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Beginnings

This book has several contentions. Together they form an argument.

The argument goes like this:

1. There are some situations in medical ethics and bioethics with which existing analytical tools are wholly unable to deal.
2. The notion of human dignity is sometimes the only concept that is any use.
3. The role of dignity in the really hard cases suggests that it might be useful in the easier cases too, if we only knew how to use it properly.
4. Using it properly entails:
 - (a) giving dignity a substantive meaning; and
 - (b) proposing a practical model for its deployment.

The substantive meaning of dignity can be derived from a look through an anthropological lens at what makes humans thrive.

I propose a transactional model. One should ask of every proposed solution to every problem in bioethics or medical ethics (every 'transaction'):

'Is that the solution that maximises the amount of dignity in the world?'

That will involve considering the dignity not only of the patient, but also the clinician or researcher, and the wider community.

5. A thorough survey bears out the suggestion in point 3, and indicates that dignity is the key that, properly wielded, unlocks all problems in medical ethics and bioethics. It is the bioethical Theory of Everything.
6. Looking back at the road we have travelled, we are surprised that we are surprised at this result. The result accords very neatly with our intuitions. We have outlawed the use of those intuitions during the journey (if indeed they needed to be outlawed: they have probably been systematically suppressed or perverted by our academic training), but it is reassuring that they were nudging us in the right direction all along.

I enlarge a little on each of these steps below.

Steps 1 and 2: Sometimes Existing Tools Won't Do, and Dignity has to Step In

A teenage girl with profound learning disabilities is admitted to hospital. She is undressed ready for a surgical procedure, but is left naked on a hospital trolley for several hours in full view of some male youths. They do nothing but look at her and lust. She enjoys the attention.

What has happened here is wrong. But it is not condemned by any of the usual canons of medical ethics or law. Think, for instance, about Beauchamp and Childress's four principles:

- (a) Autonomy can hardly object. If the girl is capable of autonomous thought or action at all (so making autonomy relevant), she autonomously wishes to be an object of desire.
- (b) Non-maleficence: do no harm. What harm has been done here? The girl herself sees her exposure as a good. So, no doubt, do the ogling boys. And what, other than dignity, can say that they are wrong? If we suppose, as is likely, that neither the girl nor the boys have been corrupted by the experience in such a way as is likely to cause subsequent harm to themselves or others, it is hard to see any harm here other than harm that has to be described using the language of dignity.

One can see dignity at work here in a slightly different but related way. The rule 'first do no harm' is generally thought of as being the primary rule in medical ethics—eclipsed though it often is in rhetoric by autonomy. But, as Neuhaus has pointed out, it begs a question. It is an enjoinder to protect and maintain something that is recognised as good.¹ But what might that thing be? In the contexts in which the principle is wielded, it is plainly not always bodily or psychiatric integrity. Only dignity can describe adequately all the 'goods' that healthcare professionals are pledged to protect.

- (c) Beneficence? Most would agree that this is not relevant here. But if it is, it too, like non-maleficence, has nothing substantive to say unless and until dignity feeds it its lines.
- (d) Justice? Again, not engaged here.

Some might invite other notions to contribute. But on examination they all prove to be parasitic on the big four, or on dignity. Privacy, and 'respect for persons', for instance, turn out to be special ways of framing autonomy claims. Professionalism is important, but its concern for the well-being of the patient is classic Beauchamp and Childress and/or dignity territory, and its concern for the integrity of the

¹ R Neuhaus, 'Human dignity and public discourse', in E Pellegrino, A Schulman and T Merrill (eds) *Human Dignity and Bioethics* (Notre Dame, IN, University of Notre Dame Press, 2009) 217.

healthcare professional herself fits more neatly into dignity than it does into anywhere else.

All this will convince many that their misgivings about dignity are justified. Here, they will say, is a classic case of dignity being used as a name for whatever principles are necessary to produce the answer that one thinks is right. It is only capable of being used that way because it is hopelessly amorphous. Why not just say: 'The girl should be covered up', and admit frankly that we can't give a very rigorous philosophical justification for it? At least that has the virtue of honesty. Dignity, here, is just a fig leaf to cover our philosophical embarrassment.

These are powerful criticisms. Indeed they are criticisms justly levelled at many of the sloppy usages of dignity in the academic, legal and lay literature. In order to contend that dignity is not only useful but essential, I have to be harder on those usages than are most of dignity's traditional opponents. And that is hard indeed. But I will be. For the moment I will simply assert, without arguing the point, that it is possible to give dignity a meaning that makes it effective at the bioethical and medico-legal coalface, and that that meaning can be empirically derived from a broadly anthropological look at what makes human beings thrive. I am aware that in deriving normative conclusions from empirical observations, some philosophers will think that I have fallen naively for the naturalistic fallacy. I will defend myself against that charge in due course.

Step 3: Usefulness in Hard Cases Suggests Usefulness in Easier Cases

This is a matter of demonstration. And that demonstration will come. In an earlier book² I contended that autonomy alone (all too often the only principle brought into the discussion) was manifestly inadequate to deal satisfactorily with even the most trivial of problems in medical ethics. It needs help. The modest and even banal suggestion was that you could only get ethically good results if you listened to the voices of all of Beauchamp and Childress's principles. I was happy to place autonomy at the head of the table, and even to give it the casting vote in the event of deadlock. But I have now listened more critically to the chorus of those voices. The sound of a good choir is greater than, and different in quality from, the sum of its parts. And my suggestion here is that the sound of a well-tuned Beauchamp and Childress choir is the voice of dignity. Often, in practice, it will be impossible to step back far enough from the choir to hear the harmony as it is meant to be heard. One part will tend to drown out the others. But there is a way of broadcasting the harmony directly into our ethical earphones. It is by pressing the button called 'dignity'. Dignity is the direct route to the right answer in most of the cases commonly surveyed in bioethics. Its utility is all the more obvious when we come to the outlandish frontiers of bioethics.

² C Foster, *Choosing Life, Choosing Death* (Oxford, Hart, 2009).

To be perfectly honest, in most of the common, ward-round problems in medical ethics, we don't need a solution as sophisticated as that given by dignity. Properly deployed, the other principles, slightly distorted though our apprehension of them might be, will give perfectly workmanlike solutions. The real necessity of dignity is best appreciated in the wild places—and particularly in the realm of human enhancement and reproductive cloning. But that doesn't mean that we shouldn't use dignity to give the more satisfactory, more nuanced, and downright easier answers to everyday problems too. It does mean that it is worthwhile learning how to use dignity (at first in intellectually less strenuous places, such as consent to treatment and clinical confidentiality), before we are forced to use it in the places to which the other principles clearly won't reach.

Step 4: (a) Dignity's Substantive Meaning, and (b) a Transactional Model of Deployment

(a) What is Dignity?

Lawyers and ethicists need to be anthropologists, and anthropologists need to be neuroscientists, archaeologists, sociologists, Shakespeare scholars and classicists. It would also help if they had a nodding acquaintance with the Torah, Talmud, New Testament, Koran, Upanishads, the myths of Old Iceland, and the Walmart catalogue. From these texts, as well as from their own experience of testy judges, departmental bickering, broken marriages, sick children, red wine, mountains, and celebration, they would get some idea about what humans are; what makes humans tick, and what makes them tick well: what makes them *thrive*.

