

EQUAL DIGNITY AND THE COMMON GOOD

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Common Good Constitutionalism manifests a commitment to equality in two distinct ways. The first is a rejection of any notion of a greater good which pits the individual in conflict with the rest of society. On that view, the purpose of constitutional law is to mediate this tension, protecting the individual from the encroaching collective or sacrificing them for the sake of the majority. In contrast, common good constitutionalism sees the good of the individual and the community as co-constitutive, grounding the basis of a conception of the political order in shared, mutual interest. The second is a deep commitment to the collective flourishing of the polity, presupposing the equal dignity of persons and positing that a constitutional commitment to respecting this dignity demands the embrace of a substantive conception of human flourishing. Together, these commitments form the basis of a constitutionalism capable of making sense of comparative and communitarian claims which are uncomfortably placed within a liberal constitutionalism focused solely on individual rights claims.

Constitutional theory comes in many divergent forms. Some of it is grounded primarily in doctrinal analysis, purporting to explain and sometimes to justify the decisions of constitutional courts. Other forms of theory are indistinguishable from political philosophy, positing ideal forms of constitutional arrangement, unmoored from any grounding within a particular social or historical context. Further still are theories which emerge from jurisprudential accounts of the nature of law itself. Common Good Constitutionalism falls into this category.¹ It begins first and foremost with a theory of

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1. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

law that many working within constitutional theory will reject: an anti-positivist account which ties law intimately to morality. It is impossible to make sense of common good constitutionalism without understanding that it emerges from a distinct theory of law as an ordinance of reason directed towards the common good and promulgated by a legitimate political authority.²

There are several jurisprudential premises which inform this account of law, many of which have been subject to extensive analysis elsewhere.³ Here I want to explore the conception of the legal subject inherent in this account of law. If law, properly understood, is tied to and directed towards the collective flourishing of its subjects, this presupposes important facts about the kind of thing a legal subject is. To be a legal subject on this account is not only to be an autonomous agent capable of guiding one's conduct in response to legal ordinances. It is also to be a valued member of a community, capable of flourishing and leading a good life wherein the equal dignity of all members is properly respected. Because common good constitutionalism is premised upon a theory of natural law, these presumptions about the legal subject are directly grounded within the natural law conception of the human person. Positive law may be jurisdictionally bounded such that it is possible for someone to not be a subject of French law or Irish law. But, on this view, we are all subjects of the natural law and so deserve to be treated as persons by virtue of our equal human dignity.

This paper will begin by setting out some of the core features of what it means to be treated as a legal subject according to this theory of law. Specifically, it will begin by examining the conception of the dignity of persons presupposed by a commitment to the common good. What gives humans value on this view is our radical

2. *Id.* at 3.

3. See Conor Casey, *Common-Good Constitutionalism and the New Battle over Constitutional Interpretation in the United States* 2021 4 PUB. L. 765 (2021); Conor Casey and Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL'Y 103 (2022); Stéphane Sérafin et al., *The Common Good and Legal Interpretation* 30 CONST. F. 39 (2021).

capacity to flourish as persons.⁴ This value cannot be disentangled from individuals such that they become mere vessels of what is actually considered to be of fundamental value — utility, pleasure, freedom, etc. Rather, it is one's value as the thing that one is (and not the experiences one has or the consequences one produces) that grounds the natural law commitment to the dignity of persons. Recognition of this value requires appropriate respect be shown to each and every person. As such, moral and political decision-making cannot ever be purely consequentialist or aggregative, justifying the sacrifice of some for the betterment of the rest.

From here, there can be a deeper exploration of the implications of the *equal* dignity of persons for constitutional theory. If one's value derives from the kind of thing one is — a person — then others of the same kind share that value and do so with no variance in degree. This being the case, the bonds of civic friendship inform a conception of law which must account for and respect this equality. It is this which grounds the principle of equality before the law and the related commitment that governance proceed by reference to general standards, only discriminating between subjects where it is appropriate to do so in order to adequately reflect differences in circumstances. Since there is no difference in moral worth, no discrimination premised upon such a difference can be capable of justification.

