

REVIEW ESSAY

Heeding human dignity's call

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The Age of Dignity: Human Rights and Constitutionalism in Europe, by CATHERINE DUPRÉ.

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Bob Dylan famously searched high and low for it and left us wondering ‘what it’s gonna take’ to find it.¹ These days, the elusive ‘dignity’ – and its equally, if not more, elusive cousin ‘human dignity’ – has captured the imagination of not just the poet and philosopher, but also, in light of its increasing prominence in an array of legal contexts, the legal scholar.² Catherine Dupré’s *The Age of Dignity*³ comes at a high point in (human) dignity scholarship, with the recent publication of numerous texts in the English language on the subject,⁴ and with interest in it looking unlikely to dissipate any time soon. In this review, I consider how (human) dignity emerges in Dupré’s wide-ranging monograph, and the promise and pitfalls of Dupré’s account of this important, but contested, concept.

DUPRÉ’S DIGNITY NARRATIVE

The Age of Dignity, subtitled *Human Rights and Constitutionalism in Europe*, embarks on the ambitious task of telling the story of human dignity’s development and transformative significance in European constitutionalism. Dupré proposes to take us on a journey through the archipelago of dignity,⁵ and on this cruise we encounter multiple conceptions and facets of dignity with Dupré our thoughtful, thought-provoking and eloquent guide. Yet it is hard to shake the feeling, after reading the book, of having travelled across multifarious islands

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1. B Dylan ‘Dignity’ (Columbia Records, 1991), cited in C McCrudden ‘Human dignity and judicial interpretation of human rights’ (2008) 19 *Eur J Int’ L* 655 at 655.

2. See eg McCrudden, *ibid*; J Waldron ‘How law protects dignity’ (2012) 71 *Camb L J* 200; D Luban *Legal Ethics and Human Dignity* (Cambridge, UK: Cambridge University Press, 2007).

3. C Dupré *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart Publishing, 2015); hereafter *TAOD*.

4. See eg A Barak *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge, UK: Cambridge University Press, 2015); M Düwell et al (eds) *The Cambridge Handbook of Human Dignity* (Cambridge, UK: Cambridge University Press, 2014); C McCrudden (ed) *Understanding Human Dignity* (Oxford: Oxford University Press, 2013).

5. *TAOD*, above n 3, ch 1.

with Ithaca hardly in sight, to labour the metaphor. While we might enjoy the beautiful journey,⁶ it bears critical consideration whether the dignity ‘compass’⁷ developed and lauded by Dupré is guiding us in any direction at all. I return to this issue below with some critical reflections on the book, after outlining its key threads.

The investigation undertaken in this book takes us through an array of constitutional *moments* in which dignity – or human dignity – has been constitutionally enshrined, expounded or adjudicated upon.⁸ Attention is paid – *inter alia* – to the French Revolution and the Declaration of the Rights of Man and the Citizen in 1789,⁹ the establishment of the International Labour Organization (ILO) in 1919,¹⁰ the West German Federal Republic’s ‘never again’ pledge of 1949,¹¹ and subsequent codifications, culminating in Art 1 of the European Union Charter of Fundamental Rights (EUCFR) and Art 2 of the Treaty on European Union (TEU).¹² Dupré offers manifold insights into the way in which (human) dignity has emerged as a legal concept across multiple European constitutional layers,¹³ and she does so synthesising and building on legal texts, case-law and multidisciplinary academic literature. In this process, Dupré offers us fascinating glimpses into a range of non-Anglophone academic commentary on (human) dignity, which is crucial in unfolding the multilateral academic and institutional conversations¹⁴ taking place on the substance, status and functions of the concept, particularly on the European continent.

Dupré avowedly adopts a narrative ‘for’ human dignity in the context of European constitutionalism that is ‘not purely factual or historical, but is also driven by a spirit of theoretical and critical investigation into human dignity and European constitutionalism’.¹⁵ In Dupré’s account, constitutionalism is described as ‘a doctrine promoting constitutional means to foster democracy and to prevent abuses of sovereignty, at whichever level it may be exercised’.¹⁶ Dupré highlights the ‘rise of dignity’, measured through scholarly attention but also increasing legal – notably constitutional – codification and prolific use of the term in both national and supranational case-law.¹⁷ She refers to the codification of human dignity in Art 1 of the EUCFR and Art 2 of the TEU, enshrined into EU law with the entry into force of the Lisbon Treaty in 2009, as the

6. See CP Cavafy ‘Ithaca’ in *C. P. Cavafy: Complete Poems*, tr D Mendelsohn (New York: HarperCollins, 2014).

7. *TAOD*, above n 3, pp 140, 165–170.

8. *Ibid*, chs 2–3.

9. *Ibid*, pp 38–52.

10. *Ibid*, pp 49–50.

11. *Ibid*, p 58.

12. *Ibid*, chs 2–3.

13. It focuses particularly on the EU and ECHR level, as well as certain national jurisdictions: *ibid*, ch 1.

14. See, on this, C McCrudden ‘In pursuit of human dignity: an introduction to current debates’ in McCrudden, above n 4, pp 54–58. The collection edited by McCrudden is an excellent sample of such conversations. See also Düwell et al, above n 4.