I contend that thriving is connected to human dignity. But the connection is not immediately obvious. It is one thing to say that dignity-enhancing laws will tend to be laws that help humans to thrive (a proposition with which I agree): it is quite another to equate human dignity with human thriving in the simple and obvious sense.

Dignity is a slippery notion. In trying to grasp it, it is best to start with the concrete and then work to the philosophical. To try it the other way round is disastrous.

Some aspects of dignity are like the proverbial elephant: we know them when we see them, but they are difficult to describe. Let's try describing some obvious examples and see where that takes us.

A woman is dying of cancer. She is fearful of dying, and is in intense pain. Nonetheless she shows great fortitude. She is far more concerned about the welfare of her carers than she is about her own needs. She greets pain, fear and death with a smile. Whatever dignity is, she has it and displays it.

A political prisoner is daily raped and tortured by his captors. He refuses to give the names of his dissenting friends, and prays daily for those who persecute him, expressly forgiving them after each act of violation. Whatever dignity is, he has it and displays it.

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What do these examples tell us? They suggest that dignity is not necessarily connected with bodily integrity. One can be physically compromised or brutally violated, and still have dignity. Indeed the compromise or the violation may be the soil in which dignity (whatever it is) flourishes most gloriously, or the background against which it is seen most clearly. They might also suggest that dignity consists in, or at least may be manifested in, these individuals' responses to the hand that life has dealt them. The patient and the prisoner refuse to abandon something that they are—something that they stand for—in the face of vicissitudes. In their cases, their dignity begins to look like an attitude of mind.

But what about people who don't have minds, or who have minds that are incapable of forming these admirable attitudes? What about the patient in PVS whose cerebral cortex has been wiped out by anoxia? Does she not have dignity in any sense? Surely she does. Would it be acceptable to invite medical students to practise their vaginal and rectal examinations on her? Surely not: and surely the reason why consists, in some way, in some residual dignity.

Or consider the profoundly mentally disabled girl lying naked on the trolley, enjoying the lustful attention of other patients. Is it acceptable for her to be there undraped? No: and again dignity—her dignity—has something to do with this. The dignity of the lusters also falls into the balance.

Or consider a patient who has given his body to be dissected by medical students. One of the medical students cuts off the patient's ear and takes it home to be used as an ashtray. Why not? Dignity again, most would say. But how?

If we are right to say that dignity is engaged in the case of these three patients, does this mean that we are talking about something different from the dignity of the cancer patient and the torture victim? Many have thought so. The difficulty of seeing that we might be meaning the same thing has propelled many dignity-sympathisers into the belief that dignity is just one useful principle amongst many, or to distinguish between dignity as an inalienable status (often seen as suspiciously theological) and dignity as a quality that is evinced by people who are dignified. On this latter analysis, the 'mind-less cases' would have status-dignity but no quality-dignity, and the prisoner and the cancer victim would have both.

This distinction is wrong. The error arises because the attributes associated with dignity (fortitude, patience, consideration for others, and so on) are wrongly seen as akin to chattels that we might possess and then lose; as something separate from us; as instruments that we use in order to do life. In fact they are a corollary of the status possessed by the 'mind-less' cases. They are a way of *being*, not of *doing* life. The 'mind-less' cases are human (if they're alive) or were human (if they're dead). The dead human is still alive in the minds of many people, whose views matter. Why should the PVS patient not be subjected to unnecessary rectal examinations? One important reason is (and I come to another in a moment), because being human *in the sense splendidly demonstrated by the prisoner and the cancer victim* means that one should not be treated that way. The italics are significant. All the patients I have discussed are going about the same enterprise: that of *being human*. They are participating in the human adventure.

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Being human doesn't necessarily entail *doing* anything, or having done anything, or even (although this will be more controversial, having the potential to *do* anything).³ It follows from the human ear ashtray example that it need not even involve breathing or having a beating heart. So: doing the right thing ethically in each of these examples entails facilitating the full humanness of each person: of encouraging flourishing. The fact that someone doesn't have the neuronal hardware necessary to appreciate that their own flourishing is being maximised is neither here nor there. Flourishing is primarily about *being*, and only secondarily (although often more spectacularly) about *doing*. The cancer victim is flourishing, although her body is crumbling, because it is of the essence of human beings to use their status of existence to laugh at the void. It's what humans do, and therefore in doing it, she is being human, which is a high calling.

Catherine Dupre invites us to consider that 'dignity is not only about being, but also, very importantly, about the process of becoming. An understanding of human dignity as time-inclusive would acknowledge the fact that an individual's personality is never finished and keeps evolving throughout their life'.⁴

I am sympathetic to the core of this idea, but reject it in the form in which she presents it. If the evolution of personality is a crucial ingredient of dignity, then the patient in PVS has no dignity. His personality will never evolve. And yet his *story* goes on; there is a continued unfolding; his *being* continues.

At the end of his life, Peer Gynt hadn't been good enough to go to heaven, and hadn't been bad enough to go to hell. He begged to go to one or the other, rather than being melted down in a spoon with other men who were too insubstantial for either. He was too light for the super-dense reality of heaven, and he didn't taste of enough for a demon's meal. He was asked to point out one time in his life when he had been truly himself: truly human. He couldn't. The main challenge for humans is to avoid his fate. The challenge for bioethics is to help humans to heaviness and tastiness—in other words to be themselves. Part of being oneself is to be a member of the species *Homo sapiens*; the other is to be a member of the species wholly distinct from all other members. To be both is to be dignified.

What is dignity, then? It is objective human flourishing. Anthony Duff prefers to use the word 'dehumanisation' to denounce that which is contrary to human dignity.⁵ To recast the idea of dignity in those terms might sometimes be helpful. There is nothing significant separating me from Duff. But his formulation need

³ Ronald Dworkin comes to a similar conclusion. Although he says that a person's dignity is normally connected in some way to her capacity for self-respect, he notes that seriously mentally incapacitated people will also possess dignity because what continues to happen to such a person colours the whole of her life: R Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York, Oxford University Press, 1993) 237.

⁴ C Dupre, C 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 *European Human Rights Law Review* 190, 201.

⁵ R Duff, 'Harms and wrongs' (2002) 5 *Buffalo Criminal Law Review* 13.

not always be negative. Dignity-enhancement is the process of humanisation.⁶ That's what we should be aiming at in our lives, loves, and laws.

This formulation works (and I shall apply it) to 'dignity' as a noun and to 'dignified' as an adjective. It is vital that it should. Many of the discussions in the literature are pointless, with people talking about 'dignified' as something slightly different from 'of or pertaining to dignity', or referring to 'dignified behaviour' as behaviour in concordance with dignity in a sense other than that understood by the other party to the debate.

My formulation does not rely on any idea of dignity as a status that humans have as a result of membership of the species *Homo sapiens*. Yes, part of being myself is being a member of my species, but my species is simply the only possible vehicle for my particular mode of *being*. For the purposes of my argument, it's the being that matters: not, essentially, the human being.

This shouldn't worry religious people, although it will. If humans do have some form of special status (and I do not at all exclude the possibility), we can't begin any non-theological discussion by asserting it as an axiom. It needs to be demonstrated, and it can only be demonstrated by looking at its corollaries. Not only that, but the corollaries will be the practically important things about the status: the things that should govern our ethical and legal thinking. What will those corollaries be? They will be the things that make humans thrive. So if and to the extent that the religious are correct in saying that humans are qualitatively different, by adopting a 'thriving' formulation we will be *enacting* the idea of special status, although without expressly uttering its controversial name.

