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## Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)

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# LAWYERS AS UPHOLDERS OF HUMAN DIGNITY (WHEN THEY AREN'T BUSY ASSAULTING IT)

David Luban\*

*David Luban argues in this lecture that the moral foundation of the lawyer's profession lies in the defense of human dignity—and the chief moral danger facing the profession arises when lawyers assault human dignity rather than defend it. The concept of human dignity has a rich philosophical tradition, with some philosophers identifying human dignity as a metaphysical property of individuals—a property such as having a soul, or possessing autonomy. Luban argues instead that human dignity is a relational property of “the dignifier” and “the dignified,” emphasizing that assaulting human dignity humiliates the victim. Lawyers honor the human dignity of others by protecting them against humiliations, and defile that dignity by subjecting them to humiliations. The lecture develops these ideas through four traditional issues in legal ethics: the right of criminal defendants to an advocate, the duty of confidentiality, paternalism of attorneys toward their clients, and pro bono service.*

[T]he many grounds for the excellence of human nature reported by many men failed to satisfy me—that man is the intermediary between creatures, the intimate of the gods, the king of the lower beings, by the acuteness of his senses, by the discernment of his reason, and by the light of his intelligence the interpreter of nature, the interval between fixed eternity and fleeting time, and (as the Persians say) the bond, nay, rather, the marriage song of the world, on David's testimony but little lower than the angels. Admittedly great though these reasons be, they are not the principal grounds, that is, those which may rightfully claim for themselves the privilege of the highest admiration.

Pico della Mirandella, *Oration on the Dignity of Man* (1486)<sup>1</sup>

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\* Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center. This Article originated as the 2004 Paul M. Van Arsdell, Jr. Memorial Lecture on Litigation and the Legal Profession at the University of Illinois College of Law. I am grateful to the organizers of the Van Arsdell Lecture for inviting me, and also to the Van Arsdell family. Special thanks as well to Heidi Hurd, Michael Moore, Richard Painter, and Charles Silver for comments on this paper.

A few months ago I had dinner with a litigation partner from a famously combative Washington law firm specializing in white-collar defense and the pugnacious representation of politicians and lawyers in trouble. She asked me what I was working on, and I told her that I have been thinking about the concept of human dignity and its connection with law. I halfway expected the neutral, wary response that practical people often have toward rarefied philosophical issues—the cautious response appropriate when your dinner companion explains that he has been thinking a lot lately about the Good, the True, and the Beautiful. Instead, she smiled and replied, “That’s extremely interesting to me, because defending human dignity is what I do in my job every single day.”

Her response came spontaneously and without a moment’s hesitation. It seemed like a remarkable thing to say. After all, “defending human dignity” is an awfully abstract, intellectualized way to describe work that is as concrete and sordid as the penitentiaries my friend keeps her clients out of. Her adversaries would hardly use the phrase “defending human dignity” to describe the pugnacious litigation tactics her firm is famous for. I expect, however, that many lawyers, and not just litigators, would agree with her. And, on reflection, I have come to recognize that it is precisely concern for human dignity that lies at the bottom of arguments in legal ethics that have occupied me for more than twenty years. Today I want to revisit some of these arguments, and use them to test a pair of working hypotheses: First, that upholding human dignity is what makes the practice of law worthwhile; and second, that adversary excesses are wrong when they assault human dignity instead of upholding it.

Of course, the concept of human dignity raises profound puzzles for a philosopher, and we cannot simply utilize the phrase without undertaking to study what it means—if indeed it means anything at all. Like Pico della Mirandella five centuries ago, the grounds for human dignity reported by many people (including, by the way, Pico della Mirandella) fail to satisfy me. The concept of human dignity sprouts from theological roots in the Abrahamic religions. The familiar grounds for asserting human dignity are that humanity is created in God’s image, that humans have dominion over the rest of nature, or that man consists of spirit. All of these are essentially articles of faith beyond proof or disproof, and I do not believe they can be rationally reconstructed into secular counterparts. Rationalist proofs that we have immortal souls have not survived the philosophical criticisms of Kant, Nietzsche, or, for that matter, Aristotle. In any event, immortality would confer dignity on the soul only if the soul already possessed dignity on other grounds: Immortal cockroaches would have no more dignity than their cousins who are not immortal, but merely very hard to get rid of. And, unfortunately, the pic-

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1. Pico della Mirandella, *Oration on the Dignity of Man*, in *THE RENAISSANCE PHILOSOPHY OF MAN* 223 (Ernst Cassirer et al. eds., Elizabeth Livermore Forbes trans., 1948) (1486).

ture of the human psyche emerging from scientific psychology is more humiliating than it is dignifying.<sup>2</sup> More controversially, the philosophical identification of human dignity with autonomy is, or so I shall argue, wrongheaded.

It seems to me that all these efforts fail because they try to zero in on some metaphysical property of humans that makes us the crown of creation, the paramount mortal links in the Great Chain of Being. I suspect that human dignity is not a metaphysical property of individual humans, but rather a property of relationships between humans—between, so to speak, the dignifier and the dignified. To put it another way, human dignity designates a *way* of being human, not a *property* of being human. It may even be the name of more than one way of being human. But that is jumping the gun. At this point, I want to approach the question of defining human dignity modestly and inductively by looking at several examples of arguments that claim to connect what lawyers do with the defense of human dignity.

Admittedly, there is something rather absurd about approaching a great and deep philosophical question by peering into the corridors of law firms. But I take my litigator friend very seriously. There is nothing absurd about connecting human dignity with legal personality and legal rights, and it is legal personality and legal rights that lawyers construct and demolish. By examining arguments about what lawyers do, I hope to provide some sense of what the term “human dignity” means, and in that way tease out a picture of what lawyers, and those who study them, mean when they invoke human dignity.

I have a more ambitious agenda in sight, however, than examining a handful of arguments about lawyers. The notion of human dignity plays something of a cameo role in discussions of legal ethics, although I shall be arguing that it is a lot more central than many writers appreciate. However, human dignity plays an enormous, central role in the contemporary law of human rights. All of the most vital documents in the twentieth-century law of human rights give human dignity pride of place. The U.N. Charter’s Preamble states the aim of reaffirming “faith . . . in the dignity and worth of the human person . . . .”<sup>3</sup> Article 1 of the Universal Declaration of Human Rights begins, “All human beings are born free and equal in dignity and rights.”<sup>4</sup> The Draft Charter of Fundamental Rights of the European Union begins with an Article 1 entitled “Human Dignity” that reads simply: “Human dignity is inviolable. It must be re-

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2. It is a picture of creatures who, over a wide range of cases, unconsciously falsify reality and change their own values whenever that is necessary to maintain an essential belief in their own inherent goodness. I summarize and analyze relevant results in experimental social psychology in David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279 (2003) and David Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE* 94 (Deborah L. Rhode ed., 2000).

3. U.N. CHARTER pmbl.

4. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 1, at 71, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

spected and protected.”<sup>5</sup> And Principle VII of the Helsinki Accords states a philosophical proposition: that all human rights “derive from the inherent dignity of the human person.”<sup>6</sup>

The phrase “inherent dignity of the human person” is, of course, a vague one, and the framers of these instruments intentionally left it vague. When the Universal Declaration was drafted, it seemed initially like a good idea to include philosophers and theologians from all over the world to help clarify its basic concepts. Predictably, however, they fell into sectarian squabbling. The drafters ended by negotiating language that finessed the metaphysical and theological questions at issue.<sup>7</sup> The result was a document that remains strategically silent about what key terms like “human dignity” are supposed to mean. Such silence is strategic because it allows individuals to provide their own definitions of these terms.

Is this the counsel of wisdom? Not entirely, and the development of human rights doctrine shows us why. A concept that can mean anything means nothing, and it seems to me that the invocation of human dignity in human rights documents does no conceptual work in explaining what rights everyone ought to have. If anyone denies, for example, that the rights to free speech or paid maternity leave are genuine human rights—and both of these appear in major human rights instruments despite the fact that some nations deny their validity—how can the case be argued against or defended if human rights are supposed to derive from human dignity, even though the concept of human dignity has intentionally been bled of content? The answer, of course, is that the case gets argued politically and diplomatically—and perhaps that is the best that can be practically hoped for. If so, however, then the invocation of human dignity in the instruments turns out to be empty rhetoric—a conceptual wheel that is unattached to the rest of the machinery.

I would hope that we can do better than this—that we can come up with an understanding of human dignity that does not beg too many important questions, but that nevertheless has enough content that it actually can be useful in the critique of existing practices. This is obviously a much bigger task than understanding how lawyers defend human dignity (when they are not busy assaulting it). But I mean to undertake the smaller task as one step toward the larger—toward understanding human dignity in all its manifestations, not just those that pertain to our entanglements with the legal profession.

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5. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION art. 1, Dec. 7, 2000, O.J. (C364) 1 (2000).

6. Final Act Conference on Security and Cooperation in Europe, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975). See also generally, Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

7. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 284–302 (1999).

## I. HUMAN DIGNITY AND THE RIGHT TO COUNSEL: ALAN DONAGAN'S ARGUMENT

Let us begin with the most basic question about lawyers in their role as courtroom advocates: Why should litigants have them? The answer that, over the years, has appealed to me the most rests on a principle stated by the late philosopher Alan Donagan: “[N]o matter how untrustworthy somebody may have proved to be in the past, one fails to respect his or her dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith.”<sup>8</sup> An immediate corollary to this principle is that litigants get to tell their stories and argue their understandings of the law. A procedural system that simply gagged a litigant and refused even to consider her version of the case would be, in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt.

Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. Knowing no law, they may omit the very facts that make their case, or focus on pieces of the story that are irrelevant or prejudicial.<sup>9</sup> They may be unable to utilize basic procedural rights such as objecting to their adversary's leading questions. Their voices may be nails on a chalkboard or too mumbled to understand. They may speak a dialect, or for that matter know no English. None of this should matter. Human dignity does not depend on whether one is stupid or smooth. Hence the need for the advocate. Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece.<sup>10</sup>

Thus, Donagan's argument connects the right to counsel with human dignity in two steps: first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard. Of course, the argument represents an abstraction from reality. In real life, advocates create theories of the case and assemble the arguments and evidence without caring much whether their theory is the client's theory. Clients, for their part, generally will not have a theory of the case, and what interests them is the outcome, not the fidelity with which their law-

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8. Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 130 (David Luban ed., 1984).

9. When Clarence Gideon defended himself against a breaking-and-entering charge because he could not afford a lawyer, he spent most of his time trying to prove that on the night of the crime he was not drunk, which was irrelevant to the charge, and completely overlooked the real weaknesses in the state's case. How was he supposed to know any better? ANTHONY LEWIS, *GIDEON'S TRUMPET* 59-62 (1964).

10. I have elaborated on this argument in DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 85-87 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*].

yer represents their own version of reality. This is not a decisive objection. The law forces an artificial and stylized organization onto the way stories have to be told; by trial-time, any legally coherent telling of the client's story will bear only scant resemblance to its raw version. And, precisely if the client is inarticulate, unreflective, or simply stupid, the lawyer's version of the client's story will be stronger, cleaner, and more nuanced than the client's own version. The lawyer will read between the lines, and perhaps imbue the story with more subtlety than the client ever could. It seems to me that this does not disqualify the story from being, in an important sense, the client's story. I acknowledge, nevertheless, that if the lawyer embellishes too much, at some point the story ceases to be the client's and becomes instead the lawyer's fictionalized version of the client's story. The difference is a matter of degree, not of kind, but that makes it no less real. For the moment, I will postpone exploring the implications of this point for our discussion of human dignity; but I do wish to take it up again shortly.

If the advocate is the client's mouthpiece or (to use a less offensive word) voice, telling the client's story and interpreting the law from the client's viewpoint, it follows that advocacy has limits. The lawyer cannot knowingly tell a false story, and perhaps under some circumstances this prohibition includes willful blindness whereby a lawyer affirmatively takes steps to avoid knowing that the story is false.<sup>11</sup> As Donagan puts it, the story has to have the minimum of credibility necessary so that it can be provisionally taken as a good-faith account.<sup>12</sup> Decades ago, Lon Fuller and John Randall drafted a quasi-official statement of the principles of adversary ethics and argued that a lawyer "trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to a controversy, he distorts and obscures its true nature."<sup>13</sup> I suspect that almost every trial lawyer would disagree with this conclusion; but, on the terms of Donagan's argument, it seems to me largely correct.<sup>14</sup>

At this point, let us return to the principle underlying Donagan's argument:

No matter how untrustworthy somebody may have proved to be in the past, one fails to respect his or her dignity as a human being if

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11. See David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999) (discussing whether lawyers legitimately can evade guilty knowledge regarding their clients).

12. Donagan, *supra* note 8, at 130.

13. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

14. But there remains plenty of room for controversy about how far the defender's leeway to mislead extends. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1759-62 (1993).



on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith.<sup>15</sup>

What does the phrase “human dignity” signify in this principle? Apparently, honoring a litigant’s human dignity means suspending disbelief and hearing the story she has to tell. So, in this context, having human dignity means, roughly, having a story of one’s own.

I add the words “of one’s own” to emphasize the first-personal, subjective character of the story. Fuller once described the advocate’s job as displaying the case “in the aspect it assumes when viewed from that corner of life into which fate has cast his client.”<sup>16</sup> The client’s story is not just the story in which she figures; it is the story she has to tell. The story is *about* her in both senses of the term—she is its subject-matter, and she is its center. It revolves about her, just as, to terrestrials, the sun revolves about the earth (no more and no less).<sup>17</sup>

Now, subjectivity is (if you will pardon the word-play) an elusive subject. As Wittgenstein observed, my subjectivity is not, properly speaking, part of the world at all. It is the limit of the world, just as my eye is the limit of my visual field rather than a part of it.<sup>18</sup> If I were to compose a book that enumerated every fact in the world, including every fact about me, about D.L., my subjectivity would not appear in it. The book (Wittgenstein suggests we entitle it *The World As I Found It*) would record every fact about D.L. except that *I* am D.L.<sup>19</sup>

Intuitively, it seems plain that, elusive or not, our own subjectivity lies at the very core of our concern for human dignity. To deny my subjectivity is to deny my human dignity. Obviously, only a psychotic or a solipsist really thinks “the world revolves around *me*.” But, tautologically, *my* world revolves around me; that is, I am the one necessary being in my world. This is what some have called the “egocentric predicament.”<sup>20</sup> Human dignity is in some sense a generalization from the egocentric predicament. Human beings have ontological heft because each of us is an “I”, and *I* have ontological heft. For others to treat me as though I have no ontological heft fundamentally denigrates my status in the world. It amounts to a form of humiliation that violates my human dignity. Hence Donagan’s principle: to honor a litigant’s dignity as a

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15. Donagan, *supra* note 8, at 130.

16. Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 32 (Harold Berman ed., 1961).

17. My own thinking about stories has been influenced deeply by Hannah Arendt’s discussion in THE HUMAN CONDITION 181–88 (1958); the present idea at 184. See DAVID LUBAN, LEGAL MODERNISM (1994), where I discuss narrative in the Introduction and Concluding Reflections, and focus on Arendt’s ideas in chapter 4. See generally ROBERT P. BURNS, A THEORY OF THE TRIAL (1999) (analyzing trials as narrative structures).

18. LUDWIG WITGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS §§ 5.632, 5.633, 5.6331, at 117 (D. F. Pears & B. McGuinness trans., 1961) (1921).

19. *Id.* § 5.631, at 117. My formulation of this point derives both from Wittgenstein and from THOMAS NAGEL, THE VIEW FROM NOWHERE 55–56 (1986).

20. The term originates in Ralph Barton Perry, *The Ego-centric Predicament*, 7 J. PHIL. PSYCH. & SCI. METHODS 5 (1910) (now J. PHIL.).

person requires us to hear the story she has to tell, because to ignore and exclude her treats her as though her subjectivity and the point of view it inhabits are totally insignificant.<sup>21</sup>

It seems here that I am explaining human dignity through a metaphysical theory. Subjectivity gives us ontological heft, ignoring someone's subjectivity denies that she has ontological heft, and that humiliates her. The trouble is that—as I indicated—subjectivity is not really a metaphysical fact about us; it appears nowhere in the Big Book of Facts, *The World As I Found It*.<sup>22</sup> So I want to propose another way of accommodating our key intuitions, and that is by reversing the order of explanation. Certain ways of treating people humiliate them; humiliating people denies their human dignity. One of those humiliations consists in presuming some individuals have no point of view worth hearing or expressing, and that is tantamount to denying the ontological heft of their point of view. Instead of beginning with a metaphysical theory of subjectivity, identifying subjectivity with human dignity, and using that to explain why humiliating people violates human dignity, I am proposing that we begin with the proposition that humiliating people denies their human dignity. We then explain what human dignity is by trying to isolate the characteristic features of humiliation—in this case, treating a person's story and viewpoint as insignificant. In effect, an explanation along these lines begins with a relationship between people—between the dignifier and the dignified—called “honoring (or respecting) human dignity.” Human dignity as such becomes a term derived from the relation rather than a primitive term. By taking Donagan's argument at face value, we arrive at a commonsense, or, as a philosopher might say, a “naturalized,” account of human dignity as having a story of one's own, and the wrong of denying human dignity as humiliation. The advocate defends human dignity by giving the client voice and sparing the client the humiliation of being silenced and ignored.

That brings us back to an earlier question. What about the advocate who constructs a story that has nothing to do with the client's version? Consider an example offered by William Simon. A man is arrested while placing a stolen television into his car, and charged with possession of stolen goods. He tells the police that he bought it from a stranger on the street and had no idea it was stolen. At trial, he does not testify, but his lawyer wishes to argue the client's version of how he obtained the television. The lawyer, cross-examining the arresting officer, elicits the admission that the defendant was placing the television in the back seat of the car, not the trunk. Arguing to the jury, the lawyer points out that if the defendant knew the television was stolen, he would be

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21. See Donagan, *supra* note 8, at 130, 133.

22. A Kantian would say that subjectivity in the sense described here is a transcendental fact, not an empirical fact. See, e.g., IMMANUEL KANT, CRITIQUE OF PURE REASON, \*A346/B404, \*A355, \*B426–27.

unlikely to put it in plain sight. The fact that he was placing it in the back seat rather than the trunk strongly suggests his innocence. But, unbeknownst to the jury and the prosecutor, yet known to the lawyer, the defendant did not have a key to the trunk.<sup>23</sup>

Here, the lawyer has constructed a client story that is, we will assume, a fabrication that the client has not told in good faith. Criminal defenders will justify the lawyer's tactic by the following argument: the lawyer has not lied, but merely shown that the evidence supports the client's version of the story. Given this evidence, the jury should acquit, because if the evidence reasonably supports an innocent alternative, it cannot prove guilt beyond a reasonable doubt. All the lawyer has done is dramatize the reasonable doubt instead of arguing for it in the abstract. That seems like an entirely legitimate way to make the case for reasonable doubt. Every litigator knows that it takes a story to beat a story. Arguing abstractly for reasonable doubt will never shake a jury's preconceptions.

