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Dignity in Administrative Law: Judicial Deference in a Culture of Justification

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In this article, I argue that the right to dignity is more at home in administrative law than anywhere else. This argument goes against the grain of much constitutional scholarship and jurisprudence, where there is increasing interest in dignity as the foundational value, and of recent work in political philosophy that invokes dignity as the right of rights—the right that grounds all others. I defend the view that we should resist the temptation to make dignity the right of rights. Rather, we should see it as the way of understanding our relationship as rights-bearing individuals with the state. Put differently, the right to dignity is nothing more than the principle that individuals must be treated as equal before the law. Understood as such, dignity has a venerable presence in theories of constitutionalism. Dignity is not merely a synonym for equality, but also a useful, perhaps even an essential, way of making precise the right to equality before the law that is intrinsic to government according to law. My defence takes place in two contexts: the “wicked” legal system of apartheid South Africa and the “decent” legal system of contemporary Canada. These two contexts show in different ways why there is a core of equality—the specifically legal status of equal dignity—to the public law order of any law-governed state.

Dans cet article, je soutiens que le droit à la dignité correspond davantage au droit administratif qu'ailleurs. Cet argument va à l'encontre d'une bonne partie des connaissances constitutionnelles et de la jurisprudence, où on s'intéresse de plus en plus à la dignité comme valeur fondamentale, ainsi que du travail récent dans le domaine de la philosophie politique qui invoque la dignité comme droit suprême, celui sur lequel tous les autres sont fondés. Je défends l'opinion selon laquelle nous devrions résister à la tentation de faire de la dignité le droit suprême. Nous devrions plutôt la voir comme la façon de comprendre nos rapports avec l'État en tant qu'individus ayant des droits. Autrement dit, le droit à la dignité n'est rien de plus que le principe selon lequel la loi doit s'appliquer également à tous. Vu de cette façon, la dignité a une présence vénérable dans les théories constitutionnelles. La dignité n'est pas simplement un synonyme d'égalité mais aussi une manière utile, et peut-être même essentielle, de préciser le droit à l'égalité devant la loi qui est une caractéristique intrinsèque du gouvernement conformément à la loi. Ma défense porte sur deux contextes : le système judiciaire « pernicieux » de l'apartheid en Afrique du Sud et le « bon » système judiciaire du Canada contemporain. Ces deux contextes montrent, de manières différentes, pourquoi il y a un noyau d'égalité – le statut spécifiquement juridique de la dignité égale – dans l'ordre public de tout État régi par le droit.

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Introduction

My injection of “dignity” into a talk on administrative law may seem a crude lure to entice you into the swamp of boredom,¹ especially when my alternative title was: “The Healthy Boredom of Canadian Administrative Law.” However, this is not because a right to dignity is at home only in the constitutional law regime created by an entrenched Bill of Rights. Rather, to the extent that Canadian administrative law is boring, this is because the right to dignity is so entrenched in it that it is easy to forget not only its presence, but also that it animates the entire legal regime. The right comes into clear view only on those occasions when an official makes an individual’s life interesting in a bad way. In sum, the more boring the administrative law of a country, the healthier it is on the scale of dignity.

I will argue that the right to dignity is more at home in administrative law than anywhere else.² This argument goes against the grain both of much constitutional scholarship and jurisprudence,³ where there is increasing interest in dignity as the foundational value, and of recent work in political philosophy that invokes dignity as the right of rights—the right that grounds all others.

Note that dignity is a Roman law concept and in Roman law one’s dignity varied according to one’s official rank in society. For example, a punishment considered suitable for one class of society might not be considered suitable for another, because it would be an affront to the dignity of those in that class. Dignity thus might seem an unlikely basis for human rights, the rights that we supposedly have just because we are human beings. It becomes a more likely basis when we understand that one of the great transformative ideas in Western thought is that the law is no longer regarded as an instrument for sorting people into different classes of human beings, each with its legal and moral entitlements. Rather, human beings are regarded as members of just one class, and so every individual must be treated as a moral equal before the law.⁴

1 See Antonin Scalia, “Judicial Deference to Administrative Interpretations of the Law” (1989) Duke LJ 511, at 511: “Administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture”.

2 For a similar view from a leading US administrative lawyer, see Jerry L Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985) at 171 and c 6.

3 Most prominently in Canada in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.

4 See Jeremy Waldron, “Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley,” (1 September 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220> for an illuminating discussion of such themes.

There are some obvious and difficult problems. First, the law is still used to draw morally and legally significant distinctions between classes—for example, children and adults, citizens and aliens, prisoners and those who enjoy full liberty. Second, there are persistent economic and other inequalities that make precarious a claim to equal human dignity, and which the law is often complicit in either creating or sustaining. Nevertheless, Western societies are officially committed to respecting dignity. And to point out that our societies fail to live up to an ideal is not a reason for abandoning it but rather a call for reform. So the commitment does make dignity seem more plausible as a basis for human rights.

My own tentative view is that we should resist the temptation to make dignity the right of rights. We should see it as the way of understanding our relationship as rights-bearing individuals with the state, a specifically legal status most at home in administrative law. Put differently, the right to dignity is nothing more than the principle that individuals must be treated as equal before the law. Understood as such, dignity has a venerable presence in theories of constitutionalism.⁵ But, as I will now argue, dignity is not merely a synonym for equality but a useful, perhaps even an essential, way of making precise the right to equality before the law that is intrinsic to government according to law.⁶

Lucky to be bored

My own attraction to administrative law started as a student in apartheid South Africa precisely because administrative law there was much too interesting—a direct result of the country's bad health on the dignity scale. I will spend some time on this topic, although my main theme is the boring nature of Canadian administrative law, for my claim is that we can only understand why we are lucky to be bored by administrative law if we appreciate what occurs when it becomes too interesting.

Apartheid laws created and maintained a system of radical inequality between white and black South Africans.⁷ These laws were enacted by a

5 Dickey said that it was the second meaning of the rule of law that all are equal before it: AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: MacMillan, 1924) at 189. For the most developed account of the rule of law in these terms, see TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

6 To limit the right to dignity in this way is not to preclude dignity playing a different role in constitutional law, as a value that informs in a quite general fashion the judicial interpretation of constitutionally-protected rights. But I will not offer any opinion on that topic.

7 The basis of the argument in this section is set out in David Dyzenhaus, *Hard Cases in Wicked Legal*

Parliament that was, like the Canadian legislatures, modeled on the British parliamentary system, although there was the glaring difference that only whites had the right to vote. And just as in Canada prior to 1982, and the United Kingdom still today, there was no entrenched Bill of Rights that gave judges the authority to declare invalid laws inconsistent with rights. Legal challenges to the policy of apartheid laws could thus not challenge the laws themselves; they were confined to contesting the ways in which officials interpreted their authority to implement the laws.