15. *TAOD*, above n 3, p 13, citing T Honderich *The Oxford Companion to Philosophy* (Oxford: Oxford University Press, 2nd edn, 2005) p 638.

16. *TAOD*, above n 3, p 7.

17. *Ibid*, pp 1–4.

contemporary culmination of (human) dignity's rise, at least in terms of European constitutionalism.¹⁸

Importantly, however, Dupré raises the paradox of dignity as follows: '2009 can ... be seen as a paradoxical stage in dignity's development, whereby its normative status has never been so strong while its semantic status has never been less clear'.¹⁹ Against the sceptics who might portray human dignity as so vague and uncertain as to be useless, however, Dupré proposes that European constitutionalism offers *definitions* of (human) dignity:

... a very strong normative definition (human dignity is inviolable), a very precise definition (as a constellation of absolute prohibitions well established in case law since the post-war years), and a very rich definition (as developed in the case law of Member States of the ECHR, and increasingly of the CJEU).²⁰

Thus, for Dupré, human dignity's place in the European constitutional order(s) is cemented and affirmed as – or rendered – meaningful by the normative force of inviolability encompassed in Art 1 EUCFR (*pace* Arts 51 and 52 EUCFR); the 'core prohibitions' such as those enshrined in Arts 2–4 of the European Convention on Human Rights (ECHR) and Ch I EUCFR²¹ (proscribing, *inter alia*, unlawful killings, the infliction of torture and inhuman and degrading treatment and punishment, slavery and forced labour), and the rich and dynamic definitions offered by courts interpreting and applying human dignity or human dignity-based rights in a vast range of contexts.²²

Dupré traces a number of human dignity's beneficiaries and functions. I can only distil them briefly here and cannot claim to do her narrative full justice. In her account, within European constitutionalism, human dignity pertains to 'man'²³ in accordance with 'the threefold definition of humanity as biological being, as citizen and as worker'.²⁴ This enables the author to unpack a thread of human dignity that brings together rights such as those enshrined in Arts 2–4 of the ECHR, Ch I and Art 31 of the EUCFR, Art 1 of Germany's Grundgesetz, and many other provisions and instantiations of human dignity in legal texts and case-law. Human dignity as codified,²⁵ judge-made²⁶ and imagined²⁷ protects and empowers humanity, seen in both individual and relational form,²⁸ in a dynamic and progressive manner. It protects freedom,²⁹

18. *Ibid*, p 82.

19. *Ibid*, p 3.

20. *Ibid*, p 17.

21. *Ibid*, p 77. On the absolute character – or inviolability – of the right enshrined in Art 3 of the ECHR, see N Mavronicola 'What is an "absolute right"? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights' (2012) 12(4) *Hum Rts L Rev* 723. But this is not uncontested: see S Greer 'Is the prohibition against torture, cruel, inhuman and degrading treatment really "absolute" in international human rights law?' (2015) 15 *Hum Rts L Rev* 101.

22. See *TAOD*, above n 3, ch 4.

23. Dupré clarifies that this is not a gendered account of the human person: *ibid*, p 30 at fn 8.

24. *Ibid*, p 177.

25. *Ibid*, chs 2–3.

26. *Ibid*, ch 4.

27. *Ibid*, chs 6–7.

28. *Ibid*, chs 5–7.

29. *Ibid*, pp 31–33.

autonomy,³⁰ equality³¹ and – it appears – certain labour rights;³² as well as rights specifically concerning vulnerable persons such as the elderly,³³ including socio-economic rights.³⁴

Additionally, Dupré builds a novel account of human dignity as human time.³⁵ In this account, human dignity signifies ‘time of one’s own’ (or *Eigenzeit*),³⁶ a notion not only capturing individual self-determination but also encompassing: the recognition of time-/context-specific vulnerability; the protection of the elderly and workers’ time through recognising time’s relativity and its value in non-economic terms and against the forces of ‘total capitalism’;³⁷ and the safeguarding of a secularly sacred humanity³⁸ across time.³⁹ The idea of human dignity as human time also signifies human dignity’s ‘moment’, casting it as the *kairos* of human rights: a time of rupture and discontinuity, whereby a break is made with a tyrannical past and a constitution is built to mark the beginning of a new, democratic time, much like – as Dupré sees it – in 1789, 1949 or 1989.⁴⁰ On this account, human dignity is both memory and promise, a stark but also hopeful reminder of past atrocity and tyranny;⁴¹ a rampart against inhumanity, war and dictatorship;⁴² and the promise of and tool for constant betterment and for the always unfinished, necessarily vigorous, process of democratisation.⁴³

The relationship between human dignity and European constitutionalism in Dupré’s account is symbiotic, attested by her assertion that, while chs 2–6 in the book use the framework of European constitutionalism to understand the actual and potential uses of human dignity, ch 7 adopts the converse approach of reflecting on human dignity’s theoretical significance for European constitutionalism.⁴⁴ Human dignity embodies and takes forward Europe’s post-war commitment to humanity before, or over and above, the sovereign state;⁴⁵ and putting humanity centre stage as the identity *and* purpose of European constitutionalism, human dignity pushes European constitutionalism towards a multi-layered⁴⁶ and potentially highly judicialised model of humanist

30. Ibid, pp 33–36.

31. Ibid, pp 37–38.

32. Ibid, ch 5.

33. Ibid, p 154.

34. Ibid, pp 137, 139.

35. Ibid, ch 6.

36. Ibid, pp 151–156.

37. Ibid, p 195. See, on the ‘total market’, A Supiot *The Spirit of Philadelphia: Social Justice vs the Total Market*, tr S Brown (London: Verso, 2012).