I think this is a good argument, and it illustrates one of the things skilled advocates do: they construct and promote theories of the case consistent with the evidence even if the theories have nothing to do with reality. If so, then at least this function of the advocate has nothing to do with telling the client's story, providing voice to the legally mute. And so this function of the advocate seemingly has nothing to do with defending the client's human dignity, at least according to Donagan's argument that I have endorsed.

In fact, however, it does. The reason lies deeply embedded in the unique character of criminal law. To honor the defendant's human dignity in the sense we have been exploring, namely to presume initially that the defendant has a good faith story to tell, requires us to presume innocence (if the defendant claims innocence). That by itself does not tell us what the burden of proof should be in overcoming this presumption. The choice of proof beyond a reasonable doubt arises because criminal conviction carries moral condemnation with it.<sup>24</sup> Because we presume innocence, we must be extremely careful to avoid mistaken moral condemnation. Hence we apply the "beyond a reasonable doubt" standard. In essence, this standard says that if a good-faith story of innocence *could* be constructed from the evidence, it violates the human dignity of the defendant to convict—even if that story is not true. And the advocate defends her client's human dignity either directly, by telling his story, or indirectly, by demonstrating that a good-faith story of innocence could be constructed from the evidence.

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23. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 171-72 (1998).

24. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958) (arguing that the sole distinguishing feature of criminal law is the element of moral condemnation attached to criminal punishment). I adopt this view here.

This is a more complex account of the criminal defender's role than our initial idea of the advocate as the client's voice. The defender does serve as the client's voice if the client wants his story told. But if he does not, the defender still protects the client's human dignity by demonstrating that the evidence is consistent with the presumption of innocence. I take it that this dual role of the advocate as defender of human dignity derives entirely from the fact that criminal conviction carries with it moral condemnation, that is, loss of stature. Outside the criminal process, losing a lawsuit can still carry moral stigma—think of losing a sexual harassment lawsuit, for example—but it is not quite the communal condemnation of criminal conviction. And so, while civil litigators strive mightily to blow smoke in the eyes of the fact-finder if that serves their clients' interest, I think they can scarcely claim that doing so has anything much to do with defending the human dignity of their clients.

## II. PATERNALISM TOWARD CLIENTS

The idea of advocates as voices for those who might otherwise be legally mute has obvious relevance to the issue of lawyers' paternalism toward clients. I use the term "paternalism" to refer to interfering with someone else's liberty for their own good. In the present context, the term refers even more specifically to a lawyer's refusal to do what the client wants because it would harm the client.

Consider *Jones v. Barnes*.<sup>25</sup> Barnes, convicted of robbery, wanted his court-appointed appellate lawyer Melinger to include some specific arguments in his brief.<sup>26</sup> Even though the arguments were not frivolous, Melinger refused to include them, and when Barnes's conviction was affirmed, he raised an ineffective assistance of counsel claim.<sup>27</sup> The U.S. Supreme Court rejected the claim, and Chief Justice Burger's opinion offered frankly paternalistic reasons for the rejection. Good appellate advocates understand that less is more, and freighting a brief with bad arguments simply detracts from the best arguments in the brief. To give clients control over tactics "would disserve the very goal of vigorous and effective advocacy."<sup>28</sup>

Justices Brennan and Marshall replied in dissent that "today's ruling denigrates the values of individual autonomy and dignity. . . . [T]he role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity."<sup>29</sup> Rather clearly, the concept of dignity at work is very close to the one we have been examining. Respect for the client's dignity consists in getting the lawyer to ar-

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25. 463 U.S. 745 (1983).

26. *Id.* at 747.

27. *Id.* at 747-49.

28. *Id.* at 754.

29. *Id.* at 763.

articulate the client's arguments—how the law and trial looked to the client. Perhaps the client's argument was that his trial lawyer was ineffective because the lawyer bullied him out of his intention to testify, or perhaps he was incensed that the police tricked him into revealing where the stolen loot was hidden by taunting him about his manhood. Or perhaps he simply wished to argue that the one-eye-witness rule is insufficient to establish his identity. All of these arguments are sure losers—but none of them are frivolous, and it might matter greatly to the client whether Melinger included them in his brief. These arguments represent the client's story about why he was wrongfully convicted, and to dismiss them as Melinger did is an affront to Barnes's dignity as a human being and a story-bearer.

Justices Brennan and Marshall refer to “the values of individual autonomy and dignity.”<sup>30</sup> And one important question for us to consider is whether autonomy and dignity are related values—indeed, whether perhaps they are the same thing, or, more precisely, whether the best analysis of human dignity will identify it with autonomy. That would be a familiar and attractive analysis. Familiar, because it has roots deep in the history of philosophy, beginning with Renaissance writers such as Pico della Mirandella (who identifies human dignity with freedom of choice), and including, most famously, Kant.<sup>31</sup> Attractive because, as we all know, Americans are in love with freedom of choice. Legal historian Lawrence Friedman, in analyzing contemporary American legal culture, refers to us as “the Republic of Choice.”<sup>32</sup> The fact that we do not like someone else telling us what to do suggests that the offensive feature of paternalism lies in its violation of autonomy—that paternalism offends human dignity because autonomy *is*, or is the basis of, human dignity.

Before proceeding, it is important to observe that Kant's concept of autonomy differs considerably from what contemporary Americans ordinarily call freedom of choice. Etymologically, “auto-nomy” means self-legislation: giving laws to oneself and acting according to them. This was what Kant meant by autonomy, and the word entered the vocabulary of morals and law primarily through the Kantian philosophy. Kant modeled morality on legislation, and conceived of the moral agent as one who acts on moral laws rather than inclinations, thus as one who asks

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30. *Id.*

31. Pico imagines God addressing Adam:

The nature of all other beings is limited and constrained within the bounds of laws prescribed by Us. Thou, constrained by no limits, in accordance with thine own free will . . . shalt ordain for thyself the limits of thy nature . . . [W]ith freedom of choice and with honor, . . . thou mayest fashion thyself in whatever shape thou shalt prefer. Thou shalt have the power to degenerate into the lower forms of life, which are brutish. Thou shalt have the power, out of thy soul's judgment, to be reborn into the higher forms, which are divine.

della Mirandella, *supra* note 1, at 225. Pico adds, “Who would not admire this our chameleon?” *Id.*; cf. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 60–61 (Robert Paul Wolff, ed., Lewis White Beck, trans., 1969) (1785), \*Ak. 434–36.

32. LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

about each proposed action, “If I were a legislator, could I will the maxim commending this action as a universal law?”<sup>33</sup>

That is surely not what we mean by ‘autonomy’ when we think of freedom of choice in the ordinary sense prevailing in American culture. Freedom of choice means doing whatever I want, that is, not having to do what others want me to do, or even to consider except in a calculating way what others might wish. Freedom of choice means consumer sovereignty. It means don’t tread on me. It means my way or the highway. The difference between this and Kantian autonomy could not be sharper. For Kant, autonomy lies in the power to act on the basis of duty rather than inclination, whereas in American culture, with its strong libertarian streak, it means the power of acting on inclination rather than duty. Kantian autonomy represents freedom achieved through stoic self-control and self-command; it means reasoned self-restraint. Freedom of choice represents casting off restraints. Donagan, a profound student of Kant, complained with some justice that the latter conception of autonomy is a “vulgarity”—but, be that as it may, it is popular culture’s favorite vulgarity.<sup>34</sup>

In either Kant’s form or the consumer-sovereignty form, however, I want to reject the identification of human dignity with autonomy. Autonomy focuses on just one human faculty, the will, and identifying dignity with autonomy likewise identifies human dignity with willing and choosing. This, I believe, is a truncated view of humanity and human experience. Honoring someone’s human dignity means honoring their being, not merely their willing. Their being transcends the choices they make. It includes the way they experience the world—their perceptions, their passions and sufferings, their reflections, their relationships and commitments, what they care about. Strikingly, the experience of caring about someone or something has a phenomenology very different from that of free choice. When I care about something, it chooses me—we sometimes say “it grabs me”—rather than the other way around. Caring lacks the “affect of command” that Nietzsche thought was definitive of the autonomous will.<sup>35</sup> And yet, what I care about is central to who I am, and to honor my human dignity is to take my cares and commitments seriously. The real objection to lawyers’ paternalism toward their clients is

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33. See generally H. J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT’S MORAL PHILOSOPHY* (1965) (paraphrasing from KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 31, at 44, \*Ak. 421, 64, \*Ak. 438). In Paton’s by-now-standard typology, my formulation in this sentence combines Formula III of the categorical imperative, the Formula of Autonomy (“So act that your will can regard itself at the same time as making universal law through its maxim.”) with Formula IIIa, the Formula of the Kingdom of Ends (“So act as if you were always through your maxims a law-making member in a universal kingdom of ends.”). *Id.* I prefer Beck’s translation of *Reich* as “realm” rather than “kingdom,” however, because I believe that Kant conceived of the *Reich der Zwecke* as a republic of ends, not a kingdom of ends.