Finally, this paper will examine the positive obligations that a commitment to equal dignity gives rise to. It is not sufficient — although it is necessary — for legal officials to refrain from acts which disrespect the equal dignity of persons. To truly respect our radical capacity to flourish, those charged with care for the community

4. Non-persons such as plants and animals may also have the capacity to flourish — to lead good and fulfilling lives — but only persons have the radical capacity to flourish *as persons*. All humans are persons but there may arguably be non-human persons. This paper does not reject that possibility and would stress that, were non-human persons to exist, they would be entitled to the same recognition of dignity as human persons by virtue of their personhood.

must take steps to facilitate the actualization of this capacity where it is possible to do so, given existing circumstances.

I. DIGNITY

All human beings possess a special kind of value or dignity which forms the basis for our fundamental rights and the duties that others, including legal officials, owe us. That is the foundational premise of the natural law tradition, even if there is debate about how best to articulate the upshots of dignity.⁵ Thus, the early sophists drew upon ideas of a natural law to ground a commitment to the unity of all men, whether Greek or barbarian, as belonging to the same race and possessive of the same fundamental essence.⁶ From here, Alkidamas advances the core insight that “nature made no one a slave” which was eventually taken up by Roman imperial jurists, such as Florentinus and Ulpian, preserved in Justinian’s *Corpus iuris civilis*. Florentinus stressed that slavery is “against nature,”⁷ and Ulpian similarly argues that under the law of nature, there are no slaves because “all human beings are equal.”⁸ Where slavery exists, it is by virtue of the positive law and in direct contrast with the natural law.⁹ In this, Ulpian identified the ground for the natural law rejection of slavery: that all humans possess the same fundamental value by virtue of the kind of being they are: persons. Dignity is not something which is confined to humans, but

5. For example, the role of individual rights within the natural law tradition is contested (although this is mostly an issue of terminology, with alternative framings focusing on fundamental duties). See Dominic Legge, *Do Thomists Have Rights?* 17 NOVA ET VETERA 127 (2019); cf. Ernest Fortin, *The New Rights Theory and the Natural Law*, 44 REV. POL. 590 (1982). See also Erika Bachiochi, *Rights, Duties and the Common Good: Reviving the Finnis/Fortin Debate*, AM. J. JURIS. (2022) (forthcoming); cf. John Finnis, *Grounding Human Rights in Natural Law*, 60 AM. J. JURIS. 199 (2015).

6. See HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* ch. 1 (Thomas Hanley tr., Liberty Fund 1998).

7. DIG. 1.5.4 preface.

8. DIG. 50.17.32.

9. This contention was central to the common law rejection of slavery. Thus, Lord Mansfield held that slavery “is so odious, that nothing can be suffered to support it, but positive law.” *Somerset v Stewart* [1772] 98 ER 499 (KB).

humans all possess the same *kind* of dignity because they are the same kind of being. Thus, Aquinas concludes that dignity signifies something's goodness on account of itself, its intrinsic value.¹⁰ Humans all share this same intrinsic value by virtue of us all being human persons.¹¹ Other beings can and do possess their own kind of dignity, by virtue of their being the thing that they are. Thus, we can speak of the dignity of the lion or the mouse or even potentially the river. But humans have our own kind of dignity which connotes the intrinsic value of our shared humanity, manifest equally within each and every individual person.

This view is in direct contrast to that of Aristotle, who argued not only that slavery can be morally defended but that it can be defended on the ground that some humans are naturally inferior to others. In response to unnamed adversaries¹² who claimed that slavery is contrary to the natural law, Aristotle advances a theory of natural slavery. He begins by setting out his opponents' position:

But other thinkers consider ruling slaves on the part of an owner to be against nature. They think that the differentiation between owner and slave obtains merely by convention, whereas by nature there is no difference between the two. The relationship between an owner and a slave is grounded in force/violence; therefore, it is not based on justice.¹³

In response to this, Aristotle maintained what he deemed to be the "evident" distinction, found in nature, between those who rule people and those who are ruled: "some people are free and others slaves by nature".¹⁴ He denied the personhood of barbarians

10. THOMAS AQUINAS, IN III SENT., d. 35, q. 1, a. 4, q1a 1, corp. See also MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 16–17 (Harvard University Press 2012).