38. *TAOD*, above n 3, p 177.

39. Ibid, pp 151–156.

40. Ibid, pp 156–160.

41. Ibid, pp 58–61.

42. Ibid, p 177.

43. Ibid, pp 184–185, citing A Barak *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006) pp 20–21; and *TAOD*, above n 3, p 190.

44. *TAOD*, above n 3, p 171.

45. Ibid, pp 46–47.

46. On multilevel constitutionalism, see eg I Pernice ‘Multilevel constitutionalism in the European Union’ (2002) 27 *Eur L Rev* 511; M Kumm ‘Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice’ (1999) 36 *Common Market L Rev* 351. For a nuanced account on the enduring relevance of ‘sovereignties’ in *Strasbourg* (ECtHR) rather than Luxembourg (CJEU), see D Feldman ‘Sovereignties in Strasbourg’ in R Rawlings, P Leyland and A L Young (eds) *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford: Oxford University Press, 2013).

constitutional democracy: dignity-democracy.⁴⁷ In this model of democracy, the (human) dignity-commitment is 'interlocked' in such a way that treaty- and constitution-makers at both national and supranational level are bound to comply with it in any constitutional revisions,⁴⁸ a point the predicate of which is human dignity's 'inviolability-eternity', as Dupré sees it.⁴⁹ On the dignity-democracy paradigm supported by Dupré, European constitutionalism must fend off 'illiberal developments and systemic breaches of human rights',⁵⁰ perhaps through a militant commitment to its humanist dignitarian foundations.⁵¹ Vigilance is key, and human dignity is there to remind us of humanity's and democracy's fragility, and demand their protection.

Thus, as I see it, (human) dignity in Dupré's narrative is Janus-like.⁵² It is full of radical potential, fostering transitions, doorways, new paths. At the same time it is eternal, facing both backwards and ahead, possessing and shaping human time. But this is a secular deity,⁵³ which is in turn possessed and shaped by humans, a *res publica*⁵⁴ that can be moulded through 'inclusive, transparent and democratic discussion, and through the procedural channels and fora of European constitutionalism',⁵⁵ resistant to ossification, ever-shifting. It embraces and safeguards a broadly construed humanity, which includes multiple identities of 'man', as well as future generations,⁵⁶ a human family that is both empowered and, arguably, duty-bound to shape and protect its existence and its future.⁵⁷ Human dignity as *kairos* is both eternal and subversive, and can be used to ward off evil and shape brighter futures, even through radical rifts with a rejected past, much like in some of the historical 'moments' identified by Dupré.

Dupré's account can offer food for thought to the theorist and comparativist of (human) dignity, as well as to the legal scholar. The book's addition to Anglophone scholarship on human dignity should come to the attention of UK public lawyers, who may wish to consider to what extent human dignity is 'interlocked' in the UK's complex and multi-layered constitutional system. This may become especially significant in the wake of the UK's referendum on EU membership and in light of possible changes to the UK's human rights protection in the not-too-distant future.⁵⁸

47. *TAOD*, above n 3, pp 182–193.

48. *Ibid*, p 189. On human dignity being 'interlocked' across Europe's jurisdictions, see *ibid*, pp 94–99.

49. *Ibid*, p 190.

50. *Ibid*, p 192. Dupré additionally makes some interesting remarks regarding constituent power and constituted power being blurred on the dignity-democracy paradigm, which merit further elaboration, particularly in terms of how they relate to crises (including crises of constitutionalism): *ibid*, p 191.

51. On constitutionalism and 'militant democracy', see eg J Antonio-Santos 'Constitutionalism, resistance and militant democracy' (2015) 28(3) *Ratio Juris* 392.

52. Habermas identifies human dignity as Janus-faced in its moral and legal aspects – see J Habermas 'The concept of dignity and the realistic utopia of human rights' (2010) 41 *Metaphilosophy* 464 at 470. In Dupré's account, however, I propose that dignity operates as Janus beyond the duality of its moral and legal aspects.

53. Dupré repeatedly emphasises that her vision of human dignity is of a 'secular concept': see *TAOD*, above n 3, pp 18–21, 170.

54. *Ibid*, pp 21–23.

55. *Ibid*, p 170.

56. *Ibid*, p 178.

57. On the power, and duty, to protect the time of mankind, see *ibid*, p 152.

58. On recognising human dignity as the foundation of human rights in the UK, see B Douglas 'Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom' [2015] *Pub L* 241.

