

Recht / im Kontext

5

Grimm/Kemmerer/Möllers (eds.)

Human Dignity in Context

Explorations of a Contested Concept



HART
PUBLISHING



Nomos

Recht im Kontext

edited by

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Volume 5

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Recht im Kontext. The Series.

Recht im Kontext is the series of the project *Recht im Kontext* (Law in Context) at the Wissenschaftskolleg zu Berlin (Institute for Advanced Study Berlin). The series features research presented and discussed in the framework of the project's various formats, from conferences and talks to blog symposia and seminars. *Recht im Kontext* aims to create an enhanced re-contextualization of the law among its neighboring disciplines and seeks to advance German legal scholarship's *aggiornamento* in a global context. From a genuinely legal perspective, the project cooperates with individual and institutional partners and initiates new forms of dialogue with the goal of creating discursive structures between the law, the humanities and social sciences. Under a twofold agenda, *Recht im Kontext* advances transnationalisation and interdisciplinarity of legal scholarship in Germany. The project explores the foundations and contexts of law in a plural world where competitive and complementary multiplicities of legal and normative orders are part of social reality. To us, *Recht im Kontext* stands for a style of discourse, an exchange on current issues in legal scholarship, for interdisciplinary encounters, and for dialogues within wider national as well as transnational public spheres we hope to foster.

Dieter Grimm
Alexandra Kemmerer
Christoph Möllers

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Berlin, December 2017

Dieter Grimm
Alexandra Kemmerer
Christoph Möllers

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Human Dignity in Context. An Introduction

Dieter Grimm, Alexandra Kemmerer, Christoph Möllers

Human dignity is a complex topic. It is a philosophical, a theological as well as a legal concept with a long and manifold intellectual history – a history it brought to the human rights context, to which it has been applied only rather recently. Within the legal world, it remains a gateway for ethical arguments. And as such it has received increased attention in recent years. Equally, when the prohibition of torture was called into question during the so-called war on terror or when the ethical limits of biotechnology became more relevant in the face of disappearing practical boundaries, these issues were debated in dignity-based language both within and outside the legal world. Human dignity arguments thus transcend disciplinary boundaries.

In confronting this phenomenon, as the book's title indicates, we are here attempting to put human dignity in context. On the one hand, bringing context to universal concepts is an ambivalent undertaking. As our arguments claim to be universal when we evoke human dignity, they defy the very idea of context. On the other hand, given the abstractness of the concept and its application to various fields, we run the risk of missing something if we ignore the different contexts. In fact it may often be easier to agree on the violation of human dignity in a specific context than on the notion's abstract meaning. It is no coincidence therefore that German constitutional lawyers, following *Günter Dürig*, approach dignity cases not by abstractly conceptualizing what is protected under Article 1 (1) Basic Law but by determining acts of infringement instead.

This volume is the result of two conferences on human dignity convened by the editors and held at the Wissenschaftskolleg zu Berlin (Institute for Advanced Study Berlin) on 16-18 November 2011 and 19-21 June 2013. As exercises in comparative constitutional law in context, both events brought together a wide array of scholars from various disciplinary and regional backgrounds.

Each of the conferences was preceded by a keynote lecture, open to the general public, and based on reflections that have been published elsewhere.

Avishai Margalit, in his 2011 lecture, outlined two genealogies of human dignity: one based on the deification of the human person (to him, apparently only of limited relevance in a secular age), the other on moral ‘kitsch’, on an exaggeration of sentimentality, stressing the capacity of suffering, shared by all human beings.¹ For *Margalit*, the latter genealogy carries the risk of a victimization culture where every human being is seen as a (potential) victim and where respect for human beings is linked to victimhood. In order to dignify the victim, the victim is to be seen as necessarily pure and innocent. For *Margalit*, however, the very purpose of respecting the human being, of human dignity as a concept, is to exclude the need to verify the individual’s innocence and ‘nobility’. All human beings, even the most despicable ones, deserve moral respect – not for what they do, but for who they are: members of the Family of Man.