Let's test this idea against some of our difficult examples.

Why should I not use a human patient's ear as an ashtray? The answer, if I'm right, must be that to do so does not promote human flourishing. But what can that mean? Is it not nonsensical to talk about the flourishing of a dead person?

There are several possible ways in which the statement might make sense.

It might mean:

- (a) That part of the dead person's human *being* survives her death. She continues to live in the minds of others. For that part of her that survives to flourish, the remnants of her body must be treated with respect.
- (b) That another part of her being survives her death—namely her wishes. A wish not to have one's dead body abused can be presumed. Even if the dead person in fact had no such qualms, from a regulatory perspective the presumption is a sensible basis for rule-making.
- (c) That if the possibility of her ear being so abused had occurred to her while she was still alive, this would have interfered with some part of her flourishing—for instance her peace of mind. An assurance embodied in a legal or

⁶ There will also be a significant overlap between my version of dignity and 'authenticity'. I will not try here to map their relationship.

ethical code that this would not happen is therefore a flourishing-promoting assurance.

- (d) That by using the ear that way, the user is himself being undignified—doing something that compromises his own flourishing.
- (e) That a set of societal rules prohibiting such abuse enshrines a principle of respect for persons that will facilitate human flourishing in society generally. To use an ear in that way instrumentalises humans, and instrumentalisation metastasises fast and widely.⁷

I adopt all these meanings. My understanding of dignity lies beneath them all. Note that meanings (a), (d) and (e) illustrate the transactional nature of a proper dignity analysis, which I refer to below. One should conduct an audit of the net amount of dignity left at the end of the proposed transaction, taking into account, suitably weighted, the dignity interests of all the relevant stakeholders, including, here, the ashtray user, potential ashtray users, persons whose ears may in future be used as ashtrays, the relatives of the ear-owner, relatives of people who in the future may have their ears used as ashtrays, society generally, and so on.

A second troubling example: the naked girl on the hospital trolley, willingly receiving the ogles of the Casualty waiting room. How is objective human flourishing at stake here? Again, there are several possible ways. Having seen in the ear example how an analysis might work, we can conflate them here. Broadly, the boys are using the girl. It is classic Kantian instrumentalism. She is a thing, not a person: a means to the end of their gratification, not an end in herself. That enhances the flourishing neither of her, nor of the boys, nor of other girls they might see, nor of society at large.

The mention of the species name and the specific reference to ‘human’ flourishing might imply species-ism. I am not guilty. I see nothing in my conception of dignity that might not be a characteristic of a dolphin or a tree.⁸ When it

⁷ Ruth Macklin would object that I am invoking in each of these elements not a real idea of dignity, but the idea of ‘respect for persons’: see R Macklin ‘Dignity is a useless concept’ (2003) 327 *British Medical Journal* 1419, 1420. I deal with that objection in ch 4.

⁸ I adopt without caveat the analysis of Debes: ‘A proper account of dignity must pick out a distinctive value belonging to humans. This is not equivalent to demanding a value that belongs distinctively to humans, which demand would not only arbitrarily rule out a shared space of dignity between different humans and other entities but also risk ruling out the best substantive options for humans. For example, if rationality should after all turn out to be the most defensible basis for a theory of human dignity, we wouldn’t want to yield it simply because we discovered that chimps and whales were rational or that Martians really have been trying to communicate with us for millennia. At least, at the formal level we don’t want to force such a decision. Thus we don’t want to condition the ‘distinctiveness’ of dignity (at the formal level) on its being something only humans have. That is the wrong sense of distinctiveness, formally speaking. This does not contradict the background qualification that human dignity, not dignity simpliciter, is our object of study. Human life remains the limiting factor (the theory must fit humans) and the heuristic lens (it is our experiences, intuitions, and history that provide the basic material for conjecture). The point at hand is simply that we cannot justify loading the formal account against non-human entities, by fixing the criteria of success as whatever would do precisely that’: R Debes, ‘Dignity’s Gauntlet’ (2009) 23 *Philosophical Reflections* 45, 61.

comes to advancing my 'transactional' model of dignity, that has some potentially important consequences.

A related point: Talk of the 'high calling' of being human might lead some to fear that I'm smuggling in the *Imago Dei*. I'm not, although as a matter of fact you may be able to get to my conclusion by that route. But there may be problems doing so. In the next chapter I suggest that the notion of the *Imago Dei* can helpfully supply a list of quintessential human characteristics, also possessed by God as he is described in the Judaeo-Christian tradition. But God, in that tradition, is conscious and cognate, and so if I am right in reducing the doctrine to a list of qualities, the doctrine might not be much help in the case of the PVS patient.

If I argue, as I do, that there are some human states of being that represent better than others what humans *are*, I must import two notions, neither of which is uncontroversial. The first is that there is a state of human being (and, by extension, human doing) for which we are suited. (I don't say 'designed', of course.) The second is that it is possible to describe that state with sufficient precision to make the discussion worthwhile.

There is little between me and many modern virtue ethicists. Like them, I rely on Anscombe to defend me from the charge that my interest in the nature of human being makes me a practically irrelevant marketer of self-indulgent philosophical reverie.⁹ I am with Aristotle, as against Plato and the Stoics, in holding that virtue is a necessary but not sufficient condition of flourishing,¹⁰ but would not follow Aristotle in saying that the missing elements, not supplied by virtue, essentially consist of the fruits of good luck. I have already disowned that position: the cancer patient and the torture victim are both unfavoured by luck, but misfortune allows their virtue to be all the more obvious, and their objective flourishing all the more florid.

Virtue ethicists have long battled against the allegation that virtue and vice are so culture-bound that it is impossible to talk meaningfully about either.¹¹ But the objection has been overstated: the surprise from the anthropological literature is the amount of agreement about right and wrong.¹² In any event, the cultural variation that there is is not so much of a worry for me as it is for a straightforward traditional virtue ethicist. There is universal agreement about the common defining features of ethically good humanness—those moral characteristics that mark flourishing humans: no one at all thinks that it is good to lie, kill indiscriminately, be cowardly or selfish, and so on.

⁹ G Anscombe, *Intention* (Oxford, Basil Blackwell, 1957); G Anscombe and P Geach, *Three Philosophers* (Oxford, Basil Blackwell, 2002).

¹⁰ For accessible summaries of this view, see M Nussbaum, 'Non-relative virtues: An Aristotelean approach' in M Nussbaum and A Sen (eds), *The Quality of Life* (New York, OUP, 1993) 242–69; and J Gentzler 'What is a death with dignity?' (2003) 28 *Journal of Medicine and Philosophy* 461, 476–80.

¹¹ The classical expression of this view is in A MacIntyre, *After Virtue* (London, Duckworth, 1985) especially ch16.

¹² See M Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006).

This reliance on consensus might sound like deciding on one's philosophical position by asking for a show of hands. Were that the case, the objection based on the naturalistic fallacy might have some bite. But that is not what is going on. The consensus only exists because it has been found empirically, by bushmen and bankers alike, that acting in a certain way promotes their flourishing. The show of hands is merely evidence that those forms of acting are enflourishing.