Consider the *Group Areas Act 1950*, a statute that gave to officials the authority to set aside an area of South Africa for residence by one racial group and made it a criminal offence for members of other groups to reside there. The statute could not be challenged on the basis that it was invalid because of its violation of the right of all South Africans to equality since there was no Bill of Rights. However, when officials designated the biggest and best areas for white South Africans, their decisions could be and were challenged on the basis that the statute did not give officials the authority to act unreasonably by creating a situation of gross inequality for racial groups. In other words, unless the statute explicitly told officials that they did not have to respect the right of individuals to equal treatment in the way in which the law was administered, they were under a legal duty to respect that right.

This kind of challenge generally failed. On the few occasions when lower courts upheld the challenges, a higher court would overrule them. And a government that enjoyed the support of the great majority of its electorate could be counted on to use its grip on Parliament to ensure that the statute in question was amended to preclude further challenges, and that new statutes were drafted in ways that pre-empted similar challenges.

It might seem that the obvious conclusion to draw from the apartheid era is that a powerful government can use the law as an instrument of bad as well as good, to destroy the conditions necessary for human dignity as well as to create and sustain such conditions. But as a student in the late 1970s that conclusion did not seem altogether right to me. My intuition in this regard was largely responsible for a decision to remain a perpetual student of the law in a bid to explain why.

As I have indicated, administrative law provided the only basis in law for legal challenges to apartheid law. The principles of administrative law require

Systems: Pathologies of Legality, 2nd ed (Oxford: Oxford University Press, 2010).

in various ways that when officials decide how to implement the law that gives them authority to act in the name of the public, they make decisions that are reasonable in light of these principles. And it is an inherent feature of the judicial role that judges are entitled to review the officials' decisions to check that they are indeed reasonable in this light. Even when judges have no authority to declare a statute invalid, they have an authority—a jurisdiction—to declare when decisions are invalid because the officials have stepped outside of the limits of the authority given to them by Parliament. In cases like those about the *Group Areas Act*, judges thus had the opportunity to rely on administrative law principles to try to ensure that the administration of the law was to the greatest extent possible consistent with the right to dignity of all those subject to the law.

So while there is no denying that law can be used as an instrument of bad, it is also the case that law provides a basis for resistance to that use, more accurately, abuse of law. Something goes wrong, in short, when law is used to undermine or even destroy the conditions under which individuals can live their lives with dignity. Put positively, law is most appropriately used in ways that respect human dignity, which is why when it is not so used we think of the use as an abuse. Hence we have the potential for a different conclusion from the apartheid experience: there is an intrinsic connection between government according to law and human dignity.

You may think that the example of the wicked legal system of apartheid South Africa clearly refutes this different conclusion. It shows that far from it being universally the case that there is an intrinsic connection between law and dignity, the connection is entirely contingent. The example shows, in other words, that a lot depends on which judge hears a dignitarian challenge and also, more importantly, that in many legal orders the government may and will opt to remove the basis for the challenges by making its intentions more explicit in the laws it enacts.

But, as I will now argue, far from helping to block the conclusion above, the fact that a government has to ensure that the Parliament does something explicit in its statutes helps to support it, for the Parliament has to adopt one or both of two methods.

First, the statute says altogether explicitly that the official is authorized to act unreasonably, for example, by setting aside areas that grossly discriminate against a racial group. Second, the statute incorporates a privative clause, a provision that explicitly deprives judges of their jurisdiction to review the

decisions of the officials charged with implementing the statute.⁸ Such provisions can be very general; for example, they might simply say that judges are not to review in any way the work of the officials. Alternatively, the clause can provide a version of the first method by saying that judges may not review on particular grounds, including that the official acted unreasonably in the light of one or other principle.

How does this support the conclusion that there is an intrinsic connection between government according to law and service to human dignity? Recall that judges have an inherent jurisdiction to ensure that state officials stay within the limits of the authority delegated to them by statute. It is in the nature of delegated authority both that there are such limits and that there is a body independent of the delegates to check that they stay within those limits, lest they become, in the words of the New Testament, “a law unto themselves.”⁹

A Parliament that delegates authority to officials and announces that the authority is unlimited is guilty of two mistakes. There is a logical mistake about the nature of delegated authority. And there is a legal mistake about its task as a body that makes laws that permit those subject to the law to guide their behaviour. Judges have been able to use the logical error as a reason to sidestep a general privative clause, one that tells judges that they have no authority to review. They say in effect to Parliament: “You cannot both give officials authority to carry out a particular mandate and tell them that they may do as they please, so we will ignore that part of your message that makes nonsense of the whole.”

If one recalls the slogan that the rule of law provides us with something qualitatively different from the arbitrary rule of men, one can put this point in the following way: something goes wrong when a particular law seems to create an opportunity for completely arbitrary decision-making, so wrong that judges are entitled to ignore the problematic part of the law. The arbitrariness here is that the individual has no idea of what kind of decision to expect from officials. It is an affront to human dignity because it removes from those subject to the law the ability to plan their lives in advance, and the ability to

8 As I will point out in the next section, privative clauses are not necessarily designed to permit unbridled power; finality of decision-making and the certainty that comes with it are usually the ends Parliament is trying to achieve. Nevertheless, read literally, unbridled power is what they in fact achieve.

9 Romans 2:14: “For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves.”

plan one's life in this way is a necessary (though not a sufficient) condition for a life of dignity.

That Parliament makes both a logical and a legal mistake means that judges can correct the latter on the basis of the former. Things are different, however, when Parliament explicitly authorizes officials to act unreasonably or tells judges that they may not review official action on the ground that it is unreasonable. Here there is no logical problem in that officials are given a limited and an unlimited authority by the same statute. Rather, there is a statutory license, even an invitation, for officials to act unreasonably. The arbitrariness arises because officials are directly empowered to inflict specific indignities on individuals, to treat them as less than worthy of equal concern and respect. But because there is no logical mistake, judges have not been able to side-step this kind of statutory provision in the absence of a written constitution. Nevertheless, their inability in this regard does not undermine the conclusion that there is an intrinsic connection between government according to law and human dignity.

Judges are under a duty to interpret the law that delegates authority to officials in light of the principles of administrative law until the point that Parliament forbids them to do so. That they are under such a duty tells us that the law implicitly claims to affect the lives of its subjects in ways that respect their dignity. When the law explicitly disavows that claim, something goes wrong not just morally speaking, but also legally speaking. Those subject to the law will have considerable difficulty in understanding why they should regard the law as an authority over them, and not simply as a brute force with sufficient power to enforce its will. In a legal order that has no entrenched Bill of Rights, judges will not be able to come to the aid of aggrieved individuals. But the order is in trouble legally speaking, something that is easier to appreciate in seeing that such a legal order is legally in more trouble than a slave-owning society.

