people. The claim can be by people on behalf of society through careful, coercive and cooperative means to contribute to the 'governing law' endeavour of 'human survival and social control'. The 'positive law' ferment determining the merit of the claim. People assert 'positive' rights to care coerce and co-operate on issues that affect human dignity, societally valued worthiness in being. The charity sector being an obvious category of 'objects improperly but by close analogy termed laws' that secure and maintain *privileged rights* for people less able or unable to claim. People voluntarily undertake care, coercion, cooperation of those who are legally vulnerable to afford societal protection to the extent that society demands and the *'legal authority'* of societal power permits. Even those who have voluntarily made a careful, coercive or co-operative commitment (*agreement*) may be held to uphold a societal standard; to account to society according to the

undertaking of the *agreement* by 'laws set by people not as political superiors'. The Law recognises and *privileges rights*, but the *rights* are still only ideas; confirmed by a societal impression of a previous *right* assertion. Legal *rights* are only inalienable and inviolable to the extent that law can protect and society will tolerate.

8.3.13 Examples of the 'New Model of Governing Law'

8.3.13.1 Claim of an existing tort or existing care of a minor *duty* (duty owed)

Here I am talking of a societally empowered *duty* claim that has been recognised and previously *privileged* by The Law 'set by people not as political superiors', as having dignity, societally valued worthiness in being. The claim could be of public or private, group or individual, who owe a recognised duty of care in negligence to children. If the claim is challenged, then the alternative position is that there is, in fact, no such *duty*, which carries with it a *right* assertion against the *privileged duty* claim that there is *no* (such *duty*)-*right*. For either claims having extant *legal authority*, of The Law recognising a duty of care in negligence there is a presumption that the court will recognise the privileged *duty* or *no-right*, which might be all that is needed to resolve the case.

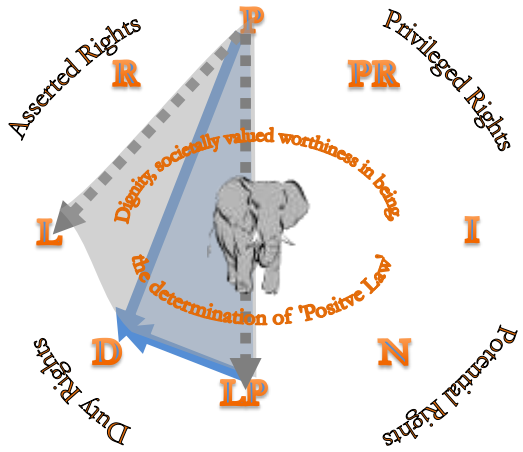
However, if the case is contested, 'governing law' will have to (re)determine the dignity, societally valued worthiness in being, of the claim, either by action or inaction; no action being a dignity determination. The potential jural relations are identified by the two conflicting claims; one of a *duty*, the other of *no* (such *duty*)-*right*. The law, will confirm, clarify or illuminate the right assertion of a *duty* owed, re-*privileging* the claim, or it will deny the *duty* as a *no right*. Other legal issues may also be identified, but will be dealt with separately. All other potential legal issues, not relevant to the case in hand, fall away as irrelevant.

8.3.13.2 Jural relations of claimed *duty* owed

The claim for affirmation of a *duty* (blue claim) places the claim in the duty rights quarter. The *duty* is claimed on *legal authority* to preserve an already privileged claim, so no new *right* (asserted right quarter) *privilege* or *immunity* (privileged right quarter) is claimed. Other options available to the court, for example, if the privileged *duty* is no longer possible, may be to remove, or *disable*, the *privilege* or impose an alternate