11. See Tianyue Wu, *Aquinas on Human Personhood and Dignity* 85 THOMIST 377 (2021).

12. There are good reasons to think that these adversaries were (at least some of) the Sophists who very probably elaborated a criticism of the institutional of slavery as against nature. See ILARIA L. E. RAMELLI, SOCIAL JUSTICE AND THE LEGITIMACY OF SLAVERY: THE ROLE OF PHILOSOPHICAL ASCETICISM FROM ANCIENT JUDAISM TO LATE ANTIQUITY 26–27 (Oxford University Press 2016).

13. POL. 1253b20–25.

14. *Id.* 1255a1–2.

because—he asserts—they lack “the deliberative faculty of the soul in the least.”¹⁵ A similar argument is advanced to justify the subordination of women, recognizing their personhood or humanity in the form of a soul, “but without full authority.”¹⁶

A shared premise here is the contention that one’s worth or dignity depends upon the possession of a variable characteristic which serves as the source for value. Aristotle justified the category of natural slaves on the basis that natural slaves are deficient in their deliberative faculty, something one can possess to greater or lesser degrees. Slaves are said to be similar to animals or even a kind of living tool, precisely because they lack deliberative faculties in their entirety: a natural slave “participates in reason only to the point of apprehending it, but not to the point of possessing it.”¹⁷ Similarly, women are portrayed as superior to slaves but inferior to free men because, while they can make decisions, they cannot do this on their own, dependent as they are upon their adult male relatives.¹⁸ The consequence of this view is that slaves and women cannot flourish as full persons and so need to cultivate only a minimal virtue. For the slave, who is deemed to lack personhood, this entails such minimal cultivation as avoiding cowardice or passions which might prevent him from carrying out his tasks efficiently.¹⁹ For women, who are, on this view, naturally less than full persons, this purports to both justify their subordination and explain why they should not be educated.²⁰

In contrast, the Stoics rejected this theory of natural slavery and the natural inferiority of women because they rejected the grounding of human value upon a variable characteristic such as deliberative faculty. Instead, they argued that all human beings have “a share in the logos.”²¹ Thus, while some may be better able to

15. *Id.* 1260a10-12.

16. *Id.* 1260a12-13.

17. *Id.* 1254b22-3.

18. GEN. AN. 1.728a; 1.82f; POL. 1254b10-14.

19. POL. 1260a33-b5.

20. *Id.* 1254b10-14; 1260a12-14.

21. RAMELLI, *supra* note 12, at 46.

actualize their participation within the logos by fostering wisdom and virtue, all humans share a common nature as rational beings, *logikai*.

This understanding of all humans as rational beings developed to become a central tenant of natural law theorizing of dignity, emphasizing a shared nature united by reference to the kind of being that humans are, rather than any actual abilities possessed.²² It is the radical, from *radix*—root—capacity of all humans to flourish as persons by directing our rational mind towards the good that grounds our dignity. This capacity is actual in that it exists even if the potentialities it involves are not yet activated.²³ Similarly, one has the capacity to be truthful or deceitful, generous or miserly, kind or callous without engaging in any action at all. The root capacity of all humans to be full moral agents entitles us to be recognized and respected as such, even if, by virtue of infancy or impairment, we may not be able to fully realize that potential immediately or ever. It is on this basis that Rawls argues that “the capacity for moral personality is a sufficient condition for being entitled to equal justice.”²⁴ Human dignity signifies our ontological unity and radical moral equality. It forms the basis of moral claims that all persons can make against others. Any conception of human rights which seeks to live up to their foundational vision as universal moral claims grounded in humanity must account for what it is about humanity which is of moral worth and why this worth does not and cannot vary between persons. The classical natural law tradition has, over more than two thousand years, developed an account for this value. The insights that the early stoics and sophists gave us, by grounding human value in human nature, remain pertinent today in the face of new challenges to human dignity.