34. Donagan, *supra* note 8, at 129.

35. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 25, at § 19 (Walter Kaufmann trans., 1966) (1886).

not that lawyers interfere with their clients' autonomous choices, but that they sometimes ride roughshod over the commitments that make the client's life meaningful and so impart dignity to it.<sup>36</sup>

Consider a particularly troubling case, that of Theodore Kaczynski, the Unabomber.<sup>37</sup> Kaczynski, a mathematician-turned-recluse, came to believe that technological society is destroying humanity.<sup>38</sup> In his secluded mountain cabin in Montana, he fashioned bombs and mailed them to technologists, academics, and businessmen whose activities he thought were emblematic of technological society.<sup>39</sup> After years of murdering and maiming his victims, Kaczynski anonymously contacted major newspapers and told them that he would halt the bombings if they would publish his 35,000-word manifesto against modernity, *Industrial Society and Its Future*.<sup>40</sup> Remarkably, they did. Kaczynski was captured when his own brother read the manifesto, suspected the identity of its author, and turned him in in return for a promise by the government (later broken) that it would not seek the death penalty.<sup>41</sup>

Kaczynski's lawyers, both of them first-rate federal public defenders, decided to put on a mental defense.<sup>42</sup> The problem was that they could not get Kaczynski to go along. He didn't even want to be interviewed by a psychiatrist. He had his own theory of how he would win acquittal. His lawyers would move to exclude all the evidence seized from his cabin because the search was illegal, and without that evidence the government had no case.<sup>43</sup>

Of course, the chance that the court would exclude the evidence was approximately zero—a mathematician like Kaczynski would say that the chance was “epsilon”—and Kaczynski's optimism about the strategy was a product of legal naïveté, if not mental disturbance. But independently of his faith in the exclusion strategy, Kaczynski simply abominated the prospect of a mental defense. As he wrote in his manifesto,

Our society tends to regard as a “sickness” any mode of thought or behavior that is inconvenient for the system, and this is plausible because when an individual doesn't fit into the system it causes pain to the individual as well as problems for the system. Thus the ma-

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36. This is the view of paternalism that I develop in David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454. See generally HARRY G. FRANKFURT, IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS (1988).

37. See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 421 (2000).

38. See *id.* at 426.

39. See William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52.

40. See *id.*

41. See *id.*

42. *Id.* at 54.

43. See *id.* at 57.

nipulation of an individual to adjust him to the system is seen as a “cure” for a “sickness” and therefore as good.<sup>44</sup>

In a letter to the judge, he wrote, “I do not believe that science has any business probing the workings of the human mind, and . . . my personal ideology and that of the mental-health professions are mutually antagonistic.”<sup>45</sup>

But he was confronted by relentless pressure from his lawyers, from his brother, and from an anti-death-penalty consultant his brother hired to help “manage” Kaczynski.<sup>46</sup> His lawyers reassured him that the psychiatric evidence would be used only at the penalty stage if he was convicted, not at the guilt stage, and Kaczynski, convinced that the case would never get to the penalty stage because he would be acquitted, relented, and spoke to the psychiatrist.<sup>47</sup> Apparently, his lawyers also reassured him that the main reason they wanted him to speak with a psychiatrist was to gather evidence to refute media assertions that he was demented.<sup>48</sup>

But then they double-crossed him. At the last minute, they announced that at the guilt phase they would undertake the mental defense—the only one that might save his life. Stunned and helpless, Kaczynski demanded to represent himself rather than let his lawyers put on the mental defense. He wrote to the judge,

It is humiliating to have one’s mind probed. [My lawyers] calculatedly deceived me in order to get me to reveal my private thoughts, and then without warning they made accessible to the public the cold and heartless assessments of their experts . . . [T]o me this was a stunning blow . . . [and] the worst experience I ever underwent in my life . . . I would rather die, or suffer prolonged physical torture, than have the [mental] defense imposed on me in this way by my present attorneys.<sup>49</sup>

Subsequently, he attempted suicide.

But if Kaczynski was in a bind, Judge Burrell was in one as well. If he let Kaczynski represent himself, a headline-grabbing trial would turn into a gruesome travesty in which a team of professional prosecutors mowed down an unrepresented, mentally disturbed defendant and secured the death penalty, which it would have been the judge’s unhappy responsibility to impose. The judge denied Kaczynski’s *Faretta* motion on the unlikely ground that Kaczynski was simply manipulating to postpone his trial, although, as Kaczynski rightly pointed out, he had nothing to gain by delaying the trial because he was already in prison. Faced with

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44. Theodore Kaczynski, *The Unabomber’s Manifesto: Industrial Society and Its Future* para. 155 (1995), available at <http://www.panix.com/~clays/Una/una5.html#section20>.

45. *U.S. v. Kaczynski*, 239 F.3d 1108, 1123 (9th Cir. 2001) (Reinhardt, J., dissenting).

46. Finnegan, *supra* note 39, at 52, 54.

47. *See* 239 F.3d at 1111.

48. *Id.* at 1122–23 (Reinhardt, J., dissenting).

49. *Id.* at 1123.



the alternative of the mental defense or a plea bargain, Kaczynski pleaded guilty, and received a sentence of life without parole.

Could Kaczynski have had any respectable reasons for rejecting the psychiatric defense, or was his behavior simply his illness talking? The answer, I think, is that his reasons were perfectly comprehensible and respectable. The mental defense would discredit what he regarded as his life's principal contribution to human welfare, the manifesto that he had killed to get into print. If the manifesto were discredited, then his intellectual justification for his terrorism would evaporate. The defense would paint him, in Kaczynski's own words, as nothing more than a "grotesque and repellent lunatic" in the eyes of millions.<sup>50</sup> Where is the dignity in that?

Let me make clear that I am not defending Kaczynski, who remorselessly blew off the limbs and took the lives of innocent people. In my book, that makes him an evil man. Nor am I denying that he may be suffering from some form of mental illness. But the manifesto he wrote is a coherent work of social theory, certainly as coherent as many essays I have read by respectable philosophers. And his motivation for wanting to avoid the mental defense is equally coherent, and expressed with substantial eloquence. He did not want to be portrayed as a grotesque and repellent lunatic, for then millions of people would dismiss his life's work as grotesque and repellent lunacy. The thought that he would prefer death or torture to abject humiliation hardly is insane. By failing to respect his preference, his attorneys demolished his human dignity.

Their defenders might protest. Doesn't the fact that Kaczynski was willing to permit the mental defense in the penalty phase of his trial indicate that he preferred humiliation to death? The only reason that he rejected the mental defense in the guilt phase was his delusion that he did not need it to win acquittal.

I think the explanation is different. Police interrogators often wear suspects down until they sign false confessions simply to make the interrogation stop. I think Kaczynski's lawyers simply wore him down, and he finally agreed to the psychiatric interview to humor them and get them to stop. They are, after all, topnotch, relentless advocates, and Kaczynski stated that he was utterly exhausted.<sup>51</sup>

When Kaczynski's counsel overrode his resistance and humiliated him in the eyes of millions, it seems to me that they did wrong. But the wrong they did has nothing special to do with Kaczynski's autonomy. True, he had chosen to forego a mental defense and they took away his choice. But the important wrong they did to him was not to take away his choice of defense, as though the choice of how to be convicted matters a great deal. It was that they made nonsense of his deepest commit-

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50. *Id.* at 1121.

51. *Id.* at 1124.

ments, of what mattered to him and made him who he was. That was their sin against human dignity. Autonomy has little to do with it.

In the aftermath of his trial, Kaczynski wrote:

Perhaps I ought to hate my attorneys for what they have done to me, but I do not. Their motives were in no way malicious. They are essentially conventional people who are blind to some of the implications of this case, and they acted as they did because they subscribe to certain professional principles that they believe left them no alternative. These principles may seem rigid and even ruthless to a non-lawyer, but there is no doubt my attorneys believe in them sincerely.<sup>52</sup>

Condescending? No doubt. Kaczynski paints his counsel as narrow-minded professional automata. Given the portrait they painted of him—as a schizophrenic, not a terrorist—this seems like poetic justice.

### III. HUMAN DIGNITY, CONFIDENTIALITY, AND SELF-INCRIMINATION

As a third example of the grounding of lawyers' responsibilities in a concern for human dignity, let us next consider the attorney-client privilege and the related duty of lawyers to keep client confidences. The familiar justification of these doctrines lies in the concern that without confidentiality, clients will be chilled from telling their lawyers what the lawyers need to know to represent them. Champions of confidentiality often point to this argument to demonstrate the close connection between confidentiality and the core rationale of advocacy—based, I have just argued, in concern for human dignity. What good is the right to an advocate who can help me tell my story if I am afraid to reveal to my advocate the very story that she is supposed to help me tell?

However, this is a weak, almost self-contradictory argument for confidentiality. After all, the only reason that I need confidentiality is my fear that without it my advocate can be compelled to reveal whatever story I tell her. The fear, in other words, is not that abolishing confidentiality will make my lawyer an ineffective mouthpiece; rather, the fear is that it will make her all too effective, a perfect conduit of a story that I would prefer never gets told at all. The “mouthpiece” rationale behind advocacy seems on its face to provide an argument for abolishing confidentiality, not preserving it.

Perhaps because they understand this, defenders of confidentiality usually invoke a utilitarian, systemic argument in addition to the one based on human dignity. Only if advocates know in advance the strengths and weaknesses of their case can they investigate properly and frame the strongest arguments; and a properly functioning adversary system requires investigation and strong arguments.

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52. Mello, *supra* note 37, at 502.