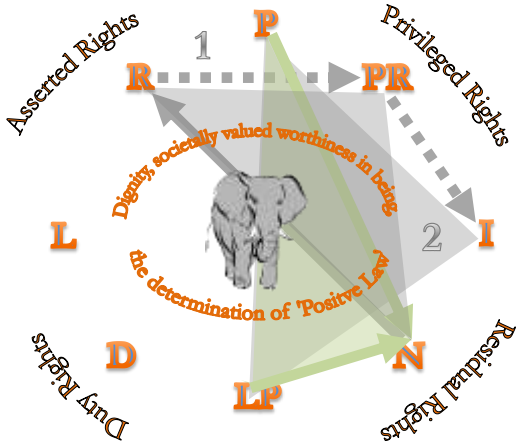
liability. Recognising Hohfeld and Halpin; the claim (*duty* to), the negation no (such duty to) right and Hohfeld's *duty* correlative of *liability* (Halpin's duty to or not to, my alternative legal outcome) set the parameters of logical jural options available to the court (grey parameters). The Elephant, the coincidence of societal 'positive law' in *legal authority*, the continuing *power* flux between the oppositional parameters of *power* and *less power,* determines the *power* scope of societal support for the claim. The more or less societal support (*power*) for the *duty* owed claim the more or less likely the *duty* be confirmed and or made more or less onerous.

Claim of a *duty* owed



The more societally *powerful* the resistance to the *duty* the higher the elephant on the *power* scope of societal 'positive law' *power* in *legal authority*. Once the 'positive law' *power* in *legal authority* forces the elephant above the negative/positive balance of the liability immunity line it would appear that society has lost its appetite for the duty and the of *no* (such duty)-*right* should be considered.

Claim of no (such *duty) -right* owed



The right (green claim) is of *no* (such *duty* to)-*right* confirmation; there is *no-right*. The *no-right* counter-claim requires judicial consideration, which as soon as *no-right* is asserted as a *no-right*, raises a negation of its claim (a double negative). Therefore the *no-right* becomes a positive *right* claim. Now we have the two-step determination of new right assertion.

Step one, the *right* to *no-right* claim sets the first two parameters; the third parameter is set as the

opposite of the *duty* claim. The reason for this is that in order for the *no-right* claim to be successful the previously *privileged duty* that The (extant) Law purports to support must be negated, by the *privileging* of the *no-right* assertion. Step two, the *privileging* of the *right* (*no-right*) claim, now places the claim in the privileged right quarter. Recognising Hohfeld's *power* in *privileging* engages the positive correlative of *immunity* sets the only other jural option available to the court. If the *no-right* claimant is successful they will in fact have a new privilege of *immunity* from the *duty* rather than the *no-right* claimed. The *no-right* remains only if 'governing law' stops at the first *right/no-right* step. Even then some measure of societal *power* may be ascertained and claimed in the confirmation of the *no-right* in The Law inaction.

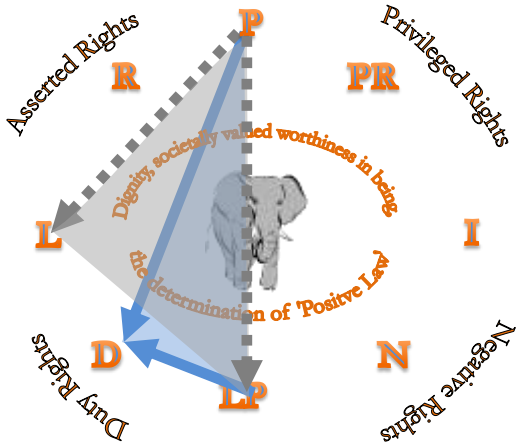
For example, (leaving aside the current outline of the duty claim) sides for and against, the repeated claim of a *right* to assisted suicide can measure societal support, of still a *no-right*, and recognise a 'governing law' attempt to rebalance a recognised instability in societal *power*. The Director of Public Prosecutions, empowered by the *legal authority* of 'laws set by people not as political superiors', issued soft law guidelines on assisted suicide to diffuse the challenge to societal *power* of legal disobedience in some incidences of assisted suicide; the pre-emptive guidelines removing some of the urgency from the need for an authoritative legal decision in this highly contestable area of law.