22. See Patrick Lee & Robert P George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173 (2008).

23. John Finnis, *Equality and Differences* 2 *SOLIDARITY* 1, 2 (2012).

24. JOHN RAWLS, *A THEORY OF JUSTICE* 504 (Clarendon Press, 1972).

II. EQUALITY

While Aristotle's account of the inferiority of ethnic minorities or women has now rightly been rejected, the idea that human value depends upon variable characteristics has proven to be stubbornly resilient. Many have argued that only some human beings have full moral worth, precisely because their worth derives from their possession of some characteristic in addition to their humanity. This is usually motivated by compassion for animals and a desire to ground moral duties owed to them not in anything about the kind of being they are but in their capacity to experience enjoyment and suffering. More perniciously, this tactic has been used to base full moral status on traits such as intelligence to deny the full humanity or moral agency of some. Yet, while we are now very unlikely to hear arguments grounded in intelligence, those grounded in the capacity to suffer remain popular among animal welfarists and this may indirectly be a proxy for intelligence-based worth. Drawing on the utilitarian tradition, Singer argues that the capacity for suffering or enjoyment is both necessary and sufficient for a being to have interests which ground moral duties.²⁵ But here 'capacity' does not mean the radical capacities that natural lawyers associate with the kind of being one is. Rather, Singer is concerned with the experience of suffering or enjoyment itself. As such, individuals, be they human or animal, are simply vessels for what is truly of value: enjoyment, pleasure, utility, etc. The vessel itself can be interchanged with no impact upon moral obligation: so long as the suffering or enjoyment remains the same, so too do the moral duties or entitlements. As such, "it would logically follow that if a human child had a toothache and a juvenile rat had a slightly more severe toothache, then we would be morally required to devote our resources to

25. PETER SINGER, *ANIMAL LIBERATION* 7 (2nd edn, The New York Review of Books 1990).

alleviating the rat's toothache rather than the human's."²⁶ It is for this reason that Singer concluded that "All animals are equal."²⁷

But this equality is profoundly misguided and manifestly *denies* equal moral worth. Rather than grounding equality within dignity—one's intrinsic value—this view renders the value of all beings, human or animal, (equally) contingent upon the variable experience of enjoyment or suffering. All animals are equal, on this account, but that is because they are all equally reduced to mere vessels, only valued to the degree to which they can experience enjoyment or suffering. This necessitates a denial of equal moral status in favor of a hierarchy informed by these variable characteristics. Yes, on Singer's view animals now feature within this hierarchy such that there has been an expansion of the circle of moral value: the boundary between human and animal which grounds the distinctiveness of human dignity has been dissolved such that there is no moral difference in kind between humans and animals. But all this does is permit some animals to rank above some humans in the ordering of value such that the suffering of a dolphin might take precedence over the life of a disabled human child. It does not flatten the moral landscape such that all humans and all animals are of equal value. Nor will they be given equal consideration. Those who can suffer more are of more value and those who cannot suffer at all may be of no value whatsoever, viewed not as persons but as resource-hogs; a drain on a system that can be, and on some views should be, killed to free up resources for those who matter more.²⁸ Lee and George capture this concern when they note that:

this difference between degrees of capacity for suffering and enjoyment, will also apply to individuals within each species. And so, on this view, while a human will normally have a greater

26. Lee & George, *supra* note 22, at 177.

27. Peter Singer, *All Animals Are Equal*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS (Tom Regan & Peter Singer eds., Oxford University Press 1989).