A slave-owning society uses the law as an instrument of extreme injustice because it denies a whole class of human beings the status of being human; it deems them to be non-human things, to have no moral status at all. Things are used by human beings in the pursuit of their own ends and are not therefore capable of having dignity.¹⁰ Such a society is in a great deal of moral trouble. But it will not be in trouble, legally speaking, as long as the class of

10 See Immanuel Kant, *Groundwork of The Metaphysics of Morals* in Mary J Gregor, ed and trans, *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996) at 84.

people who are deemed to be non-human is relentlessly consigned to a status in which no question arises of the capacity of an individual in that class to be, in Immanuel Kant's words, "a lawgiving member in the kingdom of ends."¹¹

"As long as the class of people is relentlessly consigned ..." is, it must be emphasized, a big proviso, for slave-owning societies, societies in which the institution of slavery is constituted by law, usually experience immense difficulty in maintaining the enslaved group in a status beyond morality and law and therefore beyond dignity.¹²

In contrast to a society that manages relentlessly to consign a group of people to the status of things, apartheid-era South Africa was a legal nightmare from the perspective of the rule of law, concerned with what it takes to maintain a society in good shape, legally speaking.¹³ And it was so because the ideal that all South Africans were equal before the law—the specifically legal ideal of human dignity—was maintained as an abstract ideal of the legal order throughout the period, even as the particular apartheid laws made it ever clearer that the animating political ideology of the ruling party was one of white supremacy.

The reality of that nightmare was lived on a daily basis by black South Africans, as well as the other "non-white" groups who were accorded privileges that put them somewhere in between black and white South Africans. But my focus is the way in which the nightmare played out in the law: in the convoluted attempts in statute law to ensure that the statutes would be interpreted in a fashion more consistent with the political ideal of white supremacy than with the legal ideal of human dignity; in the actual administration of the law by officials; and in the efforts by judges who took seriously the legal ideal of dignity to interpret the law in light of that ideal.

That the nightmare was played out within the law had the occasional advantage for those who used the law to challenge the political ideology of white supremacy. As I have suggested, sometimes the challenges succeeded. Indeed,

11 *Ibid.*

12 See e.g. WW Buckland, *A Text-Book of Roman Law From Augustus to Justinian* (Cambridge: Cambridge University Press, 1932) at 62–66. Consider also the difficulties our society experiences with maintaining non-human animals—cows, dogs, pigs, etc.—in the status of things, while giving them some legal protection against various kinds of bad treatment because we recognize that they share certain attributes with us human animals, including the capacity to suffer. See, however, George Kateb, *Human Dignity* (Cambridge, Mass: Harvard University Press, 2011) who argues that suffering is the concern of morality whereas dignity is something existential.

13 See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 270 and Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

in the 1980s a couple of challenges which went to the heart of apartheid policy were upheld by the highest court and were not overturned by the Parliament, perhaps because the government had come to the realization that the political ideology was no longer workable. A further advantage was that the rule of law was taken seriously by many of the leaders of the opposition to apartheid, including the leaders of the armed struggle, so that out of the experience of that era came a commitment to government according to law, with both an independent judiciary in place to ensure that the rule of law is maintained and an entrenched Bill of Rights.

The lesson for other countries is one I can now formulate somewhat paradoxically: in the political situation in which there is widespread and explicit abuse of the law to undermine the legal ideal of human dignity, we discover an intrinsic connection between government according to law and that ideal. That ideal is a somewhat thin or formal one. It is the right to dignity—a right to equal treatment in the way in which the law is administered, a judgment internal to the legal regime created by the law. It is thus not a right to be treated in accordance with an external standard of political equality, by which I mean only external to that particular legal regime.

I do not want to claim that there is a bright line distinction. Consider a challenge to the validity of a statute that limits pension benefits to the “opposite sex partners” of retired employees. If the statute says merely that the benefits go to the “partners of retired employees,” and those who administer the statute refuse to pay benefits to same-sex partners, an internal, administrative law challenge is possible. But if the statute explicitly says “opposite sex partners,” the legal challenge has to be external. It requires that some other legal document has primacy over that statute and lists a right to equality that makes possible that challenge.

The distinction is not a bright line one, first, because the two challenges are based on the same moral intuition—that discrimination on the basis of sexual orientation is wrong. Second, the point is not that the internal, administrative law challenge is uncontroversial politically while the external challenge is controversial. Those who suppose that discrimination on the basis of sexual orientation is perfectly justified will oppose both challenges.

But there is still a distinction because the internal challenge does not require a legal document as its basis that includes a right that might lead judges to conclude that a legislative decision violated some important principle. All it requires is that the political order is one of government according to law.

In addition, while the intuition behind the challenges is the same, it does not operate in the same way or have exactly the same content.

The internal challenge does not operate in the same way as the external one because a violation of the right to dignity is detectable only in the context of the actual administration of a legal regime, while the violation of the right to political equality happens as soon as a statute is enacted that either explicitly treats a group with less than equal concern and respect or that cannot be implemented without resulting in such treatment. It does not have the same content because the right to dignity has a much more limited scope than its more abstract relation of the right to political equality.

Because of these differences in operation and content, an assertion of a novel interpretation of the right to dignity is less controversial than an assertion of the right to political equality, which explains, I think, the political strategy of much same-sex marriage litigation. Even when there is a Bill of Rights that entrenches a right to equality, it is easier to succeed by initially building public support through successful internal challenges to the administration of particular legal regimes than by launching the more dramatic external challenges to the validity of explicit statutory provisions.

I wish to highlight two more features of the right to dignity before turning to Canadian administrative law. The right is to government according to law, which is the right to have the administration of the law conform to the rule of law, in particular to the principle of equality before the law. It is not therefore a right to participate in choosing the body of lawmakers. Thus, a political order could conform closely to the rule of law without being democratic, if what we mean by democracy is the principle—endorsed by any plausible conception of the ideal of political equality—that legislation should be made by the representatives of an enfranchised adult population.

Conversely, as we are about to see, a political order can conform to the democratic principle and be something of a failure when it comes to conformity to the rule of law. That the right to dignity can exist in the absence of conformity to the democratic principle, while the democratic principle cannot be a total failure when it comes to the rule of law is an issue worth further examination, a task I will come back to below.

Secondly, although the right to dignity does not entail the principle of democracy, the right to political equality does. And because the right to dignity is a kind of equality right, there is something jarring about a legal order that conforms to a considerable degree to the ideal of the individual as “a lawgiver-

ing member in the kingdom of ends,” but does not recognize the right of the same person to participate in the process of enacting the laws that provide the framework in which she make laws for herself. Even when the right to dignity of black South Africans was under continual assault, the fact that it was not entirely obliterated meant that there was a persistent tension within the policy of the ruling party between that right and the fact that ruling party was so intent on using law to deny political equality, including rights to participate in politics, to black South Africans.