Returning to the *duty no-*(such duty) *right* claim, in each side we can now see people legally separated and societally accountable to/for their part of the claim. The claim is no longer determined by an uncompromising winner takes all opposition of their claim, but by societal consideration of the 'positive law' dignity, societally valued worthiness in being of their (part of the) claim; revealed in the temporary *legal authority*, of societal dignity, The Elephant, in the flux of societal *power*.

In at least one side of a legally challenging jural claim the 'positive law' contests The Law as it is. The claim requires 'laws set by people *not* as political superiors' to react, arbitrate explain, reconsider, or prioritise the claim in careful, coercive or cooperative (re)balancing of the societal status quo; The Law. In re-balancing The law 'people *not* as political superiors' have to re-determine the dignity evaluation, carrying the weight, or *power,* of *legal authority* from society's agreement. 'Laws set by

people not as political superiors' will determine to *privilege* one or other position, *duty* or *no right* or seek an equitable solution to balance the outcome by mitigating factors on the *liability immunity* dynamic. Or, if the *duty* is *privileged,* a second claim of *liability* may ensue; the opposite of which would be an *immunity*. Again all other potential legal options, including the *duty no-right* claims, fall away as irrelevant. 'Laws set by people not as political superiors' will make a determination and have the full scope between *liability* and *immunity,* on which the competing claims might be equitably mitigated, still mindful of dignity, societally valued worthiness in being, on the *liability immunity* dynamic.

Claim of *duty* owed



Jural relations of *duty* of care owed to a minor

In the case of care of a minor 'laws set by people not as political superiors' have already established a *privileged duty* position; of a societal *duty* of care to minors. The *duty* is claimed in full glare of 'positive' societal law to be clarified on the particular facts in a specific case, to ascertain whether the *duty* exists or is, in fact, *no right* and does not exist (the two-step just considered). If a *duty* is confirmed this may give rise to a further claim, a societal *right* that the *privileged duty* is upheld, the law may enforce the *duty*, impose a *liability* or use the ultimate legal sanction of disabling the violator of the *duty* by reducing their *power* and making them *powerless;* by sending the person to jail.

Law is a constant barrage of 'positive law' rights assertions; individual attempts to inform or challenge The Law through case specific application to usually national 'governing law'. The 'New Model of Governing Law' recognises that The Law can be viewed from other perspectives; not just from professionals engaged in The Law, but from all people on all sides of The Law. The 'New Model of Governing Law' enables human beings, who understand the tool of law, to engage in law and make informed predictions on recognised positions of The Law. The model also allows human beings to inform and challenge The Law on issues that affect them.

Where The Law is unknown, providing the claimant can gain sufficient Societal *power* to directly challenge or sufficient societal care, coercion and or cooperation to uphold the 'positive law' recognition of the claim the 'laws set by people not as political superiors' are obliged to consider the claim; either by action or inaction. The 'New Model of Governing Law' recognises active community participation in The Law: from pre-law assertion to post law reaction; seeing the plurality of law that reveals the external, or less obvious internal, actors who actively engage in the process of law. Actors, outside the legal profession, can garner societal support in the name of dignity, societally valued worthiness in being, before they assert a *rights* claim. The *legal authority* garnered in society brings recognised societal *power* to the decision of 'laws set by people not as political superiors' to confer a *privilege* on the *right* claim. In this way the human dignity assertion is applied to The Law; using a process of societal recognition that has been known to, and in, law for centuries in *rights* claimed and *privileges* conferred in the name of dignity.

Chapter 9 - Conclusion

For more than two millennia since Stoic promotion of the dignity ideal as individual sensing, logical reason and ethical reflection as a good way to be, the idea of dignity has withstood the test of time. While some claim dignity can be recognised in over-arching metaphysics of God or nature, or in the sphere of a governing sovereign or state, I suggest that both are necessarily grounded in a common belief in God or the governing sovereign arising in the sense, reason and reflection of individual human beings. Hence dignity, inherent in human being, brings law down to Earth.