Even if it is true that the prerequisites of human flourishing are culturally determined, that is only a practical problem—not one that goes to the root of my thesis. It would simply mean that, in devising ethical and legal strategies based on flourishing, one would have to be culturally sensitive, which is hardly a novel proposition. It would mean that the empirical basis of one's ethical or legal action or inaction might vary between groups. Nobody ever pretended that pluralism was easy. My proposal doesn't make it any harder.

Virtue ethicists have been unnecessarily defensive in seeking to justify the origins of their moral rules. The problems they face in that respect are no greater than those of their opponents, and indeed they can often call in their opponents' help. If a virtue ethicist gives a utilitarian justification for a particular rule, she can hardly be mocked coherently by a utilitarian. Virtue ethicists' defensiveness has sent them counterproductively into the arms of Rawls, where they will find little comfort or security.¹³ A scientifically informed Aristotelian naturalism is a far more promising partner.

It has been rather unfashionable to seek to justify my sort of neo-Aristotelianism by reference to what the sciences can tell us about human nature. In some ways this is strange. If one is searching for the principles that should govern human thought and action, one might think it more sensible to start by looking at humans, than by blowing the dust off the syllogisms in a university library. The unfashionableness of the notion itself suggests that it might be where the truth lies. And there are some major thinkers who are tending in that direction.¹⁴ There may be some (surprising) aid from the neurobiological reductionists—those who think that we are nothing but the changing polarities of our neurones. Unless they are to smile on obvious depravity, surely they must agree that the content of whatever ethical rules they propose is dictated to some degree by something that might conveniently be labelled 'human nature'.¹⁵

So: what is good human *being*? What does the evidence tell us about how best to be human?

¹³ See Rawls' notion of coherentism, discussed well in M Slote, 'Virtue Ethics and Democratic Values' (1993) 14 *Journal of Social Philosophy* 5, and C Swanton, 'Profiles of the Virtues' (1995) 76 *Pacific Philosophical Quarterly* 47.

¹⁴ See, eg, P Foot, *Natural Goodness* (Oxford, Clarendon Press, 2001); J McDowell, 'The role of *Eudaimonia* in Aristotle's *Ethics*', reprinted in A Rorty (ed) (1980) *Essays on Aristotle's Ethics* (Berkeley, CA, University of California Press, 1980) 359–76; J McDowell, 'Two sorts of naturalism', in R Hursthouse, G Lawrence and W Quinn (eds), *Virtues and Reasons* (Oxford, OUP, 1995) 149–79; A MacIntyre, *Dependent Rational Animals* (Chicago, IL, Open Court, 1999).

¹⁵ See, eg, S Harris, *The Moral Landscape* (London, Bantam, 2011).

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I am not so presumptuous as to think that I know the answer. My main point here is that the questions: ‘What makes humans thrive?’, and therefore ‘How can we maximise human dignity?’, and therefore ‘How can we make ethically correct decisions?’, are empirical questions. When you tunnel down as far as you need to into the basics of bioethics, you find that the empirical and the normative are identical.

Because I do not know the answer to these questions, anyone coming to this book looking for assertive answers to questions like ‘Should we allow cloning?’, or ‘Is cognitive enhancement wrong?’, will be disappointed.

Critics of my tentative suggestion that the empirical may be the normative may say that I’m guilty of a naive scientism—an assumption, of the sort fashionable amongst the semi-educated of the 1950s, that science will one day give us all the answers to all the questions of life, including how best to live.

But I’m not guilty. However much science, anthropology and sociology do, we will still need moral philosophers. However, there are reasons to expect that observations about what is good for humans will inform our ethical, and hence legal, conclusions. Take a fanciful example. One might contend that the question of mixed-gender hospital wards is ethically fairly uninteresting. If a patient objects to going onto a mixed ward, one might think that his refusal is culturally conditioned, and that the only morality in play is the notion that, resources permitting, particularly fastidious patient should be accommodated on a single-sex ward if possible.

But suppose that it is conclusively demonstrated that patients on mixed wards have very significantly worse outcomes than those on single-sex wards. Then, if the issue is financially neutral, it would be ethically wrong not to seek to have single-sex wards. And I daresay, since popular culture and morality track best interests fairly closely, one would soon have little difficulty persuading patients that single-sex wards were culturally desirable too. Certainly the lawyers would snap quickly at the heels of any hospital that continued to have mixed wards, barking ‘*Bolam*’.¹⁶

There are many questions pertinent to bioethics and law that are in a similar category.

Critics of my suggestion (about the identity of the empirical and the normative) might also say that I’m guilty of banality—of saying nothing more than: ‘It is the business of ethics and law to work out the best way of treating people.’ I offer an extended defence to this charge in Chapter 10, but would merely point out here that if one purports to identify the most fundamental stratum on which law and ethics stand, a fair amount of one’s description of that stratum will inevitably refer to the whole point of law and ethics. If ethics and/or law already adopt my definition of their objects, I see that as reassuring, not damning.

¹⁶ The *Bolam* test is the touchstone of liability in clinical (and other professional) negligence cases. It asserts that a doctor (for instance), will only be found negligent if what he has done would not be endorsed by a responsible body of opinion in the relevant specialty: see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583; cp *Bolitho v City and Hackney Health Authority* [1998] AC 232.

Having said that I did not purport to say what makes humans thrive, two broad points can be made. The first is that we are not human in a vacuum. We exist in our bodies, and we exist in a social, political and physical environment. This is obvious, but in fact many speculations in contemporary bioethics are conducted as if the patient were an isolated organism floating in a petri dish.

Humans are embodied animals. Any sensible scheme of bioethics has to take this fully into account. Very often, and particularly in those systems inspired or contaminated by Plato or Kant, bodies have been ignored. There are many reasons for this. One is that bioethics has often been done in libraries by philosophers, rather than by clinicians over a bedpan, or by lawyers over a description of real injuries. Another is that, if there is such a thing as original sin, it surely consists in an intrinsic warp towards Manichaeism, and academics are particularly warped.

What happens to the bodies of humans affects all elements of them. If a Pope's brain doesn't have enough serotonin surging through it, he will lose his faith, although he might keep on mumbling the creed, experientially unconvinced of its propositions. But give him Prozac, and colour and faith will flow back into his world. A previously sweet child will become uncontrollably violent if she develops a limbic system tumour. Excise the tumour and the playground will be safe again. Bodily integrity has metaphysical consequences.

Does this mean, then, that the depressed Pope lacks dignity? Or that a torturer succeeds in his objective of robbing his victim of dignity by stealing his bodily comfort?¹⁷ Or that a cancer victim, bearing her illness with fortitude and cheerfulness, has no dignity, or truncated dignity? It cannot. On the contrary, dignity is often much more prominently visible in people facing bodily hardship than in the comfortable, healthy slumper.

The second point is that humans don't do well by themselves. At bottom they are social animals. Not only do they smile more, but they do more and do better when they are part of a community. That means that the most accurate description of an individual will be in terms of the nexus of relationships in which she exists.^{18,19} When

¹⁷ Rene Jules Dubos observed that: 'Among other living things, it is man's dignity to value certain ideals above comfort, and even above life. This human trait makes of medicine a philosophy that goes beyond exact medical sciences, because it must encompass not only man as a living machine, but also the collective aspirations of mankind.' In *Mirage of Health*, cited by R Richardson, 'Endpiece' (2003) 326 *British Medical Journal* 1077.