It should by now be obvious why I think Canadian administrative law is boring and why that is a good thing. Canada is a society in which the democratic principle has been fairly fully observed for almost a century,¹⁴ and legislatures have made great strides towards achieving equality in many areas of political and social life. Many factors, however, make the picture less than rosy. Among them: that great strides do not mean anything like complete success; that there is significant backsliding as the centre of Canadian politics seems to shift ever rightwards; and, most important, that for Canada’s First Nations any claim about Canada’s healthy record is going to look very suspect when it comes to either political equality or dignity. But Canada, warts and all, is the healthiest society I have encountered on the dignity scale and its health in that regard is directly related to its health on the political equality scale.

I have argued thus far that the internal tensions within a “wicked legal system” illuminate the intrinsic connection between, first, law and dignity and, second, between dignity and political equality. I will now show that, even in a decent legal system, one in which there is a serious commitment to using the law to serve the ideal of political equality so that the background conditions for dignity are in place, it is no easy matter to realize the right to dignity.¹⁵

14 “Status Indians” were accorded the right to vote only in 1960 and certain categories of prisoner were denied the right to vote until the 1980s. See the entry on “Franchise” in the *Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Param=s=a1ARTA0003020>>.

15 Moreover, to the extent that there is backsliding from political equality, there will, as one would again expect, be echoes within administrative law, including, perhaps, in the procedural part of the Supreme Court’s decision on deference doctrine, which I discuss below. See *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 79–118, [2008] 1 SCR 190 [*Dunsmuir*]. In my view, and despite its denial in para 82, the Court retreated from the procedural advance in its decision in *Nicholson v Haldimand-Norfolk (Regional) Board of Commissioners of Police*, [1979] 1 SCR 311 [*Nicholson*], as developed in *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653, and that retreat is plausibly understood as motivated by a shift in the societal commitment to political equality.

The “public conscience” of the law

One neglected item in my account so far is the extent to which maintaining a legal order in good shape requires judges who have the right mindset. Recall that only a few of the apartheid-era judges were willing to uphold the kinds of rule-of-law challenge I described. But one should not conclude that as long as there are enough rule-of-law enthusiasts among the judiciary that the legal order will be in good shape. Besides the obvious and much more important consideration that a great deal depends on the moral character of those who make the law, a lot also depends on the judge’s conception of the rule of law.

Note that the majority of apartheid-era judges had their own conception of the rule of law. On their understanding, the rule of law is the rule of rules made by Parliament, and the content of the rules is worked out by tests that rely exclusively on factual considerations that make it plausible to say: “This what the legislature as a matter of fact intended.” This “plain fact” conception of the rule of law is consistent with the following understanding of the democratic principle: in a democracy the only legitimate mode of judicial interpretation is one that adopts plain fact tests, since only such a mode respects the authority of the representatives of the people to decide on the content of the laws. It thus differs from the mode of interpretation favoured by the minority of apartheid-era judges, since they tried to find a content to particular rules that was consistent with the right to dignity. For them the content of the law was in part determined not by factual tests, but by moral reasoning about what dignity requires.

But even if one favours a dignitarian conception of the rule of law, one has to take into account that such a conception has a contested content, and that one version of it creates vast problems for the administration of the law. This problematic version argues that the only way the state can serve human dignity is to make as little law as possible. The more law there is, the more decisions officials have to make about how to implement it; hence, the more potential there is for individuals to find that they are governed not in accordance with the rule of law but by the arbitrary decisions of particular officials. This conception of the rule of law fits snugly with a *laissez faire* view of economics.¹⁶

Something like the latter version of the rule of law dominated judges in the late nineteenth century and well into the twentieth. To them the admin-

¹⁶ For the most famous statement of this view, see FA Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994).

istrative state seemed lawless, a “new despotism,” as Lord Hewart said.¹⁷ Such judges had two options when they were called upon to review official decisions. They could declare that what the officials were doing was not amenable to judicial supervision. Alternatively, they could try to curb the officials by interpreting the law so as to produce results friendly to the judges’ *laissez faire* view of the world. Often these judges veered between the options from decision to decision.

Because the second option threatened to derail the legislative reforms that set up the administrative state, reforms that were often in the service of political equality, legislatures felt compelled to curb what they regarded as the subordination of the democratic will of the people to judicial arbitrariness. Hence, it became common to insert privative clauses into statutes in order to make it clear to judges that they were not to second-guess official decisions.

In this context, the point of the clause is not the ignoble one of seeking to give officials unbridled power in order to permit them to make decisions that serve the policies of a wicked regime. Rather, the aim is finality of decision-making and the certainty that comes with it. However, the effect is the same for when officials are totally shielded from review: the ideal of political equality becomes detached from the ideal of human dignity. The officials become a law unto themselves, an affront to human dignity because it removes from those subject to the law the ability to plan their lives.

The remedy for this problem is, as we have seen, for judges to use as the basis for correcting Parliament’s legal mistake its logical mistake in attempting to delegate an authority that is both limited and unlimited. However, if *laissez faire* judges do this, we get one problem substituted for another—judicial arbitrariness for official arbitrariness; and judges’ wanton circumvention of such clauses, on whatever basis, also affronts the right to dignity.

There is a way out of this conundrum, shown by Justice Ivan Rand in the Supreme Court in 1959 in *Roncarelli v Duplessis*,¹⁸ a case that arose because Duplessis, the premier and attorney general of Quebec, had ordered the head of Quebec’s Liquor Commission to revoke the liquor license for Roncarelli’s restaurant, thus causing Roncarelli’s bankruptcy. Rand J’s judgment provides the main ingredients of the solution to the unappealing choice between official and judicial arbitrariness and a more attractive version of a dignitarian conception of the rule of law.

17 Lord Hewart, *The New Despotism* (London: Ernest Benn Ltd, 1929).

18 *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*].

Roncarelli was a Jehovah's Witness and Duplessis's order was one shot fired in the Quebec government's war against the missionary efforts of Jehovah's Witnesses in Quebec. Roncarelli's sin in the eyes of Quebec officials was that he had posted bail for missionaries who had been charged with the crime of contravening municipal by-laws that had been put in place especially to outlaw their efforts. Rand, along with the majority of the Court, found that the revocation was illegal and thus beyond the authority of the Liquor Commission. That cleared the way to the success of Roncarelli's claim against Duplessis for damages resulting from the loss of his business.