28. PETER SINGER, PRACTICAL ETHICS 181–191 (2d ed., Cambridge University Press 1993).

capacity for suffering and enjoyment than other animals, and so will have a higher moral status (indirectly), so too, more intelligent and sophisticated human individuals will have a greater capacity for suffering and enjoyment than less intelligent and less sophisticated human individuals, and so the former will have a higher moral status than the latter.²⁹

The only way to avoid this hierarchy is to base moral worth on features or characteristics which do not vary between individuals of the same kind. Here, it is important to stress that the distinctiveness of human dignity does not entail the non-existence of dolphin dignity, nor does it mean that animals are of no value or that their suffering does not carry moral weight.³⁰ Rather, dignity provides the foundation of genuinely fundamental human rights which cannot be aggregated over within some utilitarian calculus because these rights are not based on or grounded in a variable characteristic. All humans have dignity and we all have the same dignity because human dignity signifies the moral worth of humans *qua* humans—the intrinsic value that we all possess. The alternative is to value persons only in so far as they are vehicles for something else which is regarded to be of real or genuine value. But then, “it would follow that the basic moral rule would be simply to maximise those variable attributes.”³¹

It is here where the conception of equal dignity embraced by the classical tradition runs headlong into conflict with spurious notions of the “greater” good. A constitutionalism premised upon a view of persons as mere vessels for interests can very quickly collapse into a form of aggregative consequentialism, assigning no particular value to individuals themselves and instead seeking only the maximization of overall happiness or utility.³² The result is a

29. Lee & George, *supra* note 22, at 178. See also DAVID S. ODERBERG, APPLIED ETHICS: A NON-CONSEQUENTIALIST APPROACH 101 (Oxford University Press).

30. See R. Debes, *Dignity's Gauntlet*, 23 PHIL. REFLECTIONS 45, 61 (2009).

31. Lee & George, *supra* note 22, at 181.

32. John Stuart Mill, *Utilitarianism*, in 10 THE COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON ETHICS, RELIGION AND SOCIETY (John M Robson ed., University of Toronto Press 1969).

conceptual framework which presumes there to be a conflict between the individual and society such that the role of politics is to mediate this tension.³³ But this framework only makes sense if the public interest is either an aggregation of the interests of the majority or an expression of their will. In either case, the public good is presented as something apart from the community as a whole: it constitutes the interests, good, or will of a subset of the community, severed from the nature of the individuals who make up the set. By this I mean that these accounts of the 'greater' good deny the moral separateness of persons.

Many trace the idea of the separateness of persons as a critique to utilitarianism to the work of John Rawls, who argued that:

The most natural way, then, of arriving at utilitarianism ... is to adopt for society as a whole the principle of rational choice for one man ... On this conception of society separate individuals are thought of as so many different lines along which rights and duties are to be assigned and scarce means of satisfaction allocated ... so as to give the greatest fulfillment of wants ... This view of social co-operation is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator. Utilitarianism does not take seriously the distinction between persons.³⁴

Rawls was not alone in his use of moral separateness as an argument against aggregative consequentialist theories such as utilitarianism. Thomas Nagel claimed that consequentialist ethics "treats the desires, needs, satisfactions, and dissatisfactions of distinct persons as if they were the desires, etc., of a mass person."³⁵ Even Robert Nozick, eternal foil to Rawls, agreed that the separateness of

33. See J.A.G. Griffith, *The Political Constitution*, [1979] MODERN L. REV. 1 (1979).

34. RAWLS, *supra* note 24, at 26–27.

35. THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 134 (Princeton University Press 1970).

persons places moral restrictions on what one ought to do, particularly the state:

There is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.³⁶

Nozick in particular (unintentionally?) captures the problem of the “greater” good from the perspective of common good constitutionalism: in framing the good of the community in such a way that one can sacrifice the good of some within the community in order to further the good of the whole, the “greater” good undermines the very basis of social cooperation.³⁷ Nozick is wrong to imply that there is no such thing as community, however. We may be separate persons but that alone cannot explain why utilitarianism is wrong.

It should come as no surprise at this point to note that Rawls, Nagel, and Nozick have all presented a new way of framing an insight that the stoics understood millennia ago: the moral worth of individuals depends upon their shared humanity—their dignity. The distinction between persons tells us that we are separate individuals, a locus of value that cannot be aggregated over. But it is the unity of the human race which tells us that we are separate individuals with *equal* moral worth. Recognition of one’s own worth by reference to the kind of being one is, a human person, implies recognition that other persons have the same kind of worth because they are the same kind of being. While we are each thoroughly individual, unique, and particular in that we are separate persons, we do not exist in a social or moral vacuum. To recognize one’s own

36. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 32–33 (Basic Books 1974).