¹⁸ This is acknowledged by writers on relational autonomy (see, eg, P Benson, 'Feminist intuitions and the normative substance of autonomy' in Taylor J (ed), *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Philosophy* (Cambridge, Cambridge University Press, 2005) at 124–42; C Mackenzie, 'Relational Autonomy, Normative Authority and Perfectionism' (2008) 39 *Journal of Social Philosophy* 512; C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York, OUP, 2000); C McLeod and S Sherwin, 'Relational Autonomy, Self-trust, and Health Care for Patients who are Oppressed', in MacKenzie and Stoljar, *Relational Autonomy* 259–79; M Oshana, *Personal Autonomy in Society* (Aldershot, Ashgate, 2006)), and also by writers on dignity in a legal context: see, eg, C Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) *European Human Rights Law Review* 190. She comments: 'In reality ... people live at the intersection of several spheres and are not just enclosed in their private bubble with a few incursions into the public sphere' (196).

¹⁹ This is illustrated well in a legal context (a challenge to a ban on physician assisted suicide) by Stevens J: 'The State has an interest in preserving and fostering the benefits that every human being

we look at the reports from the nursing homes and the palliative care wards, we see that the people denied the luxury of illusion—the people for whom the metaphysical chips are down—often define themselves explicitly in this way. Reciprocity isn't just one of the rules of the human game: it's the game itself. If you're not a reciprocal creature, you're not playing at all.²⁰ We know, too, that active caring is good for you: that altruism confers a startlingly measurable benefit: that the more tightly you slot yourself into the social nexus, the more you will thrive.²¹

We are all, for better and for worse, interrelated. This is obvious at many levels. We all had a common ancestor a few million years ago, and it would be surprising if Jung were completely wrong about us all sharing, and potentially meeting in, a massive cognitive hinterland.

It is hard to overestimate the importance of the nexus. When a flock of birds or a shoal of fish turns as one, or a line of chorus girls high-kicks in unison, the speed of reaction of the group is neurologically inexplicable in terms of the speed of reaction of the individual. The speed of transmission along the neurones of the individual is simply insufficient for the flock to wheel.²² But wheel it does. There is something mysterious and crucial happening at the level of the group that does not happen at the level of the individual. The group is not only more than the sum of its parts, but qualitatively different.

We all recognise this mystery, although it is rarely put this way. We accept the utility of society, and sign up to a social contract, enforced by legal bailiffs, which alters the shape of our selves. We are defined by our necessary neighbourliness, just as the physical boundaries and the internal environment of a cell are defined

may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.' *Washington v Glucksberg* (1997) 521 US 702.

²⁰ CS Lewis wrote: 'The golden apple of selfhood, thrown among the false gods, became an apple of discord because they scrambled for it. They did not know the first rule of the holy game, which is that every player must by all means touch the ball and then immediately pass it on. To be found with it in your hands is a fault: to cling to it, death.' CS Lewis, *The Problem of Pain* (London, Geoffrey Bles, 1940).

²¹ See, eg, SL Brown, DM Smith, R Schulz, M Kabeto, P Ubel, J Yee, C Kim, and K Langa, 'Caregiving and Decreased Mortality in a National Sample of Older Adults' (2009) 20 *Psychological Science* 4, 488–94; SL Brown and RM Brown, 'Selective Investment Theory: Recasting the Functional Significance of Close Relationships' (2006) 17 *Psychological Inquiry* 1–29; SL Brown, R Nesse, AD Vinokur, and DM Smith, 'Providing Support may be More Beneficial than Receiving It: Results from a Prospective Study of Mortality' (2003) 14 *Psychological Science* 320–27; P Dulin and R Hill 'Relationships between Altruistic Activity and Positive and Negative Affect among Low-income Older Adult Service Providers' (2003) 7 *Ageing and Mental Health* 294–99; C Schwartz et al 'Altruistic Social Interest Behaviors are Associated with Better Mental Health' (2003) 65 *Psychosomatic Medicine* 778–85; D Shmotkin et al 'Beyond Keeping Active: Concomitants of being a Volunteer in Old-old Age' (2003) 18 *Psychology and Ageing* 602–07; N Morrow-Howell et al (2003) *Journals of Gerontology: Psychological Sciences and Social Sciences* 58B, S137–S145; A Harris and C Thoresen 'Effects of Volunteering on the Well-Being of Older Adults' (2005) 10 *Journal of Health Psychology* 739–52).

²² See, eg, R Sheldrake, *A New Science of Life: The Hypothesis of Formative Causation* (London, Icon, 2009).

by a sometimes uneasy mechanical and electrochemical negotiation with its immediate environment.

Going back to thriving: it is impossible to talk simply about 'my' thriving. My thriving is affected by and affects a multitude of other organisms, and by the super-organism (analogous to that wheeling flock). (If anyone wants to hunt for the real meaning of a special status for the *species*, I'd suggest that they start with those high-kicking, impossibly co-ordinated chorus girls.) In practice this means, as the law recognises (at least when it exercises its expressivist function, or looks shrewdly at slippery slopes), that it is not even desirable (even if it were practicable) to legislate purely for the individual. You'd be aiming your legislative arrows at a target (the individual), that hardly exists, or is in any event so gloriously diffused amongst the Brotherhood of Man that it would be hard to know when you'd hit the bull's eye. Medical law is at its very worst when it is motivated purely by a desire to placate the autonomous man. That's because there is no such thing as the autonomous man.²³

If thriving is dignity, dignity is held in a joint account. Any coherent exposition of dignity will be a communitarian exposition. The transactional approach to analysis is therefore a consequence of the substantive definition. It follows that any properly thought-through expression of self-interest will be an expression of the dignity interests of the species.

The fact that, in this definition of human thriving, and thus dignity, we are determining empirically what is good for humans, means that we can lay to rest many otherwise wholly legitimate fears about the potential tyranny of dignity as a legal idea.

David Feldman has influentially written that:

we must not assume that the idea of dignity is inextricably linked to a liberal-individualistic view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole ... The quest for human dignity may subvert rather than enhance choice ... Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two-edged sword.²⁴

If dignity has a meaning that is tied to objective findings in the neuroscientists' laboratories and the sociologists' methodologically impeccable papers, there is no need for Feldman to worry.²⁵

²³ A conclusion buttressed by the studies cited, inter alia, by Onora O'Neill, which demonstrate that, although autonomy is often the main thought in the minds of the drafters of legislation and professional guidelines, it is well down the list of patients' priorities: see O'Neill, *A Question of Trust* (Cambridge, CUP, 2002).

²⁴ D Feldman, 'Human dignity as a legal value: Part 1' (1999) *Public Law* 682, 685.

²⁵ His worries seem to have infected, amongst others, Beylveled and Brownsword: see their reliance on Feldman in *Human Dignity in Bioethics and Biolaw* (Oxford, OUP, 2004) 25–27.

(b) *Deploying the Notion of Dignity: a Transactional Model*

All this philosophising is vain unless we can *use* the notion of dignity we have identified.

Ethicists and lawyers are collectively guilty of a sort of tunnel vision. In deciding whether something is right or wrong, we tend to focus on one subject. That subject is usually the patient. We typically ask: 'Is it a good thing for X that X is treated?' Sometimes other competing interests are brought into play, and the spotlight momentarily moves away from the patient. The best example is the interest of a doctor who conscientiously objects to doing the treatment proposed. When a competition like this arises it is resolved in a messy, ad hoc, unprincipled way. Sometimes the analysis is supplemented by a nod to other societal factors—for instance the fact that, resources being limited, treating X will mean denying treatment to Y. And sometimes, too, it is acknowledged that in deciding whether or not a proposed treatment is a real benefit to X, one has to look at other people to whom X relates. Such acknowledgements are typically couched in the language of relational autonomy.²⁶

But sometimes, (and especially if the analyst is a consequentialist), the question will be more holistic: 'Looking at the net amount of good and bad that will result to the world from the proposed treatment, what should be done?' The holism of that question should be applauded and adopted. But there are, of course, potent objections to the question as a whole. Those objections are the stuff of the basic textbooks.