Regular incidents of objectified dignity are recognised throughout history, positively asserting rules or laws. Dignities are repeatedly seen to assume, sometimes embrace, the communal voices of sensible thoughtful reason to determine the sort of beings, humans in society choose to be; harnessed by careful, coercive and or cooperative means. Yet, the fundamental basis of society, of people coming and staying together is largely overlooked; taken for granted. This oversight continues to obscure the common sense natural law dignity of people, individually and as groups, determining ways of being; through 'religious and other beliefs', outward concerns for 'objects improperly but by close analogy termed laws' and day to day adherence to 'laws so called by a mere figure of speech', many of which are bound by a sense of 'positive morality'. I suggested the idea of dignity is captured in the golden rule or ethic of reciprocity and continues to inspire a natural law agenda, emerging from common sense, logical reason and ethical reflection, positive virtues that have become deeply ingrained in the public psyche.

Positive dignitarian jurisprudence celebrates dignity, recognising human beings as a new locus of the (UN) human dignity assertion. Revealed to be naturally at home in law, dignity is evidenced in the 'awesome momentousness'[1] of dignity rights, and as the nebulous 'place holder'[2] of dignity asserted but not yet conferred. Yet, this recognition of dignity is just the realisation tip of a sensed reasoned reflected iceberg. Both the immediate societal impressions of dignity and the reasoned ideas

[1] Jeremy Waldron referred to the 'awesome momentousness' of dignity in his eight week lecture series on Human Dignity at Oxford University, in the spring of 2013.
[2] Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (Legal Research Paper Series No 24, University of Oxford, 2008) Available at SSRN: http://ssrn.com/abstract=1162024 p. 25

of human dignity are palpable, because they already appeal to common sense. The idea of inherent human dignity resonates in individual human beings to challenge earlier assertions of dignity, for example, in sovereign or state, wresting the dignity of the many people of society, back from the assumed place in the dignity of a few.

Dignity necessarily remains elusive, ephemeral, hard to grasp and impossible to pin down. Because there are no general impressions of dignity; just theoretical ideas existing in community in the inherent capacity and potential of people in society to evaluate dignity in particular instances. Dignity arises in a positive ferment of human being, vesting in the strange multiplicity[3] of human thoughts, changing in ever evolving societies. Challenges to dignity, including that dignity is meaningless, stupid[4] and useless[5], are really moot points, because the valuers of dignity already exist; they have made the dignity assertion albeit in a different valuing group. The people of society naturally unavoidably reason and necessarily found the cohesive relational bonds that make them want to live together; people and things they value.

The elusiveness objections to dignity are also counter-intuitive; perhaps (mis)guided by the reason of the person claiming elusiveness accepting another dignity idea, for example, of sovereign dignity. I challenged the fixed locus of dignity throughout this thesis. While governments undoubtedly do have limited and changing roles in determining some ways for human beings to be; individual people are free in the ability to sense, reason and reflect their individual and societal being within and beyond their societal law. In most societies, claiming individual reasoning is somehow controlled by sovereign government seriously exaggerates the governing role and expects extant people to over-look their own good sense. The apparent conclusion, of people necessarily obedient to sovereign dignity, and uncritically accepting The Law of some past dignity assertion, is defeated by the point that one can challenge the governing objects of both dignity and law.

The fantastic amorphous human creation of nation, parliament, sovereign or state dignity, ruled by privileged elites, predetermined by individual or group nature,

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[3] James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995)
[4] Steven Pinker 'The Stupidity of Dignity' (The New Republic, 2008)
<http://www.newrepublic.com/article/the-stupidity-dignity> accessed January 2014
[5] Ruth Macklin 'Dignity is a Useless Concept' (British Medical Journal, 2003 Vol. 327)
<http://www.bmj.com/content/327/7429/1419> accessed January 2014

claiming sovereign dignity as the way to be, is, thankfully, becoming outdated. The governing image of an extant status quo, may deny the common sense of a positive vibrant naturally cohesive sensing, reasoning and reflecting society, yet monolithic states nonetheless respond to the positive ferment of natural law evolving within society; where the people of society found and motivate the states societal existence.