37. See VERMEULE, *supra* note 1, at 26.

worth but fail to see the same in others is to experience profound moral failure or worse, psychopathy.

A jurisprudence focused on respect for this understanding of equal dignity cannot permit a consequentialist calculus that treats some members of the community as less than full human persons. Nor could it permit a framing of politics as the mechanism by which we determine who is (on some views literally) sacrificed for the sake of the rest. But this then raises important questions relating to how constitutional order is to be structured. If constitutional theory is not a response to this conflict between the individual and the majority such that politics either permits the individual to be sacrificed or purports to protect the individual from a community they are in fundamental conflict with, then what is it? More precisely, how can we conceive of a public good which is not simply an aggregate of disconnected interests or the mere will of the majority? It is here where the idea of the common good is revelatory.

III. FLOURISHING

It may seem obvious, but it is important to stress that the common good has two constituent parts: common and good. Each of these speak to and rely upon the idea of equal dignity in subtly different ways. The “common” aspect of the common good manifests the comparative, equality-based aspects of the concept, rejecting a hierarchy of moral value or a vision of politics premised upon a tension between the individual and the majority. As Vermeule puts it, “In the classical account, a genuinely *common* good is a good that is unitary (‘one in number’) and capable of being shared without being diminished. Thus it is inherently non-aggregative; it is not the summation of a number of private goods.”³⁸ As such, the common good presupposes the moral equality of persons and conceives of politics as properly ordered towards those goods which can genuinely be shared in common; peace, justice, and abundance; “extrapolate[d] to modern conditions to include various forms of health,

38. *Id.* at 28 (emphasis in original).

safety, and economic security.”³⁹ Each of these goods can be enjoyed by all members of a community without diminishing them. What is more, the full enjoyment of such goods can only be achieved when one shares in their enjoyment with a community of moral equals. Indeed, rather than the interests of the community being in some conceptual tension with the individual, for the classical tradition, “the good of the community is itself the good for individuals.”⁴⁰ A commitment to the common good is therefore to be contrasted with tyranny and factionalism, where state power is either used for private benefit or so weak that it cannot or will not prevent the abuse of the vulnerable at the hands of powerful private actors.⁴¹

The “good” aspect of the common good directs our attention towards not just things that can be shared without being diminished, but things which are *good for* those who participate in or enjoy them. In this, “the common good is, for the constitutional lawyer, the flourishing of a well-ordered political community.”⁴² Goodness here must be objective, even if it is also contingent upon context for much of its concrete articulation and thus open to reasonable disagreement. By this I mean that the good cannot collapse into mere preference or experience, nor can it consist in merely satisfying desires or preferences. Instead, such preferences or desires are rational or reasonable only if they are directed towards what is genuinely good and thus genuinely fulfilling or conducive to flourishing.⁴³ As such, the pleasures or desires of a sadist or pedophile to torture or abuse children are themselves bad, independent of any harm caused should they be acted upon. As Lee and George note, in this context it is simply wrong to say, “it was bad for him

39. *Id.* at 7 (emphasis removed from original).

40. *Id.* at 29. See also Charles de Koninck, *The Primacy of the Common Good against the Personalists: The Principle of the New Order*, in, 2 THE WRITINGS OF CHARLES DE KONINCK (Ralph McInerny ed., Notre Dame Press 2016).

41. VERMEULE, *supra* note 1, at 26–27.

42. *Id.* at 7.

43. Lee & George, *supra* note 22, at 180.

to cause so much pain, but at least he enjoyed it.”⁴⁴ There is nothing good about the desires of a pedophile. They are bad as desires and they are bad for the pedophile because they frustrate flourishing. If someone were to act on such desires, they would be debasing themselves, quite apart from the gross harm caused. Equally, the bigoted views or preferences of the racist or sexist are bad in abstraction (because they are wrong) but are also bad *for* the racist/sexist because they inhibit their ability to flourish as members of a community of moral equals.