A disclaimer by the author: the project, according to Dupré, is ‘envisaged with the normal functioning of democracy and constitutionalism in mind’.⁵⁹ This particular proviso raises numerous questions, particularly regarding what ‘normal’ connotes in relation to the functioning of democracy and constitutionalism given the contested character of both idea(l)s; but it appears to allude to circumstances that do not palpably amount to a ‘state of exception’ or crisis.⁶⁰ This is evident from the author’s qualification of this disclaimer, whereby she suggests that she could not ignore the growing number of crises unfolding over the duration of the project, notably the euro crisis, the adoption of the Hungarian Fundamental Law in 2010 and Iceland’s constitutional revision.⁶¹ The selection of those particular crises raises questions as to what has been selected and what has been omitted, and why; but I leave these particular questions to one side. More importantly, perhaps, it is worth contemplating whether this significant disclaimer is compatible with the monumental burden that (human) dignity bears, in Dupré’s narrative, in lifting us out of the gutters of indignity and inhumanity and into brighter futures. One wonders whether, in the context of crisis, including the present terrorism threat and the humanitarian plight of millions of asylum-seekers within – or on the fringes of – Europe, European constitutionalism’s lauded human dignity might, more or less, justifiably or not, falter or shrug.⁶²

CONCEPTUAL HAZINESS, TENSIONS AND THE MORAL VOID: CRITICAL REFLECTIONS

There are certain aspects of this monograph that warrant critical reflection. I wish to briefly focus on three issues: namely, conceptual haziness; tensions and contradictions; and the absence of explicit engagement with human dignity’s moral character.

Conceptual haziness

Dupré’s analysis at times tends, in my view, unduly to alternate between dignity and *human dignity*, although she is clearly aware of the significance that could be attributed to the distinction. While dignity can be seen to connote rank or degree of (self-)worth or (self-)respect as exhibited or bestowed, in a way that might distinguish *between* human beings – so that human persons can be more or less *dignified*⁶³ – *human dignity* is generally (though not unanimously) seen to encapsulate an equal moral status or intrinsic worth attributed to all human persons, which is elevated only in the sense of distinguishing *all human persons* from objects or non-human animals.⁶⁴ As such, human dignity demands a certain minimum respect and protection from *desecration* – as

59. *TAOD*, above n 3, p 15.

60. Much has been written on the state of exception, particularly in the context of counter-terrorism. See eg G Agamben *State of Exception*, tr K Attell (Chicago: University of Chicago Press, 2005).

61. *TAOD*, above n 3, p 15.

62. Dupré is aware of this issue – in *TAOD* (ibid, ch 8), she provides a measured but optimistic response.

63. Indeed, Tasioulas suggests that non-human animals may be said to have species-specific dignity: see J Tasioulas ‘Human dignity and the foundations of human rights’ in McCrudden, above n 4, p 307.

64. See Tasioulas, ibid, p 305; see also *TAOD*, above n 3, p 35.

Dupré puts it – of one's humanity.⁶⁵ Thus, this alternating between dignity and *human* dignity within the book is important not just as a matter of style, but also as a matter of substance. There are points at which Dupré claims that an argument on *human* dignity has been made and cites a statement mentioning only dignity, without the epithet 'human'. Perhaps Dupré uses the term 'dignity' (without the epithet 'human') to connote human dignity as just described. Nonetheless, I wonder whether her assertion of the dignity of citizens and the dignity of workers is always about *human* dignity, and if so whether it takes us down a problematic path whereby all human beings are equal in human dignity,⁶⁶ but some are 'more equal than others'. I return to this point below.

A conceptual haziness also characterises how (human) dignity and its manifestations are described across the book. Without always clarifying or evaluating the significance of any distinction between these notions, (human) dignity is variously 'appropriated',⁶⁷ 'breached',⁶⁸ 'constructed',⁶⁹ 'crafted',⁷⁰ 'created',⁷¹ 'defined',⁷² 'deployed',⁷³ 'derived',⁷⁴ 'designed',⁷⁵ 'developed',⁷⁶ 'discovered',⁷⁷ 'expressed',⁷⁸ 'infringed',⁷⁹ 'made',⁸⁰ 'mapped',⁸¹ 'protected',⁸² 'shaped',⁸³ 'translated',⁸⁴ 'understood',⁸⁵ and 'used'.⁸⁶ It is variously described – inter alia – as a 'concept',⁸⁷ 'good',⁸⁸ 'idea',⁸⁹ 'principle',⁹⁰ 'right',⁹¹ 'tool',⁹² and – as mentioned – *compass*.⁹³ I note this because it raises numerous questions, such as whether (human) dignity is something the content of which is discovered or constructed, or whether its varied manifestations and functions can sensibly coexist.⁹⁴

65. *TAOD*, above n 3, p 60.

66. On this premise, see Habermas, above n 52; J Waldron 'Citizenship and dignity' in McCrudden, above n 4.

67. *TAOD*, above n 3, p 86.

68. *Ibid*, p 103.

69. *Ibid*, p 21.

70. *Ibid*, p 86.

71. *Ibid*, p 88.

72. *Ibid*, p 132.

73. *Ibid*, p 99.

74. *Ibid*, p 87.

75. *Ibid*, p 22.

76. *Ibid*, p 86.

77. *Ibid*, p 87.

78. *Ibid*, p 18.

79. *Ibid*, p 111.

80. *Ibid*, ch 4.

81. *Ibid*, p 13.

82. *Ibid*, p 21.

83. *Ibid*, p 103.

84. *Ibid*, p 94.

85. *Ibid*, p 21.

86. *Ibid*, p 22.

87. This is the case throughout *TAOD*.

88. *Ibid*, p 21.