Roncarelli faced two obstacles.¹⁹ First, Article 88 of Quebec's *Civil Code* seemed to bar his action for damages. It stated that no state official would be liable in damages "by reason of any act done by him in the exercise of his public function or duty" unless notice were given within a certain period, which Roncarelli had failed to do. Thus one of the dissenting judges²⁰ reasoned that even had there been an illegal act it was protected because of the procedural bar in Article 88. Second, the statute that gave authority to the Liquor Commission said that the Commission "may cancel any permit at its discretion," a provision that, as another dissenting judge reasoned, could be interpreted as giving to the Commission an unfettered or unlimited discretion to act; indeed, this judge said that the legislature had intended that the Commission be a "law unto itself."²¹

In sum, while the statute did not contain a privative clause—an instruction to judges not to review the decisions of the Commission—the combination of the procedural bar with the apparently limitless authority granted to the Commission seemed to have the same effect as such a clause for Roncarelli.

Rand's view of Article 88 was that Duplessis had not acted within the scope of his function but in a "private capacity," for Duplessis had used the "influence of his public office and power" to achieve a result that was altogether "private."²² Rand did not say much about the distinction between "public" and "private" at this point of his judgment, so that his response to Article 88 might look a little brisk. However, it seems clear that the distinction is informed by the preceding, more elaborate part of his judgment, in which

19 See David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill LJ 491 [Dyzenhaus I].

20 Fauteux J. For discussion, see Robert Leckey, "Complexifying *Roncarelli's* Rule of Law" (2010) 55 McGill LJ 721.

21 Cartwright J in *Roncarelli*, *supra* n 20 at 166–17.

22 *Ibid* at 144.

he dealt with the problem that the statute appeared to grant an unlimited authority.

First, Rand observed that economic life had become ever more regulated by law and that it was important to ensure that the officials in charge of the regulation served the purposes of the particular statute with “complete impartiality and integrity.” While it was up to the Commission to decide whether to deny or cancel a license, that decision had to be “based upon a weighing of considerations pertinent to the object of the administration.”²³

Secondly, Rand said that no discretion is unlimited for no statute “can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.”²⁴ For example, even if the statute does not forbid fraudulent or corrupt decisions, such decisions will be regarded as outside the authority of the official. Thus discretion

necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.²⁵

Finally, Rand said that if the victim of such a decision had no legal remedy, the result would be

that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.²⁶

Together, these three points contribute to a distinct and important conception of the idea of “public” as used in contrast to “private.” It helps us to understand why the greatest political philosopher to write in English, Thomas Hobbes, could talk of the qualities of the law as being such that it could be regarded as “the publique Conscience, by which [the individual] ... hath already undertaken to be guided.”²⁷

23 *Ibid* at 140.

24 *Ibid*.

25 *Ibid*.

26 *Ibid* at 141–42.

27 Thomas Hobbes, *Leviathan*, ed by Richard Tuck (Cambridge: Cambridge University Press, 1997) at 223 [Hobbes].

Individuals should accept the claim by the state to have authority over them, the claim that they should see their sovereign or his officials as making justified claims on them, when and only when the claims are put in general form in public laws, and the decisions of the officials as to how to implement the laws in particular cases comply with the dignity of the individuals subject to the decisions. For the decisions so to comply, they will have to be interpretable as consistent not only with the actual terms of the statutory mandate, but also with the principles of the rule of law.

Both constraints protect the right to dignity. The first does so by ensuring that the law can do its job of guiding individuals in advance of their own decisions. The second does so by ensuring that the guidance is intelligible to each individual as “a lawgiving member in the kingdom of ends.” The second constraint also compensates for the fact that statutory guidance can never be total, and is sometimes left deliberately vague in order to permit officials to develop and adapt the law to changing circumstances. It protects dignity in such situations by ensuring that officials act in accordance with both a justifiable interpretation of the statute and the relevant principles of the rule of law. Thus while individuals in such situations cannot predict the exact content of the decision, they may expect that the content will bear a rational relationship to the purposes of the statute of the sort *Rand* describes and that it will be consistent with the rule of law.

These constraints do not, however, presuppose a commitment to any ideology about how an economy is best organized, let alone a *laissez faire* one. It is for Parliament, the lawgiving body of the people, to make decisions about such issues. Nor do the constraints manifest any hostility to the fact that a vast administrative state has come into being. All they do is take seriously the fact that the decisions are expressed in a particular kind of public form—the legal form—and thus have to be implemented in accordance with both the actual terms stated in the law and with the requirements implicated in the commitment to governing through law.

It took exactly 40 years for the Supreme Court to elaborate the implications of these ideas in three further decisions—two in 1979 and the third in 1999.²⁸ I will now set out this elaboration and the way in which it has recently gone awry.

28 *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 177 [*Canadian Union of Public Employees*]; *Nicholson*, *supra* n 17; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

Three steps forward, one step back

These three decisions elaborate the ideas in the central points from Rand's judgment: first, judges must defer to official interpretations of their legal mandate as long as these are reasonable, meaning adequately justified by reasons. Second, all delegations of authority to officials are limited both by the explicit law of the statute and by rule-of-law principles that are either stated explicitly in legal documents or are part of the unwritten tradition of the legal order.²⁹ Third, the rule of law is a constitutional fundamental so that its principles can only be overridden by express language.

The first decision responded to the problem that a privative clause seems to amount to express language to exclude review and thus accountability to the rule of law, but not by sidestepping the provision.³⁰ Rather, it understood the clause in the statute not as a negative prescription against any review but as a positive instruction to defer.³¹ It thus staked out a middle ground between the bad options of judicial arbitrariness and official arbitrariness. On the one hand, the Supreme Court insisted on official accountability to the law, including the principles of the rule of law. On the other, it required that judges not second-guess the officials as long as their decisions were interpretable as reasonable understandings of their legal mandate.

In a paper on this and subsequent decisions, I argued that this kind of deference could not be understood according to the primary dictionary meaning according to which one submits to the judgment of another. A stance of "submissive deference" would be appropriate only if the privative clause were understood literally, according to a plain fact interpretation, as excluding altogether the judges' jurisdiction to review. Rather, we need the secondary meaning that deference requires not submission but respect: "deference as respect" requires that judges pay "a respectful attention to the reasons offered or which could be offered in support of a decision."³²

29 *Nicholson*, *supra* n 16, put in place the basis for this proposition by providing that procedural protections applied to exercises of discretion that had hitherto been regarded as unreviewable on this basis. As I suggest above, in *Dunsmuir*, *supra* n 17, the majority of the Supreme Court might have retreated from this position.

30 *Canadian Union of Public Employees*, *supra* n 30.

31 *Ibid* at 235–36.