I recognise the recent notoriety of dignity is a deliberate consequence of the high profile afforded to dignity in the reflective and reasoned creation of the UN. The UN agreement requires a moment of recognition; for the agreement was not plucked by chance from thin air on an arbitrary whim, but carefully, cooperatively, negotiated, informed by millennia of philosophising on governance strategizing of the way people individually, and people in society, want to be; found in the battle weary shock of the aftermath of war. The UN was a post-war reaction to a very real and recent experience of immediately felt outraged human dignity impression; the brutality, sacrifice, suffering and tragedy of humans being at war.

Knowledge and reaction to the destructive misery of war provided an opportunity to take positive calculated steps away from future wars. The reporting and scale of war shocked societies. The incommensurability of wining, with colonised populations repeatedly rejecting imposed ways of being, put a strain on societies who had something to live for at home. States recognised internal destruction and saw the devastation multiplied externally. The outraged voice of dignity struck a chord in the golden rule of reciprocity. For once selfish state agendas were set aside, for a more altruistic way of being. We should not abandon the opportunity given, lest we forget; or fail to altruistically respond to recognised catastrophes on the human horizon by together resisting the more selfish way of being.

The political innovation of human dignity was admitted to be novel; a calculated leap of political faith, uniting the founding nations in a human oriented idea of dignity. Human dignity was introduced into the narrative of national and supra-national law as well as the target of international law. Recognition of species wide inherent human dignity inevitably brought questions of dignity closer to home.

The oppressive, discriminatory tendency of the oppositional us and them dialectic of narrower spheres of sovereign and state dignity, was brought into sharp relief. In its founding moment the UN deliberately recognised the human victims of discrimination and war and unavoidably transformed their being into the clarity of law by government recognition. Whether governing institutions choose to explicitly recognise the UN reincarnation of dignity, as inherent in individual human dignity, or not, the popularisation of the idea has placed human dignity in full view of international society. Actions incompatible with human dignity provide a challenge that is recognisable in legal forums; that in turn recognises the agreement of their nation states in the founding documents of the UN. Dependent on the forums ability and receptiveness, dignity may be positively asserted as an intuitively felt idea, a reasoned object, or a spiritually sensitive way to be; and this is evidenced by the growing use of dignity in law. The UN creation of human dignity introduces tension between old well-established instances of sovereign and state dignity, historically superior in human dignity and reveals their legally contestable position.

I accept that some see dignity as an extra-legal concept, but from the evidence of dignity asserted in the UK Dignity Survey this is historically inaccurate. In contemporary legal parlance the deliberate incorporation of human dignity as an international aspiration and basis for law, by political leaders purporting to hold the legal authority of their national states, provides a legally based valuation that is recognisable beyond International Human Rights and Humanitarian Law. The idea of dignity transcendently vesting in individual beings provides a direct link between individuals and the international community. Human dignity appeals to individual human self-consciousness to recognise a wider common sense of peaceful harmony in complementary international human being. Humanly orientated community awareness shines new light on to old questions discussed for millennia; of how and why human individuals form and maintain groups; and once identified within groups, how differences might be accepted, embraced or resolved.

The relationship between individuals and groups dignity (discussed in Chapters Three and Four) reveals that the extrapolation of individual dignity ideas from particular incidents to general or universal ideas has proven incommensurable. Yet

the valuation of worthiness, in the carefully reasoned balancing of human desire (inspired by Spinoza), suggests dignity plays an important fundamental role to sense reason and reflect on individual ways of being and how people come together in societal groups. The shared evaluation of dignity, whether cared for, coerced or cooperative; acts as an essential prerequisite to the establishment of rules or laws that order and maintain society. Understanding commonality of desire in human nature opens a space for more empathetic recognition in law. The matrix of desire provides a frame of reference for individuals and groups to self-identify with others who share their internal beliefs, externally oriented concerns, and the day to day experiences that shape their lives; the objects of law severed from The Law.