I propose a version of the consequentialist approach. The consequence to which one should look is the net amount of dignity—the net amount of objective human thriving—left by the proposed action or inaction. One should view the subject of one's ethical or legal analysis not as the patient, or the doctor, or society, or anything else, but as the *transaction* that constitutes the whole bioethical encounter.²⁷ Almost every imaginable transaction is one to which there are many parties. This view, then, is a corollary of the realisation that we need to consider not atomistic entities (because there are no such entities), but the nexus in which each entity exists and of which she consists.

One should then ask: 'How can this transaction be managed so as to maximise the amount of dignity in it?' The dignity claims of all parties to the transaction are of course taken into account. In practice, those of the patient are likely to be predominant. But that does not mean that the others are ignored. This is not, or not necessarily, a 'first past the post' system. It will often be possible to negotiate a solution that allows for the preservation and expression, within the confines of practicality, of the dignity of all or most of the stakeholders.

There is nothing new about the idea that dignity describes more than the status or the interests of the patient. Mountfield and Singh talk about dignity as

²⁶ See the references at n 18 above.

²⁷ This view has something in common with views advanced by Stephen Wilkinson (see *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (London, Routledge, 2003)) and Martha Nussbaum (see *Frontiers of Justice*).

'Janus-faced'—looking at both the inflictor and the inflicttee of an action.²⁸ Ronald Dworkin notes that:

if ... objective importance cannot be thought to belong to any human life without belonging equally to all, then it is impossible to separate self-respect from respect for the importance of the lives of others. You cannot act in a way that denies the intrinsic importance of any human life without an insult to your own dignity ... Kant insisted that if you treat others as mere means whose lives have no intrinsic importance, then you are despising your own life as well.²⁹

Baroness Hale observes: 'Respect for the dignity of others is not only respect for the essential humanity of others; it is also respect for one's own dignity and essential humanity. Not to respect the dignity of others is also not to respect one's own dignity.'³⁰ Debes concludes, after his vigorous analysis of the pretenders for dignity's crown:

We simply cannot make sense of the kind of value dignity is outside of an interpersonal context. Unlike an ice cream cone, that might be relished were it and some person the only objects in existence, dignity requires mention of an 'other' person. At least, that is what a formal metaethics says of it. Dignity comes to life within the interpersonal, even if only imagined: in the café, classroom, clinic, court, combat zone, or closet.³¹

Feldman agrees that 'Giving weight to dignity adds a new value to the legal system which changes the way in which questions are asked and answered, *allowing a wider range of interests to be taken into account*'³² (added emphasis).

So then, if one has a proper view of dignity, in analysing a proposed action or inaction, one conducts an audit of dignity in general rather than the dignity of a particular patient.

This might sound hopelessly insubstantial; as if I am simply saying: 'To do good bioethics you've got to take everything into account.' And it is of course true that you do. But this approach facilitates the proper consideration of all legitimate claims, giving conscientiously objecting doctors (for instance) a recognised place at the negotiating table, rather than having to clamour to be heard above objections that they have no *locus standi*. It also uses the same test (the dignity test) in evaluating the claims. It proposes a single philosophical currency, whereas many have been confusingly used before.

²⁸ Cited by Baroness Hale, 'Dignity' (2009) 31 *Journal of Social Welfare and Family Law* 101.

²⁹ R Dworkin, *Is Democracy Possible Here?* (Princeton, NJ, Princeton University Press, 2006) 16–17, cited by Baroness Hale, *ibid*. Dworkin has another helpful gloss of Kant's view in *Life's Dominion* (New York: Knopf, 1993) 236: 'Understanding that dignity means recognizing a person's critical interests ... provides a useful reading of the Kantian principle that people should be treated as ends and never merely as means.'

³⁰ Baroness Hale, 'Dignity'.

³¹ Debes, 'Dignity's Gauntlet' 67.

³² D Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford, OUP, 2002) 133. He does continue, pessimistically, that this does 'not thereby [make] intractable moral and legal issues easier.' Not easier, perhaps, but more satisfactory.

Whether or not it is workable, and whether or not it has anything real to add to existing methods of analysis, remains to be seen. It can only be seen by demonstration. Most of this book is concerned with that demonstration.

Four observations:

- (i) My talk of dignity ‘interests’ might imply that my notion of dignity is akin to a legal right. It is not. Of course I will contend that the possession of dignity—or, perhaps better, participation in human dignity—has certain corollaries that are conveniently translated into law using the language of rights. But the corollaries are not the thing itself, and the convenience of the translation does not mean that dignity is reducible to a right. Rights are necessarily parasitic on something deeper. Whenever you see a right, ask: ‘Why is that there?’; ‘Because it is’ is never a satisfactory answer. Any philosopher or lawyer who is happy simply to talk about rights (as many autonomy advocates are), is simply shallow. Burrow beneath the right and you will always find a deeper source. Burrow as far as one can go beneath any right worth defending and, I contend, you will hit dignity.
- (ii) It may be objected that in defining dignity in the way I have done, I am not writing a book about dignity at all, and that the book should be entitled instead something like: ‘Human thriving: some bioethical and legal reflections’. A defence to that charge must be primarily hermeneutic. I begin to mount that defence in Chapter 3, and continue it at various points throughout the book. I will contend not only that my version falls squarely within the ambit of the meanings of dignity suggested by commentators down the ages, but that it is a view that resolves the tension between the two broad understandings of dignity articulated in the literature—namely dignity as constraint and dignity as empowerment (a tension often expressed in terms of dignity as status and dignity as a quality). Accordingly it represents a usually unacknowledged consensus, and, as a broker of peace between the factions, has a good claim to the throne of the united nation.
- (iii) It would of course be absurd to say that someone in PVS was in any subjective sense thriving. To read my thesis that way would be to misread it—That way lie madness and vitalism. It would also be wrong to say that someone in PVS was in any sense not human. The way to analyse the PVS case is suggested by the ear ashtray analysis. I accept entirely two important propositions. First, that there will be times when the transactional analysis equation indicates that the dignity interests of persons other than the PVS patient (for instance the relatives, the carers, and possibly those who would benefit from the allocation to them of the funds expended on maintaining the PVS patient) should trump any dignity interest that the patient might have. Second, that although one should not conclude as a general principle that a patient in PVS has no positive dignity interest that tends to suggest they should be kept alive, it may sometimes (and possibly often) be the case that their dignity interests tend to suggest that life-sustaining treatment be withdrawn.

The torture victim is flourishing in the sense of being as fully human as the circumstances allowed him to be. It doesn't follow that dignity necessarily demands that he remain alive. It may be that the net amount of dignity in the world would be increased by his biological death.

- (iv) I asserted above that I was prepared to accept the possibility that things other than human beings might have dignity in the same sense as humans. It follows that I must concede that in doing the audit of the dignity interests in play in a particular transaction, non-human dignity should be in the balance.