32 David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279, at 286.

This formulation was adopted in the third decision—*Baker*—by Justice Claire L’Heureux-Dubé.³³ In addition, she held that where an official decision affects a legally protected interest, those affected are entitled to more than an opportunity to present their side of the case to the official; they are also entitled to the reasons from the official that purportedly justify the decision.³⁴

The Supreme Court has on several occasions repeated its commitment to deference as respect, including in *Dunsmuir*, a 2008 decision in which it attempted to restate and refashion the Canadian approach to judicial review.³⁵ When the highest court of the land pays one the compliment of explicitly accepting one’s position, it might seem churlish to complain that the commitment is less than wholehearted. But since the costs of a partial commitment seem to me to be high, I will register exactly that complaint.³⁶

In the paragraph in which the quoted formulation is to be found, I framed the formulation with, on the one hand, the claim that submissive deference is the stance required by a plain fact understanding of the privative clause. Hence, if one were to reject that stance, one had to reject also the plain fact conception of the rule of law that lay behind it. On the other hand, I suggested that one of the advantages of deference as respect is that it is explicitly committed to the value of equality. I still stand by the claim in regard to the plain fact conception. But I wish to refine the suggestion about equality, in keeping with my argument, so that the commitment is understood to be in a direct relationship with dignity, but only an indirect one with political equality. That refinement does not remove political equality from the radar screen of administrative law. Rather, it moves it to the side since the relationship goes from administrative law through the right to dignity to political equality. I will start with the claim.

The plain fact conception of the rule of law is, as I have suggested, a plausible understanding of the democratic principle: the law should be made by exclusively by the people’s representatives in Parliament, and the content of their judgments should be transmitted back to the people in such a way that decisions about what the law requires faithfully reflect the content of what the

33 *Baker*, *supra* n 30 at para 65.

34 *Ibid* at para 43.

35 *Dunsmuir*, *supra* n 16 at para 48.

36 I am greatly indebted in what follows to Mark D Walters, “Respecting Deference as Respect” (Paper delivered at a Symposium on *Dunsmuir*, Faculty of Law, University of Toronto) [unpublished], and to his magisterial “Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law” in Christopher Forsyth et al, eds, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) 300.

legislature in fact decided. But while plausible, it also leads to a very serious problem, already partially identified.

In a complex administrative state where many officials have quite open-ended mandates to implement and develop the law of their regime, the plain fact conception substitutes rule by officials for rule by Parliament. We get the spectre of official lawlessness, which is only compounded if a privative clause attempts to shield the officials from judges. The point is not that officials will run amok without judicial supervision. Rather, it is the point much discussed in recent literature on “Republicanism” that the slave with a benevolent master is as subject to domination and thus to arbitrary power as the slave whose master is malevolent. A benevolent dictator is still a dictator.³⁷

But if we can see that problem, why should we think parliamentary dictatorship acceptable, albeit for limited periods so that we can vote in a new dictator if we do not like the old? The mistake here is in supposing that a parliamentary legal order amounts to serial dictatorship. However, just that view sometimes has a curious hold on judges, including the majority of the Supreme Court in *Dunsmuir*. For the majority asserted that there exists an “underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.”³⁸

Here the majority suggests that there is some plain fact in the content of Parliament’s laws, determinable outside of the interpretative context constituted by the principles of the rule of law. But there is only such a tension if one supposes that it is possible to have parliamentary sovereignty without the rule of law. And there is a compelling argument that parliamentary sovereignty requires the rule of law.³⁹

If Parliament is to be sovereign, the supreme lawmaker, it has to establish its supremacy over the executive, which requires an independent judiciary in order to ensure that the officials who make up the executive and who claim the authority of law for their decisions are in fact acting in accordance with the law. The supremacy of the supreme lawmaker is no more than the suprem-

37 For discussion, see Dyzenhaus I, *supra* n 21.

38 *Dunsmuir*, *supra* n 16 at para 27.

39 In my view, this argument is implicit in Dicey; see David Dyzenhaus, “The “Organic Law” of *Ex Parte Milligan*” in Austin Sarat, ed, *Sovereignty, Emergency, Legality* (Cambridge: Cambridge University Press, 2010) 16, 53–54.

acy of law and thus of the rule of law. *Legal* subjects are subject to the rule of a positive framework of public laws.

In contrast, dictators may act as they please, malevolently or benevolently, as the whim takes them. It follows that even if one person is the sovereign, the fact that the sovereign is committed to ruling through law by itself distinguishes the situation of legal subjects from the situation of those subject to the whims of a dictator. That is why it is possible to have the rule of law in the absence of democracy. So parliamentary sovereignty is valuable only in part because it means that we are subject not to the arbitrary will of one or many individuals. The other part is that in a parliamentary legal order, representatives of an enfranchised adult population make law in accordance with democratic principles. But they must make law—establish a system of government according to law; and judges follow their duty to the parliamentary sovereign by interpreting particular provisions in statutes as though they were intended to be part of a system of legality. To do otherwise, Hobbes tells us, is a great insult to the sovereign.⁴⁰

A parliament may introduce a tension into the legal order by relying on its place as supreme lawmaker to stipulate expressly that officials are to be a law unto themselves. But there is a world of difference between recognizing that fact and supposing, as did the Supreme Court, that there is an *underlying* tension between the “foundational democratic principle” and the rule of law. The only underlying tension is in the Court’s own reasoning.⁴¹

That same tension manifests itself in the Court’s treatment of deference. Canadian deference doctrine had, by the time of *Dunsmuir*, become quite complex. There were three different standards—correctness, reasonableness *simpliciter*, and patent unreasonableness. The Court had set out a list of criteria for determining which was appropriate. But it seemed to many that these criteria were so malleable that judges could avoid having to defer either by turning the issue into a correctness one if they so chose, or by hiding a judgment about correctness behind a smokescreen of reasonableness.⁴² In addi-

40 Hobbes, *supra* n 28 at 194.

41 It is true that the majority’s preferred narrative in *Dunsmuir*, *supra* n 16, is that they reject the plain fact conception and that Parliament cannot render executive decisions immune from review (at para 52); the best Parliament can do is signal deference as respect (by way of a privative clause), and that this is totally justified because of the rule of law. But the narrative that relies on a plain fact conception of how to interpret legislative intent undermines that narrative.

42 Precisely the second charge was made against the majority of the Court by the dissenting judges in a decision prior to *Dunsmuir*, *supra* n 16; see *CUPE v Ontario (Minister of Labour)*, [2003] 1 SCR 539 at para 46. Bastarache J, who wrote the dissenting judgment, went on to co-author the

tion, lawyers became understandably preoccupied with the issue of how to convince courts to adopt the standard most likely to lead to the outcome that favoured their clients, which increased the complexity and thus the expense of litigation.