In his 2013 keynote lecture, *Hans Joas* offered an alternative to the two dominant narratives on the history of human rights: the mostly secularist view that traces human rights back to the French Revolution and its roots in Enlightenment thinking, and the mostly Catholic view of human rights as an outgrowth of the personalist understanding of God. The alternative ‘genealogy’ which *Joas* proposed deals with human rights as the product of a profound cultural transformation for which he uses the term ‘sacralization of the person’.² The empirical cases he discussed concerned the abolition of torture and of slavery and the codification of human rights in the late eighteenth century and in the years following the Second World War. Expanding his argument in a global perspective, *Joas* shed new light on the connection between the emergence of moral universalism in the Axial Age and the history of human rights in the last few centuries.

A number of authors in this volume have engaged with the work of *Avishai Margalit*³ and *Hans Joas*,⁴ and readers will find aspects of their

1 A Margalit, ‘Human Dignity Between Kitsch and Deification’ in C Cordner and R Gaita (eds), *Philosophy, Ethics, and a Common Humanity: Essays in Honour of Raimond Gaita* (London, Routledge, 2011) 106.

2 H Joas, *Slavery and Torture in a Global Perspective. Human Rights and the Western Tradition* (Leiden, Brill, 2014). On the history of human rights and universal human dignity, and their justification, see also H Joas, *The Sacredness of the Person. A New Genealogy of Human Rights* (Washington, Georgetown University Press, 2013).

3 See Hilgendorf, Hörnle, and McCrudden (in this volume).

4 See von Bernstorff, McCrudden, and Wihl (in this volume).

contributions to contemporary legal and philosophical discourses reflected and discussed throughout the book.

The 23 chapters of this book capture a rich and multifaceted glimpse into current understandings of and conversations about human dignity. While we cannot (and do not intend to) provide a detailed sketch of all aspects canvassed by the authors, we want to leave readers with a sense of how the volume may be read and used. In putting together this collection we have approached the topic of human dignity from three different angles: foundations, developments, and variations. These can be seen as three steps in a multidisciplinary conversation that has been convened and curated, as has the resulting collection, from a genuinely legal perspective. While the editors focus on human dignity as a legal concept, the authors also draw upon various other disciplines and traditions of dignity to investigate conceptual implications for many different fields of application.

The book begins at the beginnings – with explorations into the foundations of human dignity. This includes not only philosophical and theological reflections, but also the wider fields of arts and humanities.

Taking a closer look at Diego Velázquez's *Las Meninas*, *Christopher McCrudden* engages in a retrospective justification of the painting's use in the dignity context – and, more broadly, in a conversation on the relevance of art forms such as literature and painting for an understanding of complex concepts in law and moral philosophy. In *McCrudden's* reading, *Las Meninas* conveys an experience that encourages us to engage in reflexive conversations with others.

In deconstructing and reconstructing Kant's idea of human freedom and dignity, *Ino Augsberg* provides a fresh reading of one of the core philosophical foundations of the concept of human dignity in the German constitutional tradition. *Augsberg* questions Kant's supposedly clear-cut distinction between autonomy and heteronomy and argues that 'Kant's moral philosophy, and in particular his concept of *Achtung*, undermines the classical dichotomy between Christianity and Judaism, between letter and spirit, between individual right and mitzvah, between Western and non-Western legal tradition'.

Ingolf U. Dalferth analyzes the controversial status of human dignity in legal, political, moral, philosophical and theological debates from a Christian perspective and proposes a 'dynamic personalist understanding of dignity', grounded in respect for each other that is intertwined with the respect of God for everyone 'as his neighbor'. *Dalferth* outlines 'the dignity of human persons as the humane mode of living a human life in the presence of God'.

From a perspective informed by the complex history of theological concepts, *Stephan Schaefer* takes further the Protestant critique of essentialist conceptualizations of human dignity and voices a strong plea for a ban on reified concepts of ‘man made in the image of God’. His chapter offers insights into the resistance of nineteenth-century Protestant theology against addressing the problem of dignity, an overview of various semantic antecedents of dignity in Latin, and a Christological reading of dignity discourses which leads to a dynamic understanding of human dignity as relationship to God.