In practice it may be difficult to identify what, other than mere survival, is entailed in non-human thriving. It may accordingly be difficult to quantify the dignity interest of a non-human with sufficient certainty to warrant them having a place in the equation at all. And even when they do have a place, surely the interest would carry relatively little weight beside competing human dignity interests. But that is not to dismiss non-human interests. In a competition between several thousand acres of virginal rain forest and the dignity interests of some potential fellers, the forest may well prevail. And that is not just because human dignity is outraged by the loss of the forest (although it certainly is).

(c) Looking Back at this Pair of Steps

This solution may seem trite. It may seem as if I am saying nothing more than 'look at the situation in the round', or 'consider all the available evidence'.

Two responses: first, it is actually quite unusual in ethics to look at things in the round, or to consider all the evidence. Indeed if one suggests that this should be done, one sometimes gets the feeling that you are regarded in the Academy as intellectually sloppy. Properly analytic people would never do such a thing. You don't need a PhD for that. Decent analysis, we're made to feel, involves squeezing the situation into one standard pigeonhole and then describing the situation by identifying the pigeonhole—preferably in Latin.

Second: the lens through which I suggest all things are examined is not the usual one. While there are many who would regard human thriving as the ultimate point of ethics, it is not usual to see thriving deployed *directly* as a tool for ascertaining correct action. Indeed, many would doubtless say that if one could ascertain directly what constituted or facilitated human thriving, there would be no need for ethical discourse at all. It is normally thought axiomatic that the big question—what facilitates human thriving?—can only be approached by deploying other concepts such as autonomy, beneficence and so on. I suggest that a direct path is not only possible but essential. The fewer conceptual middlemen, the better. The more middlemen, the more value we lose on the way.

I hinted above that the voice of dignity might be the concerted voice of all the classical ethical principles. That metaphor remains undisturbed by the notion of the direct path.

This step is likely to meet with the disapproval of many professional philosophers, on the grounds that it involves swallowing a cocktail made of many concepts

that, according to the formal rules of their profession, simply don't mix. Debes, in his splendidly waspish essay *Dignity's Gauntlet*, can speak for them all. Denouncing the like of Simone Weil,³³ Richard Rorty³⁴ and Herbert Spigelberg,³⁵ his verdict is that 'the frank truth is that they make for a rather slapdash mix of normative, substantive, and formal metatheory, which we ironically seem compelled to treat both charitably and casually.'³⁶ This criticism doesn't worry me much. It seems to be another way of saying that dignity is elusive yet big, and that to get a proper view of it one has to look from a number of vantage points. Debes points out very impressively the failure of philosophers of impeccable pedigree to generate an adequate account of dignity, which might suggest that there is something inadequate about the existing methods of formal analysis. Perhaps those methods are simply too pure to deal with humans in all their contradiction and messiness.³⁷

Step 5: Dignity is the Bioethical Theory of Everything

This sounds hysterically grandiose. Searches for a Theory of Everything ('TOE'), although they occupy many of the waking hours (and probably more of the dreaming hours) of physical scientists, have not been dramatically successful. The theory of evolution by natural selection is the best candidate for a TOE in biology, but rumours of its omnipotence may have been exaggerated. There are a few faithful ultra-Darwinians on the jackbooted extreme right wing of evolutionary biology who think that neo-Darwinism says it all, but there is a growing biological pluralism—an appreciation that we have to heap so many caveats onto neo-Darwinian orthodoxy that it no longer looks like the reassuring monolith it once was.

Outside the sciences, grand, all-explanatory notions are unfashionable. And for good reason. Archaeology, science, literary criticism, and the insufferable bigotry of its adherents, have robbed the Judaeo-Christian tradition (with the distinct emphasis on the Christian bit), of much of its authority and its explanatory power. Marxism failed. The free market is failing. There is more to both ethics and economics than autonomy.

So why not accept defeat? Why not accept that to get the right answer in bioethics and law, you have to do what the economists, the political scientists and the biologists have long accepted is necessary—to select from the well-stocked philosophical toolbox whatever principle is necessary for the job in

³³ S Weil, 'Human Personality' in S Miles (ed), *Simone Weil: An anthology* (New York, Weidenfeld & Nicolson, 1950).

³⁴ R Rorty, 'Postmodernist bourgeois liberalism' (1983) 80 *Journal of Philosophy* 583.

³⁵ H Spigelberg 'Human dignity: a Challenge to Contemporary Philosophy' (1971) 9 *Philosophy Forum* 39.

³⁶ Debes, 'Dignity's Gauntlet' 49.

³⁷ Debes' own account of human dignity, which purports to be free of the flaws that he sees in other people's efforts, seems to me to mix the normative and the empirical in a way for which I think he should be applauded, but which, if I am right, he would no doubt deplore.

hand? Isn't it dangerous fundamentalism to insist, despite the evidence from other fields, that one principle is enough? Isn't that insistence at root theological? Mustn't it rest on some dogmatic metaphysical assertions about the nature of man?

This is the sort of diatribe to which proponents of human dignity are treated. Since those diatribes tend, as that one did, to conflate many objections, they rarely get the answers they purport to seek.

The reason why we should not accept defeat is that acceptance is unnecessary and irrational. Dignity can only begin to stake a claim as the TOE if it works better than the alternatives. If a 5 mm Phillips screwdriver, and only a 5 mm Phillips screwdriver, fits perfectly all the screws necessary for a job, it is absurd, in the name of liberal pluralism, to insist on using a wide variety of tools. You'll botch the job and damage the tools. Remember Occam.

It is certainly fundamentalism to insist that one principle works, and it is certainly dangerous fundamentalism to insist that one principle works if it plainly doesn't. But the fact that there are dangerously misguided fundamentalists doesn't mean that there are no fundamentals. If there are fundamentals, it is rather more dangerous to fail to acknowledge them.

There are better grounds to be optimistic about a TOE in bioethics and bio-law than there are in biology, politics, economics or any of the other social sciences. The scope of bioethics and bio-law is far smaller than that of the other disciplines. Biology deals with life: with mind-bogglingly complex interrelationships of molecules, mitochondria, memes and moles. Politics and economics paint their pictures on huge canvases. Like biology, they are concerned with huge nexuses: they are ecological disciplines. But bioethics is primarily concerned with the way that one particular organism, *Homo sapiens*, deals with a small range of problems: birthing, consent, confidentiality, reproduction, dying, transplanting, ageing, suffering and so on. The problems affect every part of his life, true, but individual lives, *in the sense in which bioethics and law deal with them*, are little things. Or at least relatively little things.

I have contended and will contend further that human beings cannot be understood as atomistic entities: that they are quintessentially relational: that to describe a human being is necessarily to describe a nexus, and to describe a human nexus is necessarily to describe a human individual. But nonetheless, the numbers and complexities of the relationships concerned in bioethical problems are (with the exception of some problems concerned with healthcare resource allocation) much less than those involved in economic and political questions.

This forces me to acknowledge that dignity doesn't look very TOE-like in those areas of bioethics that are concerned with economic and political questions. It is not very obviously superior to other principles in the realm of resource allocation and distributive justice more generally. Its superiority is most dramatically on display when the focus of the ethical inquiry is on the status of an individual human.