89. *Ibid*, p 18.

90. *Ibid*, p 17.

91. *Ibid*, p 166.

92. *Ibid*, p 16.

93. *Ibid*, pp 140, 165–170.

94. On this, see McCrudden, above n 14. See also S Riley 'Human dignity: comparative and conceptual debates' (2010) 6(2) *Int'IJL C* 117.

Moreover, Dupré's frequent reference to semantic status or meaning⁹⁵ or *definitions*⁹⁶ elides the nuance needed to appreciate that a concept's specification⁹⁷ involves its application in a (potentially infinite) array of circumstances, which can both bring our abstract understanding of it into sharper focus and reveal some of its heretofore unexplored or under-explored dimensions.⁹⁸ Indeed, this is the way in which her account of human dignity as pertaining to identified beneficiaries such as workers in particular circumstances and with particular implications can perhaps best be understood. At the same time, the 'definitions' she offers in response to sceptics mostly skate on the surface of some of the controversies and tensions identified in specifying what human dignity demands in particular contexts – and I return to this below.

Tensions

Related to this conceptual haziness, Dupré often glosses over tensions in her dignity story. For instance, the marital rape case in the European Court of Human Rights (ECtHR) may have involved vindicating the sexual autonomy of married women;⁹⁹ but how did this square with the strict non-retroactivity principle encapsulated in Art 7 ECHR and its implications for the rule of law and human autonomy, ideals that Dupré supports and identifies as central in the Europe of human dignity?¹⁰⁰ Moreover, what is the ultimate connection between safeguarding the human dignity of unpopular, marginalised and/or disenfranchised persons,¹⁰¹ and democracy? And which mechanism of protection ought to prevail in Dupré's 'dignity-democracy'?¹⁰² Dupré's suggestion that safeguarding human dignity will occur through 'inclusive, transparent and democratic discussion, and through the procedural channels and fora of European constitutionalism, with ... courts playing a key role'¹⁰³ elides rather than resolves the institutional tensions that perennially plague these matters. Additionally, what is the relationship between safeguarding an abstract and intergenerational humanity and Dupré's support of individual self-determination?¹⁰⁴ And can a freedom- or autonomy-focused human dignity capture it? Some of these issues or the tensions underpinning them have been repeatedly highlighted by dignity scholars,¹⁰⁵ and Dupré does not provide a clear response to them.

95. *TAOD*, above n 3, p 3.

96. See eg *ibid*, p 17, ch 6.

97. Habermas, for example, considers human rights to be legal specifications of human dignity: see Habermas, above n 52, at 464. In turn, on the specification of rights, see eg R Shafer-Landau 'Specifying absolute rights' (1995) 37 *Ariz L Rev* 209; J Oberdiek 'Specifying rights out of necessity' (2008) 28 *Oxford J Legal Stud* 127.

98. This is only mentioned in passing and by reference to German academic commentary on Article 1 of the Grundgesetz at *TAOD*, above n 3, p 160. See also D Hollenbach 'Human dignity: experience and history, practical reason and faith' in McCrudden, above n 4.

99. See *SW v UK*; *CR v UK* (1996) 21 *EHRR* 363.

100. For Dupré, autonomy is a key aspect of human dignity (*TAOD*, above n 3, pp 33–36) and the rule of law is a key aspect of constitutionalism: *ibid*, p 141.

101. *Ibid*, pp 102–103.

102. *Ibid*, pp 182–193.

103. *Ibid*, p 170.

104. *Ibid*, pp 106–107. See also, on autonomy, *ibid*, pp 33–36.

105. See eg McCrudden, above n 1; and McCrudden, above n 14. On autonomy and paternalism, for instance, see McCrudden, above n 1, at 705–706.

Another issue is that, while a promising and illuminating argument is made in relation to the Declaration of the Rights of Man being imbued with 'the spirit of dignity as equality' even while it uses the term '*dignités*' to refer to official rank,¹⁰⁶ the author does not build on this insight by exploring instantiations of human dignity in contexts in which express reference to (human) dignity may have been absent. If 'the word [comes] after the substance',¹⁰⁷ and if human dignity's significance within European constitutionalism lies in the substantive value(s) it embodies and protects, and not merely in offering a unifying language, then in telling the story of human dignity we should also be trying to find instances of its vindication even without its explicit mention.¹⁰⁸ Otherwise, the story is skewed to reflect the linguistic use, rather than the substance, of human dignity in legal texts and judgments. While Dupré claims to have captured the most momentous struggles in the rise of human dignity,¹⁰⁹ the story of the recognition of women's human dignity is palpably missing, for example.

The substance versus rhetoric issue is broader. There is tension within the book between two perspectives on human dignity. On the one hand, human dignity embodies something substantive and meaningful, rich in content, as Dupré suggests.¹¹⁰ On the other hand, it often seems to amount simply to the way we (may) dress up or express our intentions as Europeans to be better and do better following spectacular moral failures, without agreeing on – or even properly contemplating, at least not *en masse* – why and how.¹¹¹ If human dignity is more than just the latter – that is, more than a linguistic blank canvas on which people and institutions (might) project 'best intentions' from an array of political ideologies and visions of the good, following what is widely perceived to have been a spatially and temporally contextualised morally disastrous era – then a project that seeks to tell its story should be focusing more closely on conceptualising its substance and finding its proper instantiations.¹¹² Although Dupré comes close to doing this in drawing connections between the Kantian theory of human dignity and the 1789 Declaration, Art 18 of the 1793 Declaration and the ILO principles,¹¹³ she does not pursue it more holistically.