Susannah Heschel explores the complexities of human dignity within Judaism, taking her readers from biblical origins and classical rabbinical texts to the American civil rights movement and present-day decisions of secular Israeli courts. According to *Heschel*, ‘perhaps the most radical shift in Jewish thought occurred when theologians of the modern period expanded the point of reference of human dignity to include all human beings’. But *Heschel* also demonstrates that ‘reconciling religious belief with human equality or democratic pluralism is not a new problem, but a tension already inherent in the earliest strata of rabbinic thought’.

Concluding the first part of the book, *Russell A. Miller*, drawing upon literary theory, brings us back to law and humanities and shifts the focus to how art is not only a potential means to better understand concepts of human dignity, but how art is itself a form of human dignity. In his passionate critique of the German Federal Constitutional Court’s decision in the *Esra* case, *Miller* emphasizes the ‘dignitarian potential of the literary acts of reading and writing’.

The second part of the volume is concerned with developments in the human dignity discourse. Or, more precisely: with developments in legal human dignity discourses. A special emphasis is placed here on the German constitutional protection of human dignity as enshrined in Article 1 (1) Basic Law.

Christoph Goos reconstructs the long-neglected genealogy of Article 1, its ‘original meaning’ and the intentions of the fathers and mothers of the 1949 German constitution. *Goos* rebuts the widely-held assumption that the dignity article is ‘a specific result of Catholic and Kantian thought’, and he argues that the meaning of the term ‘dignity of man’ is to be defined ‘as a real capacity of human beings that had been proven highly vulnerable during the Nazi regime: the inner freedom’.

The *Objektformel* (object formula) doctrine, deduced from Kantian ethics and shaped by Günter Dürig and Josef Wintrich, has long been a prevailing pattern of conceptual interpretation of human dignity. In taking a

closer look at the Federal Constitutional Court's *Aviation Security Act Case* (2006), *Matthildi Chatzipanagiotou* shows how 'the *Objektformel* doctrine operates as a tool of critical reflection'. Her hermeneutic and literary approach serves as 'a lens through which to look at the *Objektformel* as a recurrent feature of human dignity practice'.

The past few years have seen a heated and still ongoing debate among German constitutional law scholars about the claim to absoluteness of Article 1 (1) Basic Law, triggered in 2003 by the new commentary on this clause by Matthias Herdegen, Professor of Public Law at the University of Bonn, and the following criticism of Ernst-Wolfgang Böckenförde, former Justice at the German Federal Constitutional Court and Professor Emeritus of Public Law at the University of Freiburg. For the first time since 1949, the fundamental axiom of German constitutional law and culture was put into question.

In this section, *Nils Teifke* discusses the absoluteness of human dignity on the basis of Robert Alexy's Theory of Principles. The absoluteness of human dignity, *Teifke* argues, exists only as an idea. 'As an overarching principle, human dignity is both absolute as an idea and relative in legal practice. This is the double character of human dignity which combines the real with the ideal dimension.'

Reaffirming the claim to absoluteness and defending a deontic understanding of rights, *Jochen von Bernstorff*, in his contribution, takes the contrary position. *Von Bernstorff* contextualizes the incorporation of Article 1 into the German Basic Law with the origins of the universal human rights movement during the 1940s. Against the background of these genealogies, he develops an understanding of the human dignity clause as inspired by Emmanuel Lévinas' concept of the vulnerability of the individual. He interprets Article 1 as 'a provision that requires constitutional organs to erect and respect boundaries in what the executive powers can do to human beings'.

David Dyzenhaus takes us from Germany to apartheid South Africa of his student days and from there to contemporary Canada – and he takes us on a journey from constitutional to administrative law. Comparing the 'much too interesting' administrative law in apartheid South Africa ('a direct result of the country's bad health on the dignity scale') with the 'boring nature of Canadian administrative law', *Dyzenhaus* argues that 'this right to dignity is at the core of administrative law – the law to which officials are subject in making decisions that carry the authority of state and law'.