I am talking of law in the broadest possible terms, engaging Twining's language of 'talk about law' to inform 'law talk' of The Law. Twining uses 'talk about law' in reasoning the external experience, observation and consideration of the rules and laws that bind the formation and maintenance of existing societies and 'law talk' for the internal recognition of disagreement and differences within societies. Twining guided my thought back through Hart and Hume to the experimental design of ancient philosophers. The reasoning of separable wholes emerges time and again to recognise similarity and difference in multiple spheres of being in decreasing realms of overlapping law. Not necessarily the Thomist or Pantheist ideal of pre-ordained being, (although perfectly compatible with it) but revealed through the emergence of patterns sensed, reasoned and reflected in the common experience of human being.

The creative innovation of UN declared human dignity may not be immediately recognisable to (or in) a jurisprudence focused solely on national, or nationally subordinate, spheres of law (Chapters Five to Seven). Yet the introduction of human dignity is a perfect example of positive, natural, moral and just law recognition. I suggest assertion of human dignity is an undeniable good. A good evolved positively over time, naturally arising in careful philosophical contemplation of the worthiness of morals and justice, deliberate strategic thoughts of concerned human beings trying to avoid the misery and suffering of future discrimination and war, by providing an alternative in reasoned, ethically determined, law.

Dignity is meaningfully applied in and to law, evidenced in the newsworthiness of dignity, the use of the word in practice and the lively academic interest. While some see elusiveness in dignity, I suggest a natural reticence in law that overlooks the discriminating inclusion and exclusion of law; the preferring of one person or group's dignity to another. I suggest in doing so The Law overlooks ethical issues of concern to wider society. Where privileges of law accrue to a governing sovereign or approved elite, at the expense of the populous, this reticence might be well placed. However, modern democratic society should, and I think to a certain extent does, hold law in a more positive light and encourage the dignity challenge of natural, just and moral ideas to evolve The Law. In the agreed complementarity of a positive transparent determination of whose (or what's) dignity, a new contestation point is found for any, positively supported, challenge in the future. The undoubted widespread misunderstanding of the meaning of dignity could and should be illuminated by the transparent revelation of our dignity choices, not least in jurisprudential thought.

The evaluation highlight in the indeterminate and uncertain nature of dignity is revealed in Chapter Six, through the work of Austin, in the positive ferment of dignity held between the 'positive law (the appropriate matter of jurisprudence)' and the subsidiary role played 'by men *not* as political superiors' within human law. Austin recognised the contextual influence in 'laws of God', 'objects improperly but by close analogy termed laws' and 'laws so called by mere figure of speech' informed by 'positive morality' I brought Austin's scheme up to date: first, populating the schema, guided by Twining, with recognised spheres of influence on local, national and international law, then testing it for compatibility with theories of twentieth century jurisprudence, to reveal the complementarity of the scheme.

I then returned to what bothered me about the claims of dignity theory. Dignity rights aspired to, and or posited as normative guidelines, once recognised, are readily applied in and to law. As a champion human dignity, and law, I see recognition of dignity in concretised norms, human rights and as holding a place for individual right bearers to confidently assert their rights is generally a good thing. However, here I agree with Feldman dignity adds little to a recognised right. Further the

attempt to concretise dignity by grasping at, and attempting to pin it down, misses the elusive evaluation/determination point of dignity. Champions and critics underestimate the power of inherent dignity, in the individual capacity to sense, reason and reflect on how to be, if they only see dignity in the reified value of pre-existing rights. The point of dignity evaluation/determination is the mindfulness of recognition throughout society in multiple spheres of being, impacted and compromised by right claims. The desire to grasp and pin down a meaning for dignity misunderstands the transient nature of dignity.