The moral void

In my view, the tensions and contradictions outlined above are, to a large extent, symptomatic of a key aspect of Dupré's study: an aversion to morality, which emerges in her

106. *TAOD*, above n 3, p 40.

107. *Ibid*, p 43. Dupré also broadly attributes human dignity concerns to the ECHR, although there was no explicit mention of human dignity in it; she does so also in light of Strasbourg case-law alluding to human dignity: see *ibid*, pp 63–66.

108. M Mahlmann 'The good sense of dignity: six antidotes to dignity fatigue in ethics and law' in McCrudden, above n 4, p 595, citing N Chomsky *New Horizons in the Study of Language and Mind* (Cambridge, UK: Cambridge University Press, 2000) p 147.

109. *TAOD*, above n 3, p 51.

110. *Ibid*, p 17.

111. See McCrudden, above n 14, at 2 (citations omitted): 'The familiar story is that when the Universal Declaration of Human Rights was being drafted in 1948, the participants were able to agree on what they were against, but not on *why* they were against these violations.'

112. See Mahlmann, above n 108, pp 594–595. On conceptual interpretation, see R Dworkin *Justice for Hedgehogs* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011) ch 8.

113. See *TAOD*, above n 3, pp 47–50.

assertion that ‘human dignity has nothing to do with morality, it is about human existence’, a point made with reference to Kateb¹¹⁴ but, in my view, without engaging with some of the nuances in Kateb’s thesis on human dignity.¹¹⁵ Does human dignity, in Dupré’s account, describe a state of being, so that, indeed, many if not most of us are not *born* in dignity?¹¹⁶ Is it a matter of semantic debate – to be resolved, perhaps, through a focus on popular usage? Is it a matter of political contestation, representing victorious ideologies we can associate with it in different historical contexts? Is it a positivist legal concept the source, status *and* content of which might be identifiable through pedigree-based legal method and ultimately traced down to social fact?¹¹⁷ Is it a tool for the (legal) wordsmith, through which said wordsmith – perhaps a lawyer before the ECtHR – can promote his or her preferences?¹¹⁸ Or is it a moral concept, or morally imbued legal concept – perhaps an interpretive concept¹¹⁹ – the substance of which we are trying to capture?¹²⁰

That Dupré does not seem to take a clear evaluative stance beyond the selective narrative adopted entails that, while her perspective on the way in which human dignity’s content and significance has been shaped over time remains positive and optimistic, she leaves underlying problems and tensions largely unaddressed. This is tied to the issue hinted at above: Dupré’s identification and embrace of what is in effect a plurality – or archipelago¹²¹ – of meanings and functions of (human) dignity raises the question of whether she has appropriately responded to McCrudden’s critique of human dignity as being ‘a relatively empty shell’, which can countenance an array of competing and conflicting conceptions.¹²²

But there is a more problematic dimension to the dismissal of morality when talking about human dignity. A wishful perspective on human dignity’s malleability may present it as offering a tool for good – for progress, for democratic engagement with how to be/do better – and a platform for fruitful constitutional dialogues that reach all the way from Europe’s supranational institutions to Europe’s diverse *demos* and back again, to shape ever-brighter futures. This, of course, leaves question marks as to the place in this enterprise of Europe’s human outsiders, whose deaths at the geographical and figurative fringes of Europe we are witnessing daily; and as to how to resolve relevant institutional tensions, which pose considerable and urgent challenges. Additionally, a bleaker outlook on human dignity’s malleability would warn us of the probable hegemonic capture of this concept through power-politics.¹²³ This is no mere spectre; one can easily

114. Ibid, p 21, citing G Kateb *Human Dignity* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011) pp 10–17.

115. See eg Kateb, *ibid*, pp 13, 23. For more on Kateb’s *Human Dignity*, see B Pilkington ‘George Kateb, *Human Dignity* book review’ (2012) 66(2) *Rev Metaphys* 369.

116. *TAOD*, above n 3, ch 2.

117. See eg J Coleman ‘Rules and social facts’ (1991) 14(3) *Harv J L & Pub Pol’y* 703.

118. See the critical take on this in M Koskeniemi *From Apology to Utopia* (Cambridge, UK: Cambridge University Press, 2nd edn, 2006) ch 1.

119. On interpretive concepts, see Dworkin, above n 112, p 123, ch 8.

120. The idea of a heuristic concept that Dupré puts forward (see *TAOD*, above n 3, pp 16–18) can accommodate this possibility.

121. *Ibid*, p 8.

122. McCrudden, above n 1, at 698. On this topic, see the outline of the criticism and response in Barak, above n 4, pp 8–12.