Other authors in the second part of this volume discuss the conceptual conundrum of human dignity on a more abstract level, not explicitly linked to particular times, traditions and regions.

Roger Brownsword looks for common ground between a rights-centered understanding of human dignity as empowerment and a duty-centered understanding of human dignity as constraint. If there is an Archimedean point in the conceptual landscape of human dignity, he suggests, it is to be found in a Gewirthian theory of rights. *Brownsword* stresses that ‘in an age when regulators are discovering a new repertoire of technological tools, we need to keep an eye on the complexion of the regulatory environment’. It is here, he argues, that human dignity has an important role to play ‘as a critical benchmark for the use of technoregulation’.

Eric Hilgendorf deplores the often highly disordered and unstructured way in which debates on human dignity are conducted. In his contribution, he identifies key questions in the human dignity debate, providing lawyers and philosophers with ‘both a sort of road map of the key issues, and with something of a legal-philosophical toolbox containing instruments for analysis, arguments and possible solutions’. With his aim of defining the concept of human dignity in a way that allows for an effective anchoring of normative differences in pluralist societies in a foundation of commonly held values, *Hilgendorf* proposes an ‘ensemble theory of human dignity’, based on a set of core rights which are considered to be absolute.

Finally, drawing from different philosophical theories of truth, *Tim Wihl* develops a progressive ‘consensus’ idea of human dignity that is distinct from the prevailing conservative ‘correspondence’ and the liberal ‘coherence’ approaches. *Wihl* encourages German doctrine to adopt ‘more progressive-republican elements’ and argues that ‘structural progressivism demands a sublation of conservative and liberal visions of dignity in a democratic-republican perfection of equal liberty’.

A rich and diverse collection of variations of our topic then forms the third part of the volume. Here, legal human dignity arguments and their concrete implications are investigated and analysed in different contexts. These range from the fast-changing and contested field of biotechnologies, from choice architecture informed by behavioral economics to social rights arguments in general and the socioeconomic rights jurisprudence of the Indian Supreme Court, to human dignity in Irish constitutional law as well as to constitutional discourses on health insurance in the United States of America and in Germany more specifically. The chapters pose questions that aging societies must face, explore the links between dignity,

freedom and discrimination and criticize inconsistent uses of the concept of dignity.

Alexander Somek explores the twisted connections between dignity, freedom and discrimination in a competitive world where ‘individual agility and adaptability are virtues that individuals are generally expected to develop’ – a world ‘not for the depressed and inflexible’. *Somek* traces the postmodern-neoliberal path to self-perfection where ‘the question of self-repair’ easily turns into a matter of Kierkegaard’s ‘despair’ if the individual fails to come up with a ‘socially suitable personal identity’. His proposed reconstruction of discrimination allows for ‘self-constitution in the medium of the play between choices and tinkering with identities’, prompts ironic breaks and concludes with a forceful reminder that ‘living a life in dignity requires more than legal protection from discrimination’.

In her chapter, *Morag Goodwin* responds to the dignitarian challenges posed by the various tools that have been developed based on insights from behavioural economics in order to move the citizen towards more ‘reasonable’ conduct. *Goodwin* states that ‘nudging’ undermines our status as social and political agents and ‘betrays an understanding of individuals as morally weak’, as incapable of taking morally responsible action. Her paper inspired our further interest in a constitutionalist perspective on choice architectures and behaviorally informed regulation, and has now also become part of the edited volume ‘*Choice Architecture in Democracies. Exploring the Legitimacy of Nudging*’ (Alexandra Kemmerer, Christoph Möllers, Maximilian Steinbeis, Gerhard Wagner, eds., *Recht im Kontext* 6).

Stefan Huster explores the complex connection between human dignity and social (human) rights and contrasts the universality of human dignity with the relativity of social rights. *Huster* stresses that both the content and the applicability of social rights are relative – and, in his view, rightly so: ‘If human dignity is aimed at equal belonging, and the substance of inclusion is oriented to the relevant conception within a particular society, then social rights depend on this conception.’