This, too, however, is a weak argument, because confidentiality and the attorney-client privilege can be used to keep crucial information out of the system as well as to ensure that it gets into the system. A doctrine that frustrates the search for truth can scarcely be defended on the ground that it is good for the adversary system. Almost two hundred years ago, Jeremy Bentham argued that abolishing the attorney-client privilege would not harm the innocent, who have nothing to fear from the truth, and thus that the privilege helps only the guilty.<sup>53</sup> Bentham's argument is too glib, because we can easily imagine cases in which innocent people might not realize that they are innocent, and be chilled from telling their counsel the very facts that exonerate them. But cases of this sort are likely to be too few and occasional to undermine Bentham's conclusion that confidentiality is a bad bet on utilitarian terms. His fundamental point is that, from the point of view of truth and justice, we would be better off if miscreants' lawyers spilled the beans. Why not change the doctrine of confidentiality to compel the lawyers to sing? In that case, either the truth would come out, or miscreants would be chilled from revealing the damning facts to their lawyers and thereby alerting the lawyers that they will have to contrive some method to make truth look like lies and fiction look like fact.

Indeed, confidentiality can actually harm the innocent. Precisely because everyone knows that lawyers must keep the secrets of dishonest clients as well as honest ones, those who deal with lawyers may mistrust and discount the reliability of what lawyers say on behalf of clients. This harms the innocent client who wants what her lawyer says to be trusted.<sup>54</sup> Professor Richard Painter's pioneering work on confidentiality rules shows why it may actually help business clients trying to reassure nervous potential lenders for lawyers and clients to waive confidentiality, in effect contracting around the protections it offers.<sup>55</sup>

So far, then, we have discovered only reasons to abandon confidentiality and the attorney-client privilege, not to defend them. Let us try again. Suppose that the attorney-client privilege and the duty of confidentiality were eliminated from the legal system. Then consider the situation faced by a client with something to hide. The client faces a trilemma of unpleasant choices. First, he can elect not to tell his story to his lawyer because he is afraid that the lawyer might be compelled to reveal it. Second, he can lie to his lawyer. Either way, silence or lies, the client loses much of the benefit that having an advocate was supposed to provide. Or, finally, he can reveal the story to his lawyer, knowing that doing so amounts to revealing it to the world at large. If the story con-

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53. 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE* 302-11 (London, Hunt & Clarke 1827).

54. See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 18-19 (1998).

55. Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221 (1995).

cerns a crime he has committed, revealing it to his lawyer amounts to vicarious self-incrimination, because without the attorney-client privilege, the lawyer can be compelled to testify about whatever the client has told her. All three choices are disastrous: the first two abrogate the right to counsel, while the third abandons the right against self-incrimination.

At this point, in fact, the argument has become isomorphic to a parallel argument in the debate about the privilege against self-incrimination (which, by the way, Bentham also opposed on utilitarian grounds).<sup>56</sup> The confidentiality trilemma I have just sketched exactly parallels the U.S. Supreme Court's analysis in its 1964 opinion *Murphy v. Waterfront Commission*.<sup>57</sup> According to the unanimous Court, abolishing the privilege against self-incrimination is inhumane because it would confront the witness with "the cruel trilemma of self-accusation, perjury or contempt."<sup>58</sup> That is, if the witness refuses to testify he can be jailed indefinitely for civil contempt; if he testifies truthfully, he incriminates himself; and if he testifies falsely he commits perjury. The confidentiality and self-incrimination trilemmas involve the same trio of options: self-destructive silence, self-incriminating revelation, and lying.

*Murphy's* cruel trilemma argument—and, indeed, the entire rationale of the self-incrimination privilege—is controversial.<sup>59</sup> For, one might ask, why recognize a privilege that (like attorney confidentiality) often helps the guilty escape conviction? And what is so cruel about compulsory self-incrimination? Obviously, self-incrimination is bad for the witness because it might convict him of a crime, but we typically suppose that convicting the guilty is socially valuable rather than cruel, even if the guilty find it disagreeable. Perhaps criminal punishment is inherently cruel; but if so, it would be cruel whether the witness is incriminated by his own testimony or the testimony of others. Once we conclude that punishing crimes through imprisonment is not unacceptably cruel, it seems peculiar to throw up our hands in horror at the lesser cruelty of compelled testimony, which seems trivial by comparison with jail. Nor, finally, is there anything intrinsically repugnant about the act of self-incrimination. After all, if a remorseful defendant voluntarily confesses his crime we might praise him for accepting responsibility. In any event, we would not condemn him for confessing. So what cruelty is *Murphy* talking about?

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56. 5 BENTHAM, *supra* note 53, at 209.

57. 378 U.S. 52 (1964).

58. *Id.* at 55. The concurring opinions do not differ from the Court's opinion about the rationale of the privilege.

59. Some scholars, notably Professor David Dolinko, have carefully dissected the arguments for the privilege against self-incrimination and concluded that none of them really works. David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986).

Professor Akhil Amar believes that the cruelty *Murphy* worries about is “psychological,” the angst of the hard choice.<sup>60</sup> But, as Amar and other commentators rightly observe, this worry seems excessive, and oddly inconsistent with our willingness to countenance other psychologically wrenching criminal investigation techniques. Witnesses can be and are compelled to testify against their friends or members of their immediate families. If anything, compulsory betrayal is more “ruthlessly callous” than compulsory self-incrimination.<sup>61</sup> Moreover, prosecutors have little compunction about immunizing foot-soldiers in criminal gangs to compel their testimony even when the witnesses run the risk of being murdered or having their families murdered if they sing.<sup>62</sup> Now *that* is an agonizing choice. If the law is so concerned about psychological cruelty, why permit practices like these?

The answer, I believe, is that the cruelty of compelled self-incrimination is at bottom not psychological. In fact, the *Murphy* Court makes no mention of psychology—but it does say that compulsory self-incrimination would contradict “our respect for the inviolability of the human personality.”<sup>63</sup> That sounds like a more abstract and philosophical concern than worry about the witness’s unpleasant psychological experiences. It is, in fact, a concern about violating human dignity.

The basic idea is that although it is sometimes permissible to injure someone, for example by punishing him, it is immoral to make him do it to himself. You do not make the inmate lock himself in his cell each night, just as you do not punish a naughty child by making her throw away her favorite toys—even if locking up the prisoner or taking away the child’s toys are acceptable punishments when they are administered by an appropriate outside authority.<sup>64</sup>

This intuitive idea seems right. However, it may not suffice to explain the cruelty of compelled self-incrimination. As David Dolinko points out, what revolts us about compelling people to administer punishments to themselves is the element of deliberate sadism.<sup>65</sup> The sole point seems to be humiliating the victim. By contrast, the point of compelling testimony is not humiliating the witness, but finding out the truth. Absent the aspect of deliberate humiliation, we might conclude that there is no special affront to human dignity in compulsory self-incrimination.<sup>66</sup>

I think that Dolinko is right that compelled self-punishment violates human dignity because it humiliates the victim. But he is wrong that

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60. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 65 (1997).

61. *Id.* at 214 n.130.

62. Dolinko, *supra* note 59, at 1094.

63. 378 U.S. 52, 55 (1964).

64. Dolinko, *supra* note 59, at 1104–07.

65. *Id.* at 1105.

66. *Id.* at 1105–06.

compelled self-incrimination does not likewise humiliate the witness. In both practices, the humiliation lies in enlisting a person's own will in the process of punishing her, and thereby splitting her against herself. To see this, begin with the actual language of the self-incrimination clause, which states that no person "shall be compelled in any criminal case to be a witness against himself."<sup>67</sup> The crucial phrase "witness against himself" indicates a kind of splitting or division within the self—one half, the person with an interest in evading condemnation; the other, the witness who disinterestedly provides whatever information the state requires. A witness fulfills a civic obligation. Even if it is unpleasant or inconvenient to testify, she must do so for the good of the community, if need be under compulsion of subpoena. Temporarily, at any rate, the witness becomes the eyes and ears of the community, and aims at a collective, rather than a personal or individual, good.

To be a witness against yourself means to assume this disinterested outsider's stance toward your own condemnation. This is an extraordinary kind of self-alienation, as if the only interest you have in the matter is the state's interest in ascertaining the truth and apportioning blame. Being a witness against yourself divides you in two, one half the individual with an interest in evading condemnation, the other half, the state's representative; and compelling you to be a witness against yourself subordinates the former to the latter. In effect, it treats the individual as insignificant—as if his subjectivity simply doesn't exist or matter. Even if humiliation is not the purpose of compelling someone to be a witness against himself, as it is in forcing someone to administer his own punishment, humiliation is the outcome.

It might be thought that the real issue in self-incrimination is what it does to the witness's autonomy—his natural right (the Lockean language seems appropriate here) to reject the state and the community and the law, and to say, in effect, "You can lock me up if you want to, but you won't get me to help you do it." Professor Michael Green likens the witness to a prisoner of war who refuses to give any information except his name, rank, and serial number.<sup>68</sup> In the same vein, Michael Seidman relates the following story from a criminal trial.<sup>69</sup> An aggressive prosecutor was cross-examining a defendant with an alibi, hectoring him with trick questions to make him seem like a liar. As the barrage of questions continued, the defendant "stood up, straightened himself to his full height,

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67. U.S. CONST. amend. V.

68. Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 634, 706 n.245 (1999); see also Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction Between Criminal Law and the Welfare State*, 7 J. CONTEMP. LEGAL ISSUES 97, 131 (1996) (spelling out a version of this argument by observing that compulsory self-incrimination is tantamount to forced consent to one's own punishment).