123. See C Douzinas *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London: Routledge, 2007) pp 8, 196. But see T Beattie ‘The vanishing absolute and the deconsecrated god: a theological reflection on revelation, law and human dignity’ in McCrudden, above n 4.

imagine the appropriation of workers' 'human' dignity as put forward by Dupré to render fundamental socio-economic rights dependent on readiness to work on the terms of an increasingly brutal and brutalising neoliberal market.¹²⁴ Ultimately, one could well argue that the hopeful but also self-congratulatory tinge of the 'never again'¹²⁵ narrative and positive characterisation of Europe's dignity developments would comfortably fit a critical account of alternating between apology and utopia.¹²⁶

What, if anything, is Dupré's stance on the concrete prospect of a bleaker future? To take an example from the book, Dupré's account of the ECtHR's pragmatic backtracking – based, presumably, on a self-preservation instinct vis-à-vis the UK's vocal discontent – in *Hutchinson v UK*¹²⁷ so as to dilute the human dignity-based demand for a clear prospect of release for whole life prisoners on the basis of Art 3 ECHR, is devoid of a prescriptive position.¹²⁸ This is so despite her frequent praise for the progressive living instrument doctrine of the ECtHR,¹²⁹ which underpinned the establishment of a 'right to hope' for whole life prisoners in *Vinter v UK*.¹³⁰ This raises the question: is Dupré's narrative a rosy account of the development of European constitutionalism,¹³¹ but ultimately *amoral*? There are certainly elements in Dupré's narrative of evaluative judgement – in particular, of considering certain conceptions of human dignity to be *better* than others. Indeed, her support for evolutive interpretation (versus originalism)¹³² both embodies an evaluative stance and presupposes that there are morally sound and morally unsound accounts of human dignity and of the substantive scope of human rights.¹³³ Otherwise, if, say, Dupré is only supporting interpretive shifts that merely diagnose and reflect popular societal changes,¹³⁴ she must be prepared to have her high hopes of European society and 'civilisation'¹³⁵ crushed, and to countenance

124. Indeed, Shklar's idea of the 'dignity of work' can be seen as potentially compatible with such development – see J Shklar *American Citizenship – The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1995) p 1, as cited in V Mantouvalou 'Workers without rights as citizens at the margins' (2013) 16 *Crit Rev Int'l Soc & Pol Phil* 366 at 375, in turn cited at *TAOD*, above n 3, p 136. In light of Dupré's account of human dignity's support for the elderly (see eg *ibid*, p 154), it is worth citing a European study on welfare, ageism and neoliberalism: M Wilińska and E Cedersund "'Classic ageism" or "brutal economy"? Old age and older people in the Polish media' (2010) 24 *J Aging Stud* 335.

125. See *TAOD*, above n 3, pp 58–61, 121–122, 141–142.

126. See Koskeniemi, above n 118. Notably, however, Dupré denounces complacency: see *TAOD*, above n 3, p 198.

127. *Hutchinson v UK* (2015) 61 EHRR 13. The case has been referred to the ECtHR's Grand Chamber.

128. *TAOD*, above n 3, pp 164–165.

129. See eg *ibid*, p 184.

130. *Vinter and others v UK* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013). See on this N Mavronicola 'Inhuman and degrading punishment, dignity, and the limits of retribution' (2014) 77(2) *Mod L Rev* 292; D Van Zyl Smit, P Weatherby and S Creighton 'Whole life sentences and the tide of European human rights jurisprudence: what is to be done?' (2014) 14 (1) *Hum Rts L Rev* 59.

131. Pace the exploits of the EU's FRONTEX agency, for example, outlined in M Fink 'Frontex working arrangements: legitimacy and human rights concerns regarding technical relationships' (2012) 28 *Utrecht J Int'l & Eur L* 20.

132. *TAOD*, above n 3, ch 7.

133. On this, see G Letsas 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) 21 *Eur J Int' L* 509 at 531.

134. See *TAOD*, above n 3, p 188.

135. The – perhaps disquieting – allusions to civility and civilisation in *TAOD* are multiple: see *ibid*, pp 78, 100, 125, 175, 196.

significant regressive developments in interpreting the demands of human dignity; for instance, in how asylum-seekers or prisoners ought to be treated. If Dupré is not prepared to countenance this as part of her human dignity-constitutionalism story,¹³⁶ her evaluative stance should be more transparent. For this – the *ought* element in her story – Dupré must embrace the moral dimension of her (human) dignity narrative, which she appears to renounce at the beginning of the monograph,¹³⁷ but which strikes me as deeply embedded in her past-denouncing, future-embracing conception of human dignity as *kairos*. After all, if human dignity is meant to be the compass that guides us through what to hold on to (its eternal aspect) and what to break away from (its subversive aspect), then it surely has a lot to do with morality.¹³⁸

Lastly, I return to another issue hinted at earlier. Questions may be raised about the *human* in the European human dignity – or dignities – which Dupré expounds. From a legal perspective, we may be prepared to accept that the contingent aspects of legal norms and institutions – including the very institution of the state, or the EU, as well as state sovereignty and jurisdiction – entail that not every human being on earth can at any moment in time claim the benefits of Europe’s legal protection of human dignity. The moral defensibility of this reality is too vast a matter to discuss or problematise here, or indeed to expect Dupré to tackle in this monograph. What particularly troubles me in Dupré’s account of human dignity, however, is that the substance given to it – rather than the structural barriers to enjoying this substance – may allow or even enable the reproduction of mechanisms of othering¹³⁹ that attack the very core of human dignity; that is, the equally elevated moral status, or intrinsic worth, of *all human persons* above objects or non-human animals.¹⁴⁰ For instance, while admittedly workers or citizens warrant human dignity’s protection qua human,¹⁴¹ Dupré is also suggesting that human persons attract particular *human* dignity protections qua workers and qua (EU) citizens.¹⁴² But while all citizens and workers might be human (as are all jobless, homeless, stateless, disabled, non-gender-conforming persons and countless other specifications or ‘categories’ of human persons), not all humans are workers or (EU) citizens. This raises the question of whether, within Dupré’s account of human dignity and European constitutionalism, some persons’ status as workers or EU citizens elevates, or ought to elevate, their human dignity and concomitant human rights above those of others. Concretely, to give