In her comparative transatlantic reflections on health insurance and dignity, *Nora Markard* describes how health insurance relies on solidarity in the United States and Germany and outlines constitutional issues in terms of federal authority and fundamental rights. *Markard* examines in particular the role of human dignity and liberty for minimum entitlements and solidarity, tracing a discontinued line of dignity jurisprudence in the US. In a concluding critical comparative move, she argues that ‘human digni-

ty, by virtue of its inviolability, has proven a reliable line of defence for those forgotten by political process’.

Rehan Abeyratne examines the concept of human dignity in Indian constitutional law, with a focus on socioeconomic rights. Drawing upon the work of Frank Michelman, *Abeyratne* looks at two objections to constitutional social human rights (as developed in the ‘activist’ judicial decision-making of the Indian Supreme Court) that are not substantial in nature, but focus on how political and legal institutions should function under a democratic constitutional scheme. He explains that a ‘democratic’ objection can be overcome in light of India’s history and the dysfunctionalities of its elected government, while, to him, a ‘contractarian’ objection seems justified – but could be avoided if the Court ‘limited itself to adjudicating only the reasonableness of government schemes, much like the South African Constitutional Court’.

The Irish Constitution of 1937 was one of the earliest constitutional documents to invoke human dignity as a foundational principle, but it is only in recent years that human dignity began to play an ever more significant, but not very consistent role in Irish constitutional case law. *Conor O’Mahony* critically analyzes the various guises in which human dignity has appeared in Irish constitutional adjudication and he calls for a more consistent use of the principle, restricted ‘to the role of a background principle that acts as a normative justification for and interpretive aid to rights provisions, by reference to the equal treatment and respect that should be afforded to all human beings’.

Christoph Goos urges a ‘more inclusive, more realistic, more holistic understanding of human dignity’ in order to adequately cope with the challenges of aging societies. In his case-study on three current examples of assistive and surveillance technologies specifically designed for older people with dementia, he argues that ‘dependence, vulnerability and limitations, change, loss and death, messiness, helplessness and uncertainties’ should be integrated into ‘a contemporary understanding of human dignity as a legal concept’.

With their potential for bringing about radical transformations, advanced biotechnologies are prompting a reconfiguration of the normative concepts of human rights, rights of the individual and human dignity. *Marion Albers* provides a detailed overview of significant biotechnological fields and visions as well as of essential discussions concerning those fields referring to human dignity. She examines ‘legal contexts of human dignity’, in particular texts and documents enshrining human dignity, legislation, the reasoning of courts and scientific discourses. *Albers* stresses

the need to develop a contextualized and differentiated concept of human dignity – an idea that is ‘probably more obviously than ever before a social construction as well as an extraordinarily complex legal concept’.

Tatjana Hörnle discusses the strengths and weaknesses of different approaches to defining human dignity and the implications of these approaches for judgements regarding new developments in the area of human reproduction. In her view, human dignity needs to be clearly defined. As a meaningful concept, she argues, it cannot be defined positively, but only negatively, i.e. by defining violations of human dignity. According to *Hörnle*, one should not invoke human dignity as an objective value, or point to *Gattungswürde* (‘dignity of the human species’) because she identifies ‘an underlying socio-psychological need for “naturalness” that is rooted in ill-reflected fears and quasi-religious feelings’. As a relational concept, human dignity presupposes interactions with other people. This understanding has profound implications for the assessment of new technologies in the area of human reproduction, as *Hörnle* demonstrates using the example of surrogate motherhood.

Where does this wide variety of complex, often conflicting and contradictory understandings of human dignity leave us? What did we take from the conversations, the dialogues and controversies we had at the Wissenschaftskolleg? And what can readers take from this book?

As has been said, this volume does neither offer a comprehensive picture of human dignity discourses in the early twenty-first century, nor is it intended to do so. The present book is a kaleidoscope of legal, philosophical and theological perspectives on the concept of human dignity, and we invite readers to explore the scholarship assembled here from a position of reflexive situatedness and disciplinarity, engaging with their own discipline, formation, profession, and habitus.