69. Louis Michael Seidman, *Some Stories About Confessions and Confessions About Stories*, in LAW'S STORIES 162 (Peter Brooks & Paul Gerwitz eds., 1996).

and said in words that will live as long as the English language is spoken, 'Fuck this shit!'.<sup>70</sup> He was convicted, and went to prison. Seidman comments: "But in a deeper sense, he was a truly free man. They had his body, but they couldn't touch his soul."<sup>71</sup> Saying "Fuck this shit!" to the state, one might think, is the autonomy right that the self-incrimination clause means to defend. The right spares the witness the need for the heroic melodrama that Seidman's client engaged in.<sup>72</sup>

Although this is an attractive argument, I do not in the end think it succeeds, and I don't think autonomy is the real issue.<sup>73</sup> I have already argued that identifying human dignity with autonomy represents a deep philosophical mistake. But, even those enamored of autonomy must recognize that in the context of self-incrimination the appeal to autonomy proves too much. If the self-incrimination privilege protects a supposed natural right to flip the bird at the state *sub silentio*, then how can we explain the practice of subpoenaing witnesses to testify against their will about other people? Remember the paradox at the heart of the self-incrimination privilege: The law *is* willing to compel people to bear witness against others when they passionately wish not to, and the law *is* willing to use hard means to bring criminals to justice; but the law is unwilling to bring criminals to justice by the hard means of compelling them to bear witness against themselves. It is the combination of the two—the inner split, the self-alienation, at the heart of compelled witnessing against yourself—that generates the humiliation that the self-incrimination clause means to spare us. Autonomy has to do with individual will, which the law reserves the power to override to serve important social goals. Self-alienation goes to something more basic than will—it goes to protecting the self, which the law must never override on pain of violating human dignity.

Consider next that there is no right to remain silent in a noncriminal case, even if the stakes are enormous. This shows that the point of the self-incrimination clause is not to spare people the burden of testifying against their own important interests.<sup>74</sup> The privilege concerns only one specific interest—the interest in avoiding criminal condemnation. The difference cannot be that criminal punishments are harsher than the stakes in noncriminal matters, for that is not always true. If the differ-

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70. *Id.* at 162–63.

71. *Id.*

72. Of course, I am not suggesting that Seidman's client was testifying against his will.

73. Indeed, I don't think that autonomy is the reason for the law of war that allows prisoners of war to maintain their silence. The value this rule defends is loyalty to one's own state, in some sense the opposite of individual autonomy; and the rule exists because it is in belligerent states' reciprocal interest to recognize it, a point that has no parallel when the individual is at war with the state.

74. Holmes was not wrong when he said, "No society has ever admitted that it could not sacrifice individual welfare to its own existence." OLIVER WENDELL HOLMES, *THE COMMON LAW* 37 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881). That includes liberal societies that preserve the privilege against self-incrimination. Holmes went on, "If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death." *Id.*

ence does not lie in the tangible consequences, then it must lie in the moral element of criminal punishment—the fact that criminal conviction joins a tangible penalty with condemnation. Noticing this helps identify more exactly the split in the self that compulsory self-incrimination creates. Making the witness testify enlists his will in the process of his own moral condemnation. It is not exactly a compulsory *mea culpa*, because the witness testifies to facts, not to guilt, but it is a compulsory *mea inculpare*, and that seems just as humiliating.

American law recognizes the special affront to human dignity that comes from forced confession in only one context, when the confession is itself insincere. I am referring to the curious practice known as the *Alford* plea, in which a defendant accepts a plea bargain but denies factual guilt.<sup>75</sup> The background is this: When a defendant accepts a plea bargain and enters a guilty plea, the judge is responsible for ascertaining that the guilty plea is voluntary. The judge will ask the defendant if he truly admits to the elements of the crime. But what if he doesn't? What if he has accepted the plea bargain only because he is afraid of what will happen if he goes to trial? Confronted with a strong capital murder case against him, Alford accepted a life-saving plea bargain, but said to the judge,

I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.<sup>76</sup>

Alford was convicted. The question raised in his appeal was whether his plea was voluntary.

The Court said yes.<sup>77</sup> The outcome was probably a foregone conclusion, because the Supreme Court was not going to throw out the practice of plea bargaining, nor was it going to say that Alford should have lied under oath. The remaining alternative was to condone guilty pleas in which defendants deny their factual guilt.

This result may be *reductio ad absurdum* of the view that plea bargaining is morally acceptable. But, supposing for the sake of argument that the practice of plea bargaining is acceptable, *Alford* pleas may be seen as a requirement of human dignity, because without them defendants would be placed in a "cruel dilemma" of rejecting life-saving plea bargains or disowning their own stories by stating in public that they are guilty when they believe they are not. Notice that the *Alford* plea makes no difference in the defendant's sentence—it actually makes no practical difference at all. The sole rationale seems to be protection of the defendant's dignity.

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75. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (holding that such a plea was not coerced within the meaning of the Fifth Amendment).

76. *Id.* at 28 n.2.

77. *Id.* at 31.



After this prolonged detour through the privilege against self-incrimination, let us return to confidentiality and the attorney-client privilege. Eliminate the attorney-client privilege and the defendant's three choices are vicarious self-incrimination, lying to her lawyer, or telling her lawyer little or nothing. Either of the latter two choices effectively foregoes the very right to counsel that we have seen is closely tied to respecting human dignity. Thus, each horn of the trilemma violates the defendant's human dignity in one way or another. Furthermore, as we have analyzed these violations, our understanding of human dignity has become clearer and fuller. Human dignity consists in having one's own story to tell. It consists as well in not subsuming one's own point of view—one's own story—to the impersonal needs of the legal system.

Of course, a complete discussion of the human dignity defense of lawyer confidentiality would have to address many other issues. One issue is why on this argument the constitutional privilege not to bear witness against yourself applies only in criminal cases, but the attorney-client privilege applies in all cases. Another issue concerns exceptions to the attorney-client privilege and confidentiality, topics of perennial debate. These I defer to another occasion.

I do wish, however, to highlight one conclusion that is likely to be controversial. Because, in my view, the rationale for lawyer confidentiality and the attorney-client privilege is to protect the human dignity of the client, it should apply only when the client is a flesh-and-blood person. In *Lawyers and Justice*, I argued that the organizational attorney-client privilege should be abolished, because organizational clients are not subjects with human dignity, and the privilege costs society too much by facilitating corporate cover-ups.<sup>78</sup> This argument, which I naively regarded as among the strongest in my book, attracted no subsequent discussion, not even criticism. Apparently, my recommendation was too fanciful to take seriously. Yet in the years since I published it, events have amply confirmed my worries. One such event was the collapse of the savings-and-loan industry in the late 1980s, a catastrophe that required the services and confidentiality of lawyers every step of the way. Judge Stanley Sporkin's blistering opinion in the *Lincoln Savings and Loan* case, with its famous question "Where were the attorneys?", was prompted because

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78. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 10, at 225. Many observers have commented on the so-called "Black Hole" problem. See, e.g., Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 496 (1987). Suppose that a CEO wants to do an internal investigation without the risk of being compelled to reveal what is found. The CEO puts a lawyer in charge. Every conversation between the lawyer and employees is privileged, and the lawyer's report to the CEO is likewise privileged. The lawyer becomes a black hole of information: information goes in but it does not come out. One version of the Black Hole problem that emerged in both the Dalkon Shield and tobacco litigation concerned scientific studies of product safety supervised by lawyers rather than executives, in order to maintain the privilege. Medical studies ordered and supervised by lawyers are my idea of a nightmare.

Sporkin understood all too well that the lawyers knew everything but said nothing.<sup>79</sup>

The second major event was the gradual unveiling of Big Tobacco's secrets through a combination of whistle-blowing and litigation. One of the striking revelations was how successfully Big Tobacco's lawyers had abused the attorney-client privilege as an information concealing device. Now some might say that the tobacco case shows that sooner or later even the best-kept secrets will come out, so there is no need to pare back the corporate attorney-client privilege. Eventually a Merrell Williams or a Jeffrey Wigand will blow the whistle. It does not have to be a lawyer.<sup>80</sup>

But I think the lesson is the opposite. The privilege was an essential tool in suppressing information for forty years. The corporate attorney-client privilege has turned out to be a bad utilitarian bet for society, and the "deontological" human dignity defense of the privilege cannot be invoked on behalf of an artificial person with no soul to divide against itself, no body to imprison, no subjectivity to ignore and humiliate.

#### IV. HUMAN DIGNITY AS NONHUMILIATION

At this point we are in a position to draw some preliminary conclusions about what it means to have human dignity, as the concept has emerged so far. It means, first, being the subject of a story, no matter how humdrum or commonplace that story is. And honoring human dignity means assuming that someone has a story that can be told in good faith, hence listening to it and insisting that it be told. Second, we have learned that to have a story means more than to be an autonomous chooser. It means being the subject of experience, and it means existing in a web of commitments, however detestable or pathetic those commitments may be. And honoring human dignity means refraining from overriding those commitments for paternalistic reasons. Third, our discussion of confidentiality and the right against self-incrimination shows that having human dignity means being an individual self who is not entirely subsumed into larger communities. Not only are we subjects of a story, it is *our* story, and human dignity requires that we not be forced to tell it as an instrument of our own condemnation.

Underlying all these themes, I think, is a single root idea. Whatever the metaphysical basis of human dignity—indeed, whether or not human dignity even has a metaphysical basis—at the very least honoring human dignity requires not humiliating people.<sup>81</sup> Indeed, I would propose this as

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79. "Where were these professionals . . . when these clearly improper transactions were being consummated? . . . Where also were the . . . attorneys when these transactions were effectuated?" *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

80. The number of tobacco informants turned out to be not insignificant. See generally DAVID KESSLER, *A QUESTION OF INTENT* (2001).