This is an important point that is necessary for any account of the common good to be distinguished from these ideas of the ‘greater’ good mentioned above: the flourishing of the individual necessitates their participation within a community of moral equals who are also flourishing such that the community as a whole (not merely the majority) can flourish. The good of an individual cannot be separate from the good of the community: my life is better when my friends’ lives are better.⁴⁵ My membership within a civic community grounds the bonds of a civic friendship that connects all members of a polity.⁴⁶ It is in our shared common interest that all members of our community be capable of leading flourishing lives and that they be treated justly.⁴⁷ To diminish the flourishing of others in the name of the common good is to fundamentally misunderstand what makes the common good common. It also fundamentally misunderstands what it means to pursue a good life, of which membership within a flourishing political community of equals is essential.⁴⁸ This flourishing is intimately tied to human dignity. Dignity is the value that we have by virtue of being the thing that we are. It speaks to an intrinsic worth which finds its character in human

44. *Id.* n.6.

45. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 4, 6 (Oxford University Press 1980).

46. See JACQUE MARITIAN, *THE PERSON AND THE COMMON GOOD* ch. 4 (University of Norte Dame Press 1966).

47. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, q. 64, art. 4; II-II, q. 65, art. 1; II-II q. 61, art. 1; I-II, q. 96, art. 4.

48. FINNIS, *supra* note 45, at ch. 6.

nature and that nature is tied intimately to our radical capacity to flourish as persons. Thus, we can describe affronts to dignity as “dehumanization.”⁴⁹ In this sense, we can see (human) dignity manifest in three distinct but unified ways, centered on humanity.

Firstly, an affront to human dignity occurs where a human is treated as less than a person. In being treated in this manner, one is dehumanized because humans are persons. To be treated as less than a person is to be treated as less than human, as a *thing* or a mere means, rather than an end in oneself or a locus of intrinsic value. Thus, being enslaved, murdered, raped, coerced, falsely imprisoned, objectified, or exploited constitute various ways in which one’s dignity can be disrespected. Indeed, this may occur even when one is unduly advantaged as a result of stereotypes about one’s group identity – the association of your ethnicity with musical abilities for example.⁵⁰ In such contexts, one is no longer truly treated as an individual, separate person. Dignity operates here as the ground for fundamental entitlements—rights correlatively entailed to one’s duties under justice.⁵¹ In this context, the role of dignity has come under sustained critique for its apparent vagueness or emptiness.⁵² Some have even argued that we should abandon all talk of dignity within human rights and instead focus on humanity

49. R. A. Duff, *Harms and Wrongs*, 5 BUFFALO CRIM. L. REV. 13 (2002).

50. Benjamin Eidelson, *Treating People as Individuals*, in PHILOSOPHICAL FOUNDATIONS OF INDIRECT DISCRIMINATION (Deborah Hellman & Sophia Moreau eds., Oxford University Press 2013); see also BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* (Oxford University Press 2015).

51. See Michael Foran, *Rights, Common Good, and the Separation of Powers*, 86 MODERN L. REV. 599 (2023). Note, however, that this claim is not in conflict with Vermeule’s argument that it is the common good which is the ground of rights. Human dignity is not simply a negative concept. It is intimately tied to our collective flourishing within a community of moral equals and so respect for it is an essential component of the common good.

52. Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257 (2006); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008); Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (2008); cf. JACOB WEINRIB, *DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW* (Cambridge University Press 2016).

or moral equality alone.⁵³ This has a certain appeal to it, given that on any sound conception, dignity, humanity, and moral equality are intimately connected such that we all have equal moral worth by virtue of our shared humanity. But this argument also runs the danger of collapsing dignity into rights and obscuring the connection between dignity and the common good.