Despite an often deplored ‘dignity fatigue’, despite a sometimes voiced plea to ‘move on’ and leave behind a concept that to some observers seems vague, empty and ‘oversqueezed’ – the chapters of this book confirm the relevance and salience of comparative and contextual engagements with human dignity. ‘Dignity is here to stay!’, as *Samantha Besson* confidently stated in her general comments at the end of our first conference.

The very notion of human dignity opens spaces to discuss and renegotiate competing, conflicting, sometimes incommensurable but sometimes also overlapping legal, philosophical and theological concepts and ideas. It is indeed a notion inviting us to explore and better understand the internal tensions of liberal constitutionalism. What could be more timely?

Part I

Foundations

On Portraying Human Dignity

Christopher McCrudden*

I. Introduction

There is a well-known scene in *The Simpsons*, which is an American cartoon show for the over-16s, when Kirk and Luanne are playing Pictionary.¹ This involves players guessing the word or phrase as it is being ‘drawn’ by their partner. Kirk is seen drawing what looks to the viewer like a random set of squiggles on the board and saying to his partner, Luanne, somewhat testily: ‘Ah, come on Luanne, you know what this is.’ Luanne says: ‘Kirk, I *don’t* know what it is.’ Kirk sighs and says: ‘It could not be more *simple*, Luanne. You want me to show this to the *cat*, and have the cat tell you what it is? ‘Cause the cat’s going to get it.’ After a lot of argument between the two of them, Kirk gives up in frustration at Luanne’s inability to ‘get’ it, and says: ‘It’s *dignity*! Don’t you even know *dignity* when you see it?’

But Luanne is dismissive of Kirk’s efforts. He challenges her: ‘Okay, genius,’ he says to her, ‘why don’t *you* draw dignity.’ She goes to the drawing board, and sketches something. Everyone gasps in recognition, but we, the viewers, can’t see it because it’s hidden from our sight. We’re none the wiser, but we’re supposed to be left with the idea that if only we were able to see the picture that Luanne had drawn, we too would gain an insight into dignity. Or, at least that is the *initial* idea we are supposed to take from the scene. But, of course, the joke is actually a lot deeper than that, as it nearly always is in *The Simpsons*: in fact, it’s a critique of the idea that one picture is worth a thousand words.

So, from the ridiculous to the sublime. What I want to consider is whether Diego Velázquez (1599-1660) succeeded in doing in *Las Meninas*

* An earlier version was presented at the Straus Institute, New York University Law School, where I was a Fellow in the academic year 2013-14. I am particularly grateful to Alexandra Kemmerer, Emily Kidd White, Aden Kumler and David Freedberg for commenting on an earlier version.

1 *The Simpsons*, episode 6, season 8: ‘A Milhouse Divided’, first broadcast December 1, 1996.

what Kirk in *The Simpsons* wasn't able to do, and whether Velázquez has indeed conveyed several aspects of the idea of human dignity in ways that do not just echo some aspects of contemporary philosophical and legal analysis, but transcend them, bringing into our understanding aspects of dignity, and the controversy surrounding it, that otherwise might be underestimated.

II. The Aims of this Chapter

When I chose *Las Meninas* as the cover of a recent edited book of essays on human dignity, I was blissfully unaware of the extent to which the painting had been viewed by countless others in multiple settings. *Las Meninas*, painted in 1656, has intrigued pretty much everyone who has ever seen it.² I know it did me when I first saw it in the Prado in Madrid in the early 1990s. In drawing on *Las Meninas* to make a broader point in philosophy, I am following in the illustrious, if controversial,³ steps of none other than Michel Foucault.⁴ Foucault has an extensive discussion of the painting in the first chapter of his 1966 book,⁵ but he uses the painting in a way that differs from my use. For Foucault, the painting usefully problematizes issues of representation through its use of mirrors and screens; for me, it provides insights into ways of thinking about human dignity. As we shall see, however, the approach that Foucault adopted, focusing on the complex perspectives embedded in the painting, and our position as spectators in the painting, are also important for my project.