81. Readers of Avishai Margalit's remarkable book *THE DECENT SOCIETY* 1 (Naomi Goldblum trans., 1996), will recognize it as the source of my proposal. Margalit's thesis is straightforward: what-

a condition or criterion that any theory of human dignity must satisfy: it must entail nonhumiliation as a theorem.

What is the intuitive connection between human dignity and non-humiliation? Begin with the notion of dignity. Oscar Schachter, reflecting on the phrase “dignity and worth of the human person” used in human rights documents, suggests that dignity and worth are synonyms.<sup>82</sup> I disagree. Schachter has focused on one lexical meaning of dignity, namely intrinsic worth. But another, more prominent, meaning treats dignity as a status-concept. Dignity goes with rank; an indignity occurs when someone is treated below their rank. And the effect of indignity is humiliation, which is connected semantically as well as etymologically with the word “humbling” and its cognates. The difference between the two is this: I am humbled when I am *rightly* taken down a peg—when my own inadequacies, made visible to all, reveal me as a lesser sort than I have represented myself (to others or to myself). I am humiliated when I am *wrongly* taken down a peg—when others treat me as a lesser sort than I really am.<sup>83</sup> Humiliation is an affront to my dignity.

Dignity, as a concept connected with social rank or prestige, will vary in its concrete meaning from society to society. What about *human* dignity? Evidently, it must refer to the prestige conferred simply by being human. To violate someone’s human dignity means to treat them as if they were a being of lower rank—as an animal, as a handy but disposable tool, as property, as an object, as a subhuman, as an overgrown child, as nothing at all.<sup>84</sup> The phrase “death with dignity,” as used in discussions of the right to die, incorporates this way of reading the concept. To die with dignity means to go out with my boots on, not to be maintained as a “ghost in the machine,” a frail, drugged simulacrum of myself hooked up to respirators and catheters and intravenous tubes. The gross diminution of my stature amounts to a loss of dignity, a humiliation.

In our discussion of lawyers as defenders of human dignity, the specific indignity at issue was treating people as though their own subjective

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ever the good society may turn out to be, the decent society is simply one whose institutions do not humiliate people. My analysis of dignity and humiliation differs at some points from Margalit’s.

82. Schachter, *supra* note 6, at 849.

83. I recognize that this is not the only legitimate sense of the word “humiliation.” Sometimes we simply use it as a synonym for “extreme embarrassment,” which can be deserved as well as undeserved (consider the sentence, “He humiliated himself.”). Similarly, being humbled is sometimes used as a synonym for being defeated at a contest. Thus, my uses of these words are narrower than ordinary usage.

William Ian Miller argues that humiliation (in distinction from shame and embarrassment), always involves puncturing someone’s pretenses. Humiliation in Miller’s sense can be justified (when the victim of humiliation is putting on airs, is pretentious, is a pompous ass who needs to be put in his place, like Malvolio in *Twelfth Night*) or unjustified (when the victim is not putting on airs, when the humiliation is done out of cruelty or thoughtlessness, like children making fun of the retarded child in their school). I am reserving the word for the unjustified kind of humiliation, and using the term “being humbled” for the justified kind. See WILLIAM IAN MILLER, HUMILIATION 137–41, 146–48 (1995).

84. Margalit defines humiliation as “the rejection of a human being from the ‘Family of Man’—that is, treating humans as nonhuman, or relating to humans as if they were not human.” MARGALIT, *supra* note 81, at 108.

stories and commitments are insignificant. Everyone is a subject, everyone's story is as meaningful to her or to him as everyone else's, and everyone's deep commitments are central to her or his personality. To treat someone's subjectivity as insignificant treats her as a being of lower status, and that turns out to be the specific form humiliation takes when we analyze the right to counsel, the right against self-incrimination, and the lawyer's duty of confidentiality. I do not assert that disregarding another person's subjectivity or commitments is the only form that human indignity can take, but I do assert that the wrong of disregarding another's subjectivity and commitments lies in the humiliation it inflicts by treating the other beneath her human status.

## V. PRO BONO AND ITS CRITICS

To further elaborate on how the practice of law can uphold—or assault—human dignity, I want to fasten on the notion of dignity as non-humiliation and discuss the pro bono obligations of lawyers. To facilitate the discussion, I will use that time-honored literary device, the foil—a published article that approaches the issue of pro bono in what seems to me exactly the wrong way.

My foil is an essay by two professors, Frank Cross and Charles Silver, that ingeniously criticizes the very idea that lawyers ought to perform pro bono service.<sup>85</sup> They do not deny that “[a]ll persons of means should be charitable, especially to widows, orphans, the handicapped, and others whose poverty results from circumstances that are largely or wholly beyond their control.”<sup>86</sup> But they believe legal services simply are not as important to the poor as “money, hot meals, home repairs, medical assistance, transportation, and help with chores . . . . Lawyers should provide the forms of charity that poor people need most, especially gifts of cash.”<sup>87</sup> Thus, Silver and Cross reject the duty to do legal service for the poor not because they are skeptical of duties to the poor but because “poor people would rather have other things.”<sup>88</sup>

To illustrate their point, they pose a rhetorical question: “Query: Would a poor person waiting for help at a legal aid office rather have twenty hours of a lawyer’s time . . . or \$3000? . . . Three thousand dollars would be a lot of money for so poor a person to pass up.”<sup>89</sup>

Silver and Cross seem to think that offering the money, which the poor person can spend as she wishes, pays more honor to her autonomy than offering her legal services on a take-it-or-leave-it basis. My intui-

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85. Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1477–93 (2000) (reviewing ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1999)).

86. *Id.* at 1479.

87. *Id.* at 1478.

88. *Id.* at 1483.

89. *Id.* at 1484.

tion runs differently, and not only because I do not identify dignity with autonomy. I would like us to imagine Silver and Cross staffing the intake desk at the legal aid office. Four clients are sitting in the waiting room, thumbing the old *People* magazines or the cheaply printed “Know Your Rights!” pamphlets. A bored toddler is tugging at her mother’s dress. Absently, she pushes the toddler’s hand away. Then the lawyers call her name. She sweeps up the toddler and goes in to speak with the professors:

PROSPECTIVE CLIENT #1: The city is trying to terminate my parental rights and take my child away. Can you help me?

SILVER AND CROSS: That’s a twenty-hour job. We won’t represent you, but we’ll give you \$3,000.

They are honoring her autonomy. Which does she prefer, the money or the child? It’s her call.

After she leaves, clutching the child to her, the next client comes in:

PROSPECTIVE CLIENT #2: Immigration is trying to deport me back to my home country. I’ll be arrested if I’m sent back, maybe tortured and killed. Can you represent me at my asylum hearing?

SILVER AND CROSS: Oh sure. But that will take at least forty hours to do right. Tell you what: We’ll give you \$6,000 instead. That should get you across the Canadian border in style!

Next comes Client Number Three:

PROSPECTIVE CLIENT #3: Last week my boyfriend beat me up and broke my arm. Now he’s threatening to kill me. My cousin told me that you could help me get a court order to keep him away.

SILVER AND CROSS: We could. It would take about four hours. But what if we give you \$600 instead? Now you can buy a gun and take yourself out to dinner with the change.

And now the last:

PROSPECTIVE CLIENT #4: My landlord is trying to evict me, and I haven’t got the money for a new apartment. He has no right to evict me—I’ve always been a good tenant and paid the rent on time. He just doesn’t like me. My eviction hearing is next week. Can you help me?

SILVER AND CROSS: Here’s the money for a new apartment.

It’s been a good day’s work at the alms factory. Instead of foisting legal services on clients, they have honored the clients’ autonomy by giving them money they can spend on anything they wish. The professors apparently believe that the four prospective clients will be grateful for their response. My own prediction is rather different. Even if Prospective Client Number Four will be happier with the money for a new apartment than with legal assistance, I suspect she will also be angered and humiliated by the offer.

The imaginary dialogues dramatize a few points that Silver and Cross overlook. First, whether the client prefers legal services or cash

depends on how urgent the legal problem is. Second, how much the case is worth to the lawyer may have nothing to do with how much it matters to the client. Third, not all legal woes translate into monetary equivalents.

Of course, nothing prevents the clients from taking the money and spending it on legal services—in effect, retaining someone other than Cross and Silver to do the legal work. But the fact that some or all of these clients will undoubtedly prefer to spend the money on legal services demonstrates that Cross's and Silver's question about whether legal aid clients would rather have lawyers or money is not merely rhetorical.

Though they are important, these points do not bear on the question of human dignity. The next point does, however. It is this. Even if the client's legal problem concerns only money, as in the eviction case, it may matter enormously to her how she gets the money. The reason has to do with the entirely different social meanings of help and handouts. Handouts accentuate the helplessness and dependency of the recipient. They do nothing good for a person's self-respect.

Help is different. All of us need help sometimes for some things, so there is no sense that getting help is demeaning. When you help someone cope with a problem, you create a sense of shared enterprise. Your implicit aim is to reduce their dependency by removing a stumbling-block. By contrast, substituting handouts for help seems very much like bribing the recipient to go away. Handouts accentuate social distance. Handouts humiliate.