Is dignity-talk incurably theological? Well, no: or not necessarily: or not if you don't choose to see it that way. But if it is, so what? The fact that it was the Psalmist who asked 'What is man?'³⁸ doesn't reduce the importance of the question for law, medicine, neuroscience, politics, child rearing or our choice of TV programme.

That said, it is not, in fact, this question that lies at the heart of the dignity-talk that I'm urging. I'm suggesting that we need to answer a different, but presumably related question: what is good for man? In approaching that lesser question, we will all, no doubt, have our own views about the answer to the greater. But those views need not and should not taint our answers to the lesser. They needn't, and shouldn't, rest on any metaphysical assertions at all. They can be derived from some basic anthropological and sociological observations. If those observations happen to coincide with the view of the authors of Genesis, the Bhagavad Gita, the *Rubaiyat of Omar Khayyam*, or *Das Kapital*, it is hard to see why that coincidence reduces their importance. Should one reject any observation simply because, in the view of some believers, it happens to have a metaphysical corollary?

Assume that it can be demonstrated that dignity works more satisfactorily in the humdrum world of clinical ethics than anything else, and that it is the only thing that works on the distant frontiers. It doesn't necessarily follow that it is the TOE, although the observations are suggestive. One can never have an algebraic proof of dignity's TOE status. The best one can do it is to note that, wherever one looks, it is philosophic top-dog, and then to show that its top-dog status is a consequence of its derivation from the most fundamental characteristics of humans. If the other principles competing with dignity in the marketplace cannot trace their roots as deeply, or originate from a smaller collection of basic characteristics, one is then well on the way to crowning dignity as the TOE.

Step 6: Being Reassured by our Intuitions

It isn't disreputable to ask whether the destination *feels* like the right one.

I partly share John Harris's suspicion of 'olfactory philosophy'—the notion that your ethical nose is a reliable guide to the correct answer.³⁹ But to neglect our intuitions entirely is foolish and unnecessary.⁴⁰ If we're trying to design ethical solutions for the human beings that we are, or to whom we are related, it is unscientific to excise from our consideration the intuitions that we as humans have. Those

³⁸ Psalm 8:4.

³⁹ J Harris 'Cloning and Human Dignity' (1998) 7 *Cambridge Quarterly of Healthcare Ethics* 163, 166. He traces it back to David Hume, who said that morality 'is more properly felt than judg'd of': cited in Harris, 'Cloning and human dignity' 166.

⁴⁰ Sandel has of course responded substantively and robustly to this allegation. With some reservations, which do not matter for present purposes, I adopt his response: see below in chs 9 and 10. Baroness Hale of Richmond, writing extra-judicially, has commented: 'Instinctively we know that these things are wrong and should not be allowed to happen in a civilised world. Why is that? The answer is that such treatment offends against basic human dignity'. B Hale 'Dignity' (2009) 31 *Journal of Social Welfare and Family Law* 2, 101, 103.

intuitions are vertiginously ancient, distributed surprisingly uniformly amongst humans of very varying cultures, and have presumably been selected for very rigorously by natural selection. They are likely to tell us something meaningful. If they are outraged, it is legitimate to wonder why. But of course we must be careful. Our intuitions are of such mysterious ancestry that often we cannot be sure that we fully understand the language in which they speak to us—lyrical and intoxicating though its cadences are. They are too close to us for us to be able to evaluate their contribution as critically as would be necessary for them to be allowed much of a voice at the table where decisions are made.

What place do they have? Their place is only here, in the final step. And it is only to provide some sort of corroborative reassurance that our other navigational aids (the only ones used to get us to our destination) haven't failed us. Once here, we can inhale philosophically, whatever John Harris says, and say: 'Yes, that smells right.' We can then go about our business in the destination more confidently and comfortably.

Assumptions about the Role of Law

Unless it is to be simply a game for academic bioethicists, bioethics needs teeth. The most nuanced bioethical proposition is pointless unless its nuances are palpable on the wards. There are various ways in which bioethics can be made to matter. They can transform the *zeitgeist*, and the *zeitgeist* itself can transform the healthcare professionals who have such awesome power over patients. But the *zeitgeist*, eventually and imperfectly, is translated into domestic and international declarations, into regulatory codes, authoritative and persuasive guidelines, and hence (often courtesy of *Bolam*)⁴¹ into the substantive law. Although something is generally lost in the translation, something is often gained too. 'Bioethics in practice requires a healthy dose of old-fashioned *prudence*', observed Adam Schulman, 'and is not well served by a dogmatic adherence to the artificial division between an ethics of principles and an ethics of consequences.'⁴² Quite right. And when bioethics is dosed with *prudence*, it turns into the raw material of law: it becomes *jurisprudence*.

If I contend, as I do, for a sort of neo-Aristotelian virtue ethic, it should follow that I contend for a virtue jurisprudence. And so I do. I start by believing that any law is regrettable, and that the imposition of any law requires very explicit justification. What might amount to sufficient justification? Here I follow Colin Farrelly and Lawrence Solum in believing that virtue (not economics, or rights, or anything else) is the only legitimate legal draftsman:

⁴¹ See n 16 above.

⁴² A Schulman, 'Bioethics and the Question of Human Dignity' in Pellegrino et al (eds), *Human Dignity and Bioethics* 12.

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the fundamental concepts of legal philosophy should not be welfare, efficiency, autonomy or equality; the fundamental notions of legal theory should be virtue and excellence ... [The goal of law is] not to maximise preference satisfaction or to protect some set of rights and privileges: the final end of law is to promote human flourishing to enable humans to lead excellent ones.⁴³

I do not propose to argue this position here. Farrelly and Solum do not need my help. This book is about the main problem involved in making their position practically useful; namely the problem of saying in what ‘human flourishing’ consists. I have suggested that human dignity is objective flourishing. There is room in this argument for the consequentialist assertion that the role of law is to maximise the dignity of the greatest number to the greatest possible degree, but I do not in fact make that assertion. This is not because I believe it to be untrue, but because I am agnostic on the point. This book therefore focuses on whether, and if so, how, the law can maximise the dignity of individuals.

Law, importantly, has an expressivist function. It declares the values of its society. Declaration isn’t just pomp and wind. It can change, enshrine and preserve. Even if my version of dignity is wholly misconceived, or isn’t as fundamentally true as I argue, it has some value. A dignity analysis of legal problems will have the effect of saying that one should strive to make and construe laws in a way that will humanise. However many philosophical brickbats can be thrown at that proposition, and however many questions it begs, the proposition won’t take you far off the right path. At least it won’t take you anywhere nasty, as can (for instance) the unfettered rule of autonomy.

People and institutions tend to live up or down to the names that they are given or, more importantly, give themselves. When someone takes up running, one of the main benefits is that he immediately—long before he has any measurable increase in cardiac output, and while he is still wobbling ludicrously along—self-identifies himself as a ‘runner’. It is because he is a ‘runner’ that he immediately gives up the deadly Big Mac and fries. And it is that abstention that makes him fit; makes him live up to the name; turns him, in fact, into a runner. It’s the same with a dignity approach to law and ethics. If we say that law and ethics are really all about the maximisation of dignity, law and ethics will tend to generate full-blooded, thriving humans. Which is a Good Thing.

⁴³ C Farrelly and L Solum (eds), *Virtue Jurisprudence* (London, Palgrave Macmillan, 2008). See the discussion in C Cimino, ‘Private Law, Public Consequence and Virtue Jurisprudence’ (2010) 71 *University of Pittsburgh Law Review* 279.