My purpose in this article is partly, therefore, to engage in a retrospective justification of the use of the painting in the dignity context. At the time I included the painting on my book cover, I thought that making the connection between dignity and *Las Meninas* was an original idea; I

2 The scholarly literature on Velázquez, and the painting is, of course, immense. For an introduction to the former, see SL Stratton-Pruitt, 'Introduction: A Brief History of the Literature on Velázquez' in SL Stratton-Pruitt, *The Cambridge Companion to Velázquez* (Cambridge, Cambridge University Press, 2002). For an introduction to the literature on the painting, see SL Stratton-Pruitt, 'Velázquez's *Las Meninas*: An Interpretive Primer' in SL Stratton-Pruitt, *Velázquez's Las Meninas* (Cambridge, Cambridge University Press, 2003).

3 See Y Greslé, 'Foucault's *Las Meninas* and Art-Historical Methods' (2006) 22 *Journal of Literary Studies* 211.

4 I am grateful to Robert Yelle, who first pointed this out to me.

5 M Foucault, *Les mots et les choses* (trans as *The Order of Things*).

should have known better, of course. Andrew Edgar had already linked the painting to the representation of dignity, in his 2003 article.⁶ Indeed, Edgar had already argued, as I shall here, that

[f]undamental questions about the very notion of dignity lie at the core of much of Velázquez's work, and indeed it may be suggested that they find their culmination in *Las Meninas*.⁷

He also usefully documents how others have seen strong connections between the painting and conceptions of dignity. I want to continue that conversation. To help in this endeavor, I will draw on recent work by Avishai Margalit⁸ and Hans Joas,⁹ both of whom have presented their work as lectures associated with the two conferences of dignity at the Wissenschaftskolleg zu Berlin, from which this volume draws.

More broadly, I want to continue a conversation in the *legal* academy (I am, after all, a legal scholar) on how far resort to art forms such as literature and painting may help us understand problematic concepts in law and moral philosophy.¹⁰ Iris Murdoch has famously claimed that great art 'is the most educational of all human activities and a place in which the nature of morality can be *seen*. Art gives a clear sense to many ideas which seem more puzzling when we meet them elsewhere.'¹¹ She continues:

we may be able to learn more about the central area of morality if we examine what are essentially the same concepts more simply on display elsewhere.¹²

6 A Edgar, 'Velázquez and the Representation of Dignity' (2003) 6 *Medicine, Health Care and Philosophy* 111.

7 *ibid.*

8 A Margalit, 'Human Dignity, Between Kitsch and Deification' in C Cordner (ed), *Philosophy, Ethics, and a Common Humanity: Essays in Honour of Raymond Gaita* (London, Routledge, 2011).

9 H Joas, *Die Sakralität der Person. Eine neue Genealogie der Menschenrechte* (Berlin, Suhrkamp, 2012), trans as *The Sacredness of the Person: A New Genealogy of Human Rights* (Washington DC, Georgetown University Press, 2013).

10 I am thinking, in particular, of the debate in the legal academy over the use of literary texts since JB White's *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston, Little, Brown and Co., 1973), in which the use of literature is seen as a valuable means of illuminating law by stimulating critical thought.

11 I Murdoch, *The Sovereignty of Good* (London, Ark Paperbacks, 1985) 87 f. I am grateful to Emily Kidd White for drawing this to my attention.

12 *ibid* 89.

This aspect of the article is, however, a secondary element, and one that I shall only hint at in addressing my primary concern.