In *Dunsmuir*, the majority held that henceforth there would be only two standards:⁴³ correctness and reasonableness. Generally, the issue of which was appropriate could be ascertained by checking to see whether it had been settled by previous jurisprudence, but if it had not, a court would have to determine which of the two standards was appropriate.⁴⁴ Factors that would indicate that reasonableness was the appropriate standard would include the presence of a privative clause, a “discrete and special administrative regime,” and the “nature of the question of law.”⁴⁵ In the last regard, the majority said that correctness review is always appropriate for an allegedly confined list of questions including constitutional law, the common law, “general law,” statutes other than the official’s own statute, and a category called “true jurisdiction.”⁴⁶

The majority suggested that “the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.”⁴⁷ In addition, it held that deference is appropriate when the statute does not dictate “one specific, particular result,” in which case there would be a range “of possible reasonable conclusions”⁴⁸ between which the official may choose.

Both of these statements presuppose the plain fact conception of the rule of law. As with the claim about underlying tension, the holdings assume that there is a fact of the matter about legislative intent that is determinable outside of the interpretative context constituted by rule-of-law principles. In order: there is a fact about what standard Parliament intended the courts to apply; about whether the statutory provision admits of only one meaning; and, if it does not, about whether the meaning arrived at by the officials falls within the range that judges should consider reasonable.

majority judgment in *Dunsmuir*. In *Dunsmuir*, Binnie J, who wrote the majority judgment in that earlier case, wrote a minority opinion in which he sought to preserve, to the extent possible, his jurisprudential approach.

43 *Dunsmuir*, *supra* n 16 at para 45.

44 *Ibid* at para 62.

45 *Ibid* at para 55.

46 *Ibid* at paras 58–61.

47 *Ibid* at para 31.

48 *Ibid* at para 47.

This array of claims is confusing. On the one hand, the majority could mean that a court should first determine what standard Parliament intended. It follows by definition that there is only “one specific, particular result” if a court concludes that Parliament intended correctness and that there is a range of reasonable results only if a court concludes that Parliament intended reasonableness.

On the other hand, the majority could mean that a court should conclude that a reasonableness standard is appropriate if and only if it first concludes that the statutory provision in question does not in fact dictate “one specific, particular result.” In contrast, if there is one such result (that is, if the judges suppose that they are able to arrive at a conclusion about what the law requires), the standard is correctness. And this last point raises particular problems.

Judges will usually presume that the law does provide an answer to the questions that are raised about its requirements. This is a regulative assumption of reasoning about the law for all legal officials charged with interpretation of the law, since they must seek to give an answer that is fully justified by legal reasons. As a result, if judges adopt a stance that permits them to ask whether there is such an answer in abstraction from the answer the official gave, so that they will consider deferring only if they cannot themselves determine an answer, they will rarely if ever find that they should consider deferring.⁴⁹

Far from simplifying and clarifying Canadian deference, the *Dunsmuir* majority thus perpetuates a problem that has plagued the Court since 1979. It has never managed to screw its courage to the sticking place of affirming once and for all that legislative intention is not the product of some plain fact test. To do that, the Court would not only have to resist the pull of declaring its allegiance to the plain fact conception of the rule of law. It would also have to embrace with all of its implications the idea that legislative intention is a normative construct—an interpretation of the statute in light of its purposes, including its more abstract purpose to be part of a scheme of public law that regulates the lives of legal subjects in ways that are intelligible to them as consistent with their right to dignity.

Macbeth’s decision to take his wife’s advice to stop dithering and reach the sticking place of his convictions was followed by disastrous consequences.

⁴⁹ For a similar point, see Scalia, *supra* n 2 at 521.

And it might seem that disaster also looms if the Canadian Court jettisons its plain fact tool kit, since that entails an assertion of its supremacy over Parliament in public law, even in cases where no constitutional question arises from either the *Charter of Rights and Freedoms* or the entrenched division of powers in the 1867 Constitution. However, as I have argued, the Court would be asserting not its supremacy, but the supremacy of the system of public law that Parliament has made. It would then be in a position to accept the implications of deference as respect—of its duty to respect officials' decisions about how to understand and implement their statutory mandate, as long as the decisions are adequately justified by the reasons the officials gave.

Deference in the culture of justification

Courts who take seriously the idea of deference as respect start their inquiry not by looking for a fact about legislative intent, whether about the standard of review or about the meaning of a particular statutory provision. Rather, they inquire into the relationship between the official's reasons and his or her conclusion. There is thus only one standard for all decisions—reasonableness—since jettisoning the plain fact conception requires jettisoning the correctness standard.

On the one hand, then, deference as respect may appear less intrusive than the *Dunsmuir* doctrine. But, on the other hand, it may appear more intrusive since an inquiry into whether the reasons adequately support the conclusion cannot avoid considering whether the official adequately weighed the reasons. Recall that Rand said that while it was up to the Liquor Commission to decide whether to deny or cancel a license, that decision had to be “based upon a weighing of considerations pertinent to the object of the administration.” One does not weigh a pertinent consideration merely by mentioning it.

Consider an official who is asked to stay a deportation order on “humanitarian and compassionate grounds” and who is under a duty to take into account the best interests of the children of the woman subject to the deportation order. If the official decides that the person should be deported despite the fact that her Canadian children will inevitably be affected by the deportation, he will have to show why the reasons in favour of deportation outweighed the impact on her children's interests. A court cannot scrutinize the reasons for adequacy without evaluating whether pertinent considerations were appropriately weighed, especially when the official's legal duty is to give a particular consideration—the best interests of the child—extra weight.

This example sets out a legal issue central to *Baker* and the Supreme Court's reasoning that the official's refusal to stay the deportation order was unreasonable hinges in on the inappropriate consideration that the official gave to the interests of Baker's children. In contrast, the Court in *Suresh*, decided in the wake of 9/11, was captivated by the idea that when it comes to national security, state officials are omniscient; and so the Court proclaimed a taboo on reweighing. That taboo is now repeated mantra-like in its decisions on deference doctrine.⁵⁰

The rationale for the taboo is that to reweigh is to review on the merits, to use the correctness standard, and thus reweighing is inappropriate if the legislative intent is that the court should deploy a reasonableness standard. However, as we have seen, that rationale presupposes that there is a plain fact as to legislative intention. Moreover, to the extent that the taboo is impossible to observe, its repetition at the same time as a court engages in reweighing makes that court look bad. It will seem to be playing the old judicial game of cloaking correctness review with reasonableness rhetoric. Even worse is that when the taboo is taken seriously, the duty to give reasons set out in *Baker* is largely gutted of its substantive point of ensuring the dignity of the individual affected by the decision. As L'Heureux-Dubé J suggested, the normative basis of the duty is the dignity of the individual affected by the decision.⁵¹

The rule of law has to be more than the fiat of officials if it is to be explained in terms of a right to dignity. It establishes what during South Africa's transition to democracy an eminent public lawyer called a "culture of justification": "a culture in which every exercise of power is expected to be justified; in which leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command."⁵² For officials to play their role in such a culture, they have to offer not only reasons to those affected by their decisions, but also reasons that do adequately justify their decisions. When, for example, an official makes a decision that negatively affects an individual's fundamental legal right, the official must regard that individual as someone to whom a duty is owed to justify why the right is legitimately limited. The individual is not going to be happy with the substantive outcome of the decision. But he or she will be able to distinguish

50 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 37, 1 SCR 3.