Secondly, to act with dignity is to actualize one's radical capacity to flourish: it is to manifest and demonstrate one's humanity in the fullest sense of that term. When we speak of someone adopting a dignified attitude or facing adversity with dignity, we are appealing to the same idea that we call upon to describe the value or moral status that one has by virtue of the kind of being one is. To act with compassion and fortitude while dying of cancer, to pray for and forgive one's abuser, and to hold fast to one's duty when fulfilment demands the impossible all manifest a preservation of one's humanity in the face of adversity. Equally, when we associate nobility, heroism, and valor with dignity we take them to symbolize the pinnacles of human achievement, the actualization of the radical capacity to flourish as a person and a community. It is here where we can see associations between dignity and the respect afforded to symbols of history and tradition.⁵⁴ Even in a trivial manner, slipping on a banana peel is undignified because it entails "being reduced for a moment to a passive object."⁵⁵ More seriously, one can feel a loss of dignity when one loses independence or privacy, unable to control one's own life or to exclude others from improper intrusions into it. In these cases and those where someone debases themselves, there is no actual loss of humanity: we always remain the same kind of being. But there is a reduction in one's ability to actualize one's potential: to flourish. Equally, acting with dignity does not translate to an increase in value or humanity merely

53. ANDREA SANGIOVANNI, *HUMANITY WITHOUT DIGNITY: MORAL EQUALITY, RESPECT, AND HUMAN RIGHTS* (Harvard University Press 2017).

54. See WALTER BAGESHOT, *THE ENGLISH CONSTITUTION* (Oxford World Classics ed., Oxford University Press 2001).

55. Lee & George, *supra* note 22, at 174.

because one has been able to actualize human potential in particularly laudatory ways. The single greatest mistake in the theory of dignity is to associate it with high rank (necessarily implying a lower rank or inferior worth).⁵⁶

Thirdly, proper respect for equal dignity demands more than mere forbearances. Fuller captures this idea when he distinguished between the morality of duty and the morality of aspiration. The morality of duty represents bare minimum requirements below which one is not permitted to fall. It is the morality of rights protection; it “lays down the basic rules without which an ordered society is impossible or without which an ordered society directed towards certain specific goals must fail of its mark.”⁵⁷ In contrast, the morality of aspiration is not about rights (or principles of right action); it is about the good: “[i]t is the morality of the Good Life, of excellence, of the fullest realization of human powers.”⁵⁸ It is grounded in the firm realization that a person, or citizen, or official, may fail to live up to their potential and so may be found wanting. Crucially “in such a case he [is] condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing.”⁵⁹ This is not to imply that rights are somehow removed from the good. But they are indirectly informed by conceptions of the good life.⁶⁰ Duty and Aspiration are two sides of the same coin, each essential for equal dignity to be fully respected.

A constitutionalism seeking to fully respect the equal dignity of persons must be directed towards the collective realization of human potential. Foster is entirely correct to stress that “Dignity-enhancement is the process of humanization.”⁶¹ Constitutional actors, if they are to realize the conception of law embraced by the classical tradition, must take the flourishing of individuals and the

56. See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (Oxford University Press 2012).

57. LON FULLER, *THE MORALITY OF LAW* 5–6 (Revised ed., Yale University Press 1969).

58. *Id.* at 5.

59. *Id.*

60. Foran, *supra* note 51.

61. CHARLES FOSTER, *HUMAN DIGNITY IN BIOETHICS AND LAW* 7 (Hart 2011).

community to be constitutive of their own success. As such, “human energies must be directed towards specific kinds of achievement and not merely warned away from harmful acts.”⁶² As such, the rule of law appeals to “a sense of trusteeship and the pride of the craftsman” on the part of the lawgiver.⁶³ In acting in the best interests of the governed, in facilitating their flourishing, legal authority attains and maintains its legitimacy. This cannot be done simply by setting up and maintain a system of individual rights. It demands that the good itself be pursued, that the vulnerable and disadvantaged are not merely protected from the abuse of bad actors but positively provided with the mean needed to actualize their potential. To flourish as a person is to flourish in community. It is not within the scope of this paper to provide a comprehensive account of human flourishing (not least because the answer to that question would depend to a great extent upon the specific context that one finds oneself in) except to argue that the questions “what does dignity require?”, “what constitutes the common good?” and “how can we flourish?” are all, on this framework, broadly the same question and will be afforded broadly the same answer.

62. FULLER, *supra* note 57, at 42.

63. *Id.* at 43.