Consider an instructive biblical passage from the Book of Leviticus: When you reap the harvest of your land, you shall not reap all the way to the edges of your field, or gather the gleanings of your harvest. You shall not pick your vineyard bare, or gather the fallen fruit of your vineyard; you shall leave them for the poor and the stranger . . . .<sup>90</sup>

One important point to notice about this passage is that it sets out a duty, not just something that you do if you are nice. In fact, the Hebrew word for giving to the needy—*tzedakah*—derives from *tzedek*, the word for “justice.”<sup>91</sup>

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90. *Leviticus* 19:9-10 (Jewish Publication Society Tanakh Translation). This commandment appears in the chapter of *Leviticus* that the rabbis regard as the moral core of the Bible—the so-called Law of Holiness (*Kedoshim*), the same chapter that contains the laws “Love your [neighbor] as yourself,” *Leviticus* 19:18, and “love [the stranger] as yourself,” *Leviticus* 19:34.

91. However, Maimonides's analysis of the word *tzedakah* downplays this link. He distinguishes two senses of justice. The first, giving people what they have by right (his example is returning a pledge to the poor) is not called *tzedakah*. Instead, the word is reserved for fulfilling duties that are connected with moral virtue, “such as remedying the injuries of all those who are injured.” We might use the English word “philanthropy”—etymologically, “love of man”—except that Maimonides carefully distinguishes *tzedakah* from *chesed* (loving kindness). His emphasis is on the duty and virtue aspects of *tzedakah*, not the emotional and motivational aspects. And, according to Maimonides, this implies that the connection between *tzedakah* and justice is that by performing *tzedakah* one does justice to one's own soul, not to the beneficiary. Nevertheless, the fact remains that Maimonides insists

The second point to notice about the duty to leave gleanings for the poor and the foreigner is that it is not a commandment to give handouts. It does not say “After the harvest, give some grain to the poor begging at your gates.” Instead, the commandment is to leave something for the poor to gather for themselves. The poor will gain their living by work—indeed, by the same kind of work as any other harvester. It is a commandment to help the poor in a way that, to the highest degree possible, maintains their self-respect and makes their lives normal. It is a commandment to do *tzedakah* in a manner that honors human dignity, that spares the gleaner humiliation. As the twelfth-century rabbi Maimonides put it, “Whoever gives *tzedakah* to a poor man ill-manneredly . . . has lost all the merit of his action even though he should give him a thousand gold pieces.”<sup>92</sup>

The views of Maimonides, who thought more deeply about the duty to give than any other author I know, are instructive, and his analysis of benevolence, which includes a subtle classification of modes of giving into eight degrees, highest to lowest, is one of the most celebrated passages in the rabbinic literature. As I read it, his teaching centers overwhelmingly around the concern that gifts to the poor should never humiliate recipients or perpetuate their dependency. For that reason, Maimonides argued for the superiority of anonymous giving.<sup>93</sup> He thought that giving too little, but graciously, is better than giving an adequate amount grudgingly.<sup>94</sup> He maintained that gifts bestowed before the poor person asks are better than those given after,<sup>95</sup> and he regarded giving that promotes the self-sufficiency of the recipient, for example by making him one’s business partner, as the highest form of benevolence.<sup>96</sup> Particularly relevant to the pro bono context is Maimonides’s careful specification that, if a gift cannot be anonymous, the giver should bestow

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that *tzedakah* is a duty, not a grace. MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED 631 (Shlomo Pines trans., Univ. Chi. Press 1963) (1197).

92. MOSES MAIMONIDES, MISHNEH TORAH, Sefer Zerain, Ch. 10, § 4, reprinted in A MAIMONIDES READER 136 (Isadore Twersky ed., 1972).

93. *Id.* §§ 8–10, at 137. Giving in which neither donor nor recipient know each other’s identities is the seventh (second-highest) stage of Maimonides’s eight-stage classification. Just below that is giving in which the donor is unknown to the recipient—as in the case of “the great sages who would go forth and throw coins covertly into poor people’s doorways”; and below that is giving in which the recipient is unknown to the donor, as in the case of “the great sages who would tie their coins in their scarves which they would fling over their shoulders so that the poor might help themselves without suffering shame.” *Id.* §§ 9–10. Why is unknown-recipient *tzedakah* ranked lower than unknown-donor *tzedakah*? Presumably, the answer lies in the fact that when the recipient knows the donor she will feel beholden; when the donor is unknown, the recipient can consort with anyone in the community on an equal footing.

94. *Id.* §§ 13–14, at 137. Giving “morosely” is the first, or lowest, of the eight degrees, while giving graciously, but too little, is second-lowest.

95. *Id.* §§ 11–12, at 137. Giving before being asked is the fourth stage, while giving only after the poor person asks is the third.

96. *Id.* § 7, at 136–37. “The highest degree, exceeded by none, is that of the person who assists a poor Jew by providing him with a gift or a loan or by accepting him into a business partnership or by helping him find employment—in a word, by putting him where he can dispense with other people’s aid.” *Id.*

it “with his own hand.”<sup>97</sup> Bestowing the gift with your own hand matters because it removes the suspicion that, while you are willing to help the recipient, you are not willing to associate with her.<sup>98</sup>

How do these ideas play out in the context of legal services? The four imaginary dialogues dramatize the way that offering money in lieu of legal assistance humbles and humiliates the would-be client. To begin with the obvious, to offer money when someone asks for legal services is to treat a potential client like an actual beggar. A second point is that legal problems often concern rights, and treating people as rights-bearers by offering legal help dignifies them in a way that treating them as needs-bearers, by offering them cash, does not.<sup>99</sup> A rights-bearer is, after all, a legal person, with ontological heft that others are obligated to respect. Rights connect with human dignity in a way that needs do not. A lawyer who offers pro bono assistance recognizes the client as a person, not a panhandler.

Now Silver and Cross might reply that giving cash to poor people who request pro bono services actually treats them with greater respect than restricting your gift to in-kind services. The reason is one we have already seen: If it is really legal services poor people want, they can use the cash to hire a lawyer. If not, they can use the money for something more important. In this way, the decision is up to them.<sup>100</sup>

I remain skeptical, however. Is the donor-lawyer giving the would-be client money to hire a different lawyer? If so, the message seems to be “I don’t want to have to deal with you, so here’s some money so you can go away and find another lawyer.” Maimonides’s injunction that a giver should provide aid “with his own hand” comes ineluctably to mind.

Or, alternatively, is the donor saying to the would-be client, “Here’s some money. You can either use it to hire me to represent you, or you can spend it on whatever else you think is more important?” This alter-

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97. *Id.* § 11.

98. As an aside, I might mention that Maimonides’s rules for recipients partake of the same themes of dignity, equality, and independence. He offers three fundamental rules: first, that dependence on the community’s benevolence should be a last resort, and one should be willing to work hard and even endure some hardship before asking for aid. Second, and related, obtaining aid by deception is forbidden. Third, and perhaps most interesting and surprising, is that a needy person who *rejects* essential aid has sinned—he is “a shedder of blood, guilty of attempts on his own life.” There is a difference between enduring hardship to avoid the shame of dependence and stiff-necked, false pride. One suspects that Maimonides included the third rule in part for strategic reasons. Maimonides was the greatest rabbi—as well as the greatest physician and lawyer—of his time. (On learning this, my wife remarked, “His mother must have been so happy!”) Maimonides served as the court physician of the caliph in Cairo, and wrote legal opinions for Jewish communities all over the world. His codification of the religious law, the *Mishneh Torah*, became the model for the *Shulchan Arech*, the authoritative code still used by rabbinic courts. In addition, he wrote medical, astronomical, and philosophical treatises. So great was his celebrity that he has been known ever since by the acronym “Rambam” (*Rabbi Moses ben Maimon*). Backed by Maimonides’s authority, the needy can henceforth regard their acceptance of aid as a duty, not a weakness.

99. This is an important theme of PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* (1991).

100. I am grateful to David Hyman for pointing out this argument to me.



native is certainly better than the last—but it still transforms the nature of the encounter from a professional consultation into an occasion for alms-giving. Instead of a lawyer-client relationship, the offer creates a patron-client relationship. No longer is the client a person with rights at stake. Now her rights are subsumed into the category of her needs. Furthermore, now the client must regard her legal problem as fungible with all her other needs, which diminishes its significance and underlines the fact that a poor person finds desperation wherever she looks. Imagine a physician making a similar offer to an impoverished person who shows up at the physician's office with a broken wrist:

Sure, I could set your wrist for free, which is actually a thousand dollars' worth of medical treatment. But instead, I'll give you a thousand dollars. That way, you can decide whether to spend it on getting your wrist set, or else live with the broken wrist while you take care of something even more urgent.

How much humiliation should a poor person have to put up with?

I do not suggest that pro bono legal assistance is always morally superior to cash assistance. Blanket generalizations like that, in either direction, are absurd. Every poverty lawyer can call to mind clients who needed money more than anything a lawyer could do for them. I suspect that every poverty lawyer has at one time or another chafed under the ethics rule forbidding lawyers to offer humanitarian financial assistance to their litigation clients.<sup>101</sup> What I am suggesting is that, even when all a client wants from a lawyer is help in obtaining money, ignoring the legal problem and giving the client money creates a sorry excuse for a moral relationship. Helping those in need is an interaction, not an action, and Silver and Cross neglect the question of what kind of interactions cash transfers rather than legal services would be likely to create. They are, it seems to me, humiliating transactions. The lawyer who offers legal services may not be offering what the client needs most urgently—but the offer honors the client's human dignity in a way that cash on the barrel-head never can.

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101. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2003).