51 *Baker*, *supra* n 29 at para 43.

52 Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 32.

between that feeling and the feeling that either the way the official decided or what the official decided violated his or her right to dignity.⁵³

The subjective perception is important here both because it alerts us to an important distinction in the normative structure of our thought and because it is that perception that will trigger further action. However, the perception is not determinative. The question for a reviewing court is not whether the individual *felt* treated in a fashion inconsistent with her dignity, but whether she was *in fact* so treated.⁵⁴ And that she was so treated is important because there is a connection between appropriate process and substance.

Recall that individuals are treated arbitrarily when they are subject to the rule of officials who are a law unto themselves even when the officials make decisions that happen to be substantively good. A benevolent dictator, to repeat, is a dictator. But if all the official has to do to comply with the rule of law is to go through some cosmetic exercise that makes no difference to the substance of the decision—for example, ticking the box labelled “Considered best interests of the children”—the individuals subject to the official’s power are no better off.

There has to be something to procedural duties that makes it more likely the decision-making exercise will result in decisions that are actually justified, for while many of the principles of the rule of law seem more procedural than substantive in nature, in that they pertain to the process of decision-making without measuring the decision against some external standard of political morality, they do condition the substance of the law.⁵⁵ Indeed, even the specifically legal right to dignity—the principle that individuals must be treated as equal before the law—is in a sense procedural. As we have seen, when dignity

53 If I am dismissed from my job because my employer thinks that I have been performing badly whereas I disagree, I will, of course, be unhappy. But my unhappiness is quite different from my sense of affront if I am dismissed without being given an opportunity—a hearing—to contest that judgment. It is also different from my sense of affront if I suspect or know that the real reason I was dismissed is that my employer had discovered that I am gay. When I am denied the opportunity to be heard, the decision is procedurally arbitrary. When I am dismissed because I am gay, the decision is substantively arbitrary. While curing the procedural problem is no guarantee that the decision will turn out not to be substantively arbitrary, it is the best hope that we have. My employer might want to get rid of me because I am gay, and might find enough problems in my record at work to make a case for dismissing me on that basis, in which case the hearing and reasons provided might make me even more affronted. But I will have to take into account that my record did provide the basis for that case.

54 See Sophia Reibetanz Moreau, “The Wrongs of Unequal Treatment” (2004) 54 UTLJ 291.

55 Consider the principle that one should get a hearing prior to a decision that affects an important interest, or the principle that the decision-maker should not be biased.

is in issue, equality is evaluated by standards internal to the particular legal regime, and not by reference to some conception of political equality.

The duty to give reasons is of particular importance here. It provides the lens through which compliance with the principle of equality before the law is evaluated. More generally, reasons provide to someone adversely affected by a decision a justification for the exercise of the coercive power of the state against him or her. They are a concrete manifestation of the official's view of how both the relevant procedural considerations and the substantive policy of the law bear on the particular decision. Hence, the question for the judge in a culture of justification is: "Given those standards, has the official shown through his or her reasons that the individual has been treated in a way respectful of dignity?"

What is it that gives rise to the antecedent likelihood that a procedurally sound decision will also be substantively sound? The explanation is not simply that the principles of the rule of law help governments to exercise power effectively. Other ways of exercising power can be more effective, depending on what those with power want to achieve, which is why tyrants always want to keep open the option of behaving in an arbitrary fashion. Moreover, if the effective exercise of power were our concern, we would not take our bearings from efficacy as such. For our question is the extent to which the principles of the rule of law can be explained as helping the effective exercise of power through law.

To the extent that efficacy is a concern, it is so because effective guidance from the law is part of what it takes to treat legal subjects in a way that respects their right to dignity. But it is only a part, since it is also the case that the guidance has to be interpretable in a way that respects the right to be treated with dignity. A command that puts me in a condition of slavery, totally subjected to my master, makes it apparent how my conduct is to be guided—by my master's whims. But the command radically violates my right to be treated as "a lawgiving member in the kingdom of ends."

I have argued 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. An entailment of this argument is that there is a core of equality—the specifically legal status of equal dignity—to the public law order of any law-governed state. While this entailment might seem counterintuitive given the experience of wicked legal systems, my research suggests that this kind of experience supports the entailment. A government

that wishes to eliminate this core of equality will find that it has to exercise power through means other than law. As the apartheid experience also suggests, such a government will have a wider political program, one that includes an assault on the right to political equality of a particular group. The assault will introduce tensions into the internal administration of the public law of the system as long as the core equality of the right to dignity is preserved, so that the core has to be eliminated if the assault is to succeed totally. That tells us that there is an intrinsic connection not only between law and the right to dignity, but also between law and political equality, though the former is direct and the latter indirect.

This explains why the initial formulation of deference as respect being explicitly committed to the value of equality has to be refined, since the commitment is directly to dignity, and only indirectly to political equality. A further modification, implicit in the argument so far, is to my claim that deference as respect requires “a respectful attention to the reasons offered or which could be offered in support of a decision.” That claim was made before the Supreme Court had found a duty to give reasons. And with that duty in place, all that the judges need scrutinize are the actual reasons. But those reasons must justify the interpretation the officials have of the law when they claim to be acting according to law.

The judges on review must not ask the question required by the correctness standard, a question that would permit them to first work out the answer and then check to see whether the official’s answer coincided without any need to inspect the reasons offered by the official. They must ask whether the official’s reasons do justify the conclusion—and that cannot be done, as I have suggested, without considering whether the official gave appropriate weight to important factors. That will lead to more or less intense scrutiny of the reasons, depending on the nature of the interest at stake. But even when the interest is a fundamental one, and so deserving of the most intense scrutiny imaginable, the issue remains whether the official justified the conclusion and not what the judge would have concluded in the absence of the official’s reasons.⁵⁶

Hence, the thought that deference as respect might be either less or more intrusive than *Dunsmuir* doctrine is misleading, for deference as respect requires of officials that they ensure that their reasons do justify their conclusions and of judges that that issue becomes their sole concern on review. If the inherent right of every individual to dignity presupposes a legal culture “in

56 See *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador*, 2011 SCC 62.

which every exercise of power is expected to be justified,” the legal decisions that most affect our lives, those of state officials, must be made in the spirit of that culture. It follows that judges have to enter into that same spirit, which requires them to drop the plain fact conception of the rule of law and its corollary that judges have a monopoly on interpretation of the law.