Figure 1: Diego Velázquez, *Las Meninas*, Museo del Prado

III. Looking at *Las Meninas*

Let's turn to look at the painting itself. It's a complex painting. Here is *one* way of viewing what is going on, although this interpretation is contested.¹³ What we seem to see is a self-portrait of Velázquez, painting the king and queen of Spain, King Philip IV and his second wife Mariana of Austria, who are standing where we, the spectators, are placed. The king and queen are seen reflected in a mirror at the back of the room. Looking at the king and queen as they are being painted, and looking at us, the spectators, is a group composed from among the royal household—the extended 'family' of the royal couple; indeed, the painting was originally known by a title that reflected this 'family' element.¹⁴ The apparent centerpiece of this group is a young girl, the five-year-old Infanta, Doña Margaret Theresa, their daughter. She is with two of her ladies-in-waiting, or *meninas*, on either side of her. On the right of the painting is Doña Isabel de Velasco. On the left of the painting is Doña Maria Agustina Sariato, who is offering the Infanta something to drink, in a red cup on a silver tray. They form the main group. It looks like the Infanta is perhaps playing up, because the *meninas* look as if they are trying to surround her, dancing attendance on her, even perhaps trying to control her.

Outside this group, there is an additional collection of people. To the right of the painting as we look at it, there is what looks like a young boy, but whom we know is Nicolasito Pertusato, who is actually a dwarf. He is prodding what appears to be a sleeping dog, possibly playing with it, or trying to provoke it. Next to him, there is another dwarf; she is Maria-bárbola. Behind the two dwarfs are two other people, one apparently dressed in religious garb, Doña Marcela de Ulloa, the Infanta's chaperone (or *guardamujer*). She is talking to an unidentified soldier or bodyguard. And last, there is a courtier at the back of the painting, standing in the doorway. He is Don José Nieto Velázquez, the queen's chamberlain. So, what is it about 'human dignity' that causes me to feel I should resort to choosing art to help our understanding, and why does *Las Meninas* help in this regard?

13 On the variety of possible interpretations, see R Wicks, 'Using Artistic Masterpieces as Philosophical Examples: The Case of *Las Meninas*' (2010) 68 *Journal of Aesthetics and Art Criticism* 259.

14 It was originally known as *El Cuadro de la Familia*, then as *La Familia de Felipe IV*.

IV. Relating *Las Meninas* to Dignity

One of the current problems with ‘dignity-talk’, at least in some jurisdictions, is what has been termed ‘dignity-fatigue’, which I understand to mean that the current ubiquity of the concept is leading to its degradation. Dignity is now so commonplace that it ceases to have the power that it once had in pointing to important fundamentals. This degradation is important, not least because ‘human dignity’ has been identified as *a*, if not *the*, central principle on which human rights are based; if ‘dignity’ becomes degraded, then so too will human rights. Here, perhaps, is where other media can assist—in confronting the spectator directly, without the ‘corrupting’ effect of an overused word.

There are several further functions that *Las Meninas* might play initially in understanding the idea of dignity. One important debate in our current attempts to understand the concept concerns the *history* of the concept: there is an debate between those who see the use of human dignity in earlier times as having a significant degree of continuity of meaning with its use in later times, as opposed to those who see the history of dignity as one of significant discontinuities in meaning.¹⁵ Does dignity have a relatively similar meaning in different historical contexts? And what are the implications if it doesn’t? In thinking further about this debate, we might look at *Las Meninas* as a historical artifact and think about what it tells us about the evolution of the meaning of dignity in the Spanish court of the 17th Century, in much the same way as Lynn Hunt and Joseph Slaughter attempt to do with the concept of ‘human rights’ by examining novels.¹⁶

Second, we might look at *Las Meninas* not from the historical perspective but more broadly: as a way of articulating (representing?) something of universal significance that is true across space and time, helping us to understand how dignity is to be understood as a principle that transcends historical contingency. For example, a powerful understanding of dignity is that it expresses the idea that a person should be accorded respect due to

15 Contrast the approaches adopted by S Moyn, ‘The Secret History of Constitutional Dignity’ in C McCrudden (ed), *Understanding Human Dignity* (Oxford, Oxford University Press, 2013) and R Scott, ‘Dignité/Dignidade: Organizing Against Threats to Dignity in Societies after Slavery’ in McCrudden, *Understanding Human Dignity*.

16 L Hunt, *Inventing Human Rights: A History* (New York, WW Norton, 2008); JR Slaughter, *Human Rights, Inc: The World Novel, Narrative Form, and International Law* (New York, Fordham University Press, 2007).