136. Dupré’s aversion to a morally worse future is evident at many points in the book: see eg *ibid*, pp 148–150.

137. *Ibid*, p 21, Kateb, above n 114, pp 10–17. See Tasioulas on deploying ‘moral reasoning’: Tasioulas, above n 63, p 293.

138. I juxtapose this with Dupré’s suggestion that human dignity has nothing to do with morality. See text to n 114 above.

139. Consider, for instance, Weiler’s prophetic ‘*Us and Them*’ warning prior to the establishment of EU citizenship, in J Weiler ‘The transformation of Europe’ (1991) 100(8) *Yale L J* 2403 at 2482: ‘The potential corrosive effect on the values of the community vision of European integration are self-evident. Nationality as referent for interpersonal relations, and the human alienating effect of *Us and Them* are brought back again, simply transferred from their previous intra-Community context to the new intercommunity one. We have made little progress if the *Us* becomes European (instead of German or French or British) and the *Them* becomes those outside the Community or those inside who do not enjoy the privileges of citizenship.’

140. See eg Mahlmann, above n 108, p 598; Tasioulas, above n 63, p 305.

141. *TAOD*, above n 3, p 126.

142. For a nuanced account of the relationship between human dignity and the dignity of citizenship, see Waldron, above n 66.

one example of the implications of this within Dupré's narrative, suggesting that reading Art 4 EUCFR in conjunction with Art 3 ECHR can be a premise for a requirement of 'decent remuneration', which protects workers from destitution, raises the question: would other human persons *not* be entitled to such protection from destitution on the basis of human dignity? Could some be seen to be deservedly destitute?¹⁴³ Additionally, and more broadly, to return to a theme repeated across this review, if human dignity is viewed and constructed as a *res publica*¹⁴⁴ through 'democratic discussions' premised on a constitutionalism that is humanist in *both* process and substance, who forms the *demoi* that can possess and mould human dignity; who is and who ought to be excluded from it, and why?¹⁴⁵

Some of these concerns may stem from Dupré's narrative seeking to make *human* dignity do too much, or allowing it – within her narrative – acceptably to *do* and *be* such a variety of things that pervasive tensions and a lack of coherence become inevitable.¹⁴⁶ Perhaps a more morally coherent story is possible – and necessary.¹⁴⁷

CONCLUSION

The Age of Dignity offers an array of ways of thinking about, interpreting and shaping (human) dignity through time, unfolded with the aspiration of a humanist constitutionalism at its centre. Whether and in so far as we are fascinated, inspired or troubled by the (human) dignity story or stories being told, I take Dupré's book as calling on us to 'heed the call'¹⁴⁸ of human dignity and to enter the conversation; to engage in the ongoing endeavour of determining the substantive contours of the minimum respect our common humanity requires. Of course, our all too human¹⁴⁹ grasp of how best to navigate this morally contested terrain is likely to be flawed; we must try our best nonetheless.¹⁵⁰ Aiming to do and be better demands it.

143. See the critical comment on such a stance in C O'Connell 'A modest proposal: destitution, state responsibility and the European Convention on Human Rights' (2008) 5 Eur Hum Rts L Rev 583, p 588.

144. *TAOD*, above n 3, pp 21–23.

145. Dupré recognises that certain human rights, notably the absolute rights found in the ECHR and the EU Charter of Fundamental Rights (EUCFR), protect 'foreigners' and other 'voiceless minorities' (see *ibid*, p 186); see also, on asylum-seekers' protection, *ibid*, pp 110–111. Yet foreigners do not enjoy the full range of civil and political or socio-economic rights and benefits associated with EU citizenship. On human rights and the 'other', see WP Simmons *Human Rights Law and the Marginalized Other* (Cambridge, UK: Cambridge University Press, 2014).

146. See McCrudden, above n 1, at 723.

147. Such a story could broadly pursue integrity – see Dworkin, above n 112, esp chs 1, 4, 6–9. See also R Dworkin *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

148. Although a commonly used phrase, the plea to 'heed the call' is also a reference to Bob Dylan's 'The times they are a-changin'' (Columbia Records 1964), in which 'the times' could be read as embodying the idea of *kairos* outlined by Dupré – see *TAOD*, above n 3, pp 157–160.

149. See F Nietzsche *Human, All Too Human*, tr R J Hollingdale (Cambridge, UK: Cambridge University Press, 1986).

150. See R Dworkin 'Objectivity and truth: you'd better believe it' (1996) 25(2) *Phil & Pub Aff* 87 at 122, 139.