The natural place of dignity in law is readily assumed, but assertion/conferment has not been adequately explained. I suggest dignity is the evaluative indeterminacy in human being; naturally evolving the law. New dignity assertions provide the crucial challenge to law's (previous) dignity determination. Who made or is making the law? Who is law for? Is the law fit for purpose? The apparent elusiveness is the factual transience of dignity; favour for dignity objects waxes, wanes and sometimes comes to an end; values change. Objects of dignity, may act as empty signifiers, vessels or place holders, of yet to be defined dignity, momentously filled with worthiness, of some or other dignity, in the instant of law's determination; the choice or judgment, including of law, to be filled, or not, with an extant example of dignity, societally valued worthiness in being. I suggest the intuitively felt judgement, of practically reasoned impressions of dignity founds the right and wrong of all law. Previously recognised ideas of dignity already recognised as a right, enjoy the challengeable presumption of privilege. Once rights are recognised they enjoy the reassurance of recognition and may also be applied in and to a particular sphere of law.

Temporary incidences of dignity, illuminated in the determination of law, remain in societal view; a crux or point for future challenge of law. Who or what the law is for requires contemporaneous (re)determination in its contextual setting. The flux of dignity; who made or makes law for who, reveals challenges already familiar to law; of who decides the state of exception, in the contestation of ever-changing rightness of choice and appropriateness of forum for law. This bring us face to face with the sovereignty issue and the assumption of uncritical acceptance of the legacy of past dignity assertion. I do not deny there is wisdom in learning from the experience,

observation and reflection of success and failure in past human being, but to blindly follow the edict of past societies from a bygone age seems intuitively illogical and practically unreasonable. Informed by, and consistent with, contemporary and historic assertions of dignity, I suggest dignity as a word, holds a place of recognised human power. The 'societally valued worthiness in being' significance of dignity is not the word, but the potential of the human capacity to value captured by it. The evolution of dignity through, broad and narrow, groupings of order has recognised and maintained a stable naturally evolving continuum of ordered rules and laws. The realms of order revealed in Chapter Seven in The Law embraced in objects of law including Human Law in an overarching Natural Law Continuum of Earth Law.

Finally, with the empathetic understanding of human desires, developed from the Spinoza inspired Matrix of Desire, I suggest human valuations of dignity can be seen and recognised in the making of law. I propose a New Model of Governing Law adapted from a matrix designed by Hohfeld. In an attempt to bring clarity to the imprecise use of rights language in law, Hohfeld recognised the clarity of values, like dignity and rights, in the momentous determination of law. The New Model of Governing Law is positive and can be used to harness dignity to be applied in and to law. Instead of only recognising pre-determined dignity rights; the New Model of Governing Law is a proactive model. The model can be used to identify the legacy of dignity in its current position of law and to recognise whether, where and how any change in dignity might be used to challenge the law.

The sub image of emergent law, pregnant with dignity assertion, will always already be known in society and the model can be used strategically to target influence in the political legal sphere of law making; the assertion of the word dignity holding the place for recognition of societal valuation. Whether trying to garner support for new legal rights, or challenging the incidents of the law; the associative context of existing and emergent law can help to inform any legal challenge. A repeat challenge of emergent law will have the beneficial experience of any previous challenge; highlighting contestation points necessary to overcome in any subsequent challenge. If there is an already existent or associative right, conferred and privileged, what is its relationship to dignity? Does it complement or compete with

the emergent law claim? I suggest the New Model of Governing Law used in this way demonstrates how dignity, societally valued worthiness in being, can be meaningfully applied to recognise emergent, and challenge existing, law.

The fundamental nature of dignity, evolved and inherent in individual and societal being, offers transparent exposure of law, and sensible intuitive practical reasons for careful, cooperative and even coerced compliance in law. Dignity recognises positive goods; societally valued worthiness in being, pursuance encouraged by both champion and critic of dignity. The lack of attainment or retention of dignity provides crucial information on societally valued worthiness in being; revealing whose dignity, choice, or judgement; and points of future contestation in law.

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