What We Talk About When We Talk About Dignity in Policing

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[This essay is an edited, draft excerpt from chapter 1 of my book, *The Retrieval of Liberalism in Policing* (Oxford University Press, 2019); see PhilPapers entry on the book's preface and introduction.]

Force and Brutality

In 1989, Lou Reed released *New York*, a record that adeptly captured the ethos of a tumultuous era in New York City. It was an era of economic distress (for many), rampant drug use, crime, strain along racial lines, and the scourging effects of AIDS. The intense friction between the New York Police Department and the impoverished communities it served was addressed directly in the song "Hold On": "The dopers sent a message to the cops last weekend, they shot him in the car where he sat, and Eleanor Bumpurs and Michael Stewart must have appreciated that."[1] Michael Stewart, 25-years-old, was a black graffiti artist who was arrested by several white officers for spray-painting in a New York City subway station on September 15, 1983; he died shortly thereafter.[2] It is not altogether clear what happened during the time between his arrest and his death, but he was comatose when he arrived in the hospital—"bruised and hogtied"—and died less than two weeks later. Stewart's family and others believed the case was about racism and brutality, contending that Stewart was beaten to death after his arrest. Several officers were charged with criminally negligent homicide, assault, and perjury, but all were acquitted by an all-white jury in "one of the most complex and highly publicized police brutality cases in New York City's history."[3] The defense's position was that Stewart died from acute intoxication while resisting arrest, though various medical reports and experts noted a variety of factors that contributed to the death, including cardiac arrest, a spinal cord injury,

asphyxia, and "blunt force trauma."[4] Street artist Jean-Michel Basquiat immortalized the event with a painting, *Defacement (The Death of Michael Stewart),* challenging what he viewed to be state-sanctioned brutality.

Then, a year later, 66-year-old Eleanor Bumpurs was killed—two blasts from a shotgun—by New York City police on October 29, 1984. Bumpurs, who was four months behind in the $98.65 rent at her Bronx apartment, threatened housing workers with boiling lye in the face if they tried to evict her.[5]

> Officers arrived with shields and a special Y-shaped bar used to pin people to the wall, but the woman, almost 300 pounds and naked, fought her way free, waving a knife and trying to slash an officer. His partner shot her twice with a shotgun, once in the hand and once, fatally, in the chest.

Because the officers followed the patrol guide, the police commissioner questioned whether anything had gone wrong during the incident—comments that sparked widespread outrage.[6] The case nevertheless prompted changes to the patrol guide, including having a senior officer on scene "before officers confronted a disturbed person."[7] Both the Stewart and the Bumpurs case illuminate what is an often overlooked point: Regardless of the minimal legal constraints (e.g., constitutional standards) placed upon the police in their use of force, there are other norms that may constrain police conduct and that may become manifest in police regulations (e.g., officers ought to use a greater standard of care when dealing with a person known to have a mental illness in light of the value and status of all persons).[8] Indeed, the Fourth Amendment is quite permissive with respect to establishing the limits of the police's use of force to arrest and seize a person. Coinciding with the era in which Stewart and Bumpurs were killed, the U.S. Supreme Court decided two important cases: *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989).[9]

The *Garner* case held that it is *unreasonable* to use deadly force to prevent escape unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[10] Building upon this standard, the *Connor* case explained that the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[11] Although the test is objective inasmuch as it is based upon a "reasonableness" inquiry, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[12] Whatever the merit of these and subsequent interpretations of the legal limits of the police's use of force, it is obvious that issues of police brutality and use of force have not gone away since the 1980s.[13] And this bolsters the view that other norms—beyond the minimal legal norms expressed in constitutional law—ought to be considered in the context of police use of force and brutality. For instance, while it might clearly be reasonable to shoot someone who is attacking with a knife (regardless of whether they are mentally ill), there might be normative principles that constrain an officer's actions leading up to a confrontation with such a person—or any person—as illustrated in the Bumpurs case.

By *normative* (rather than *descriptive* claims, which typically rely upon empirical evidence to describe how things are), I mean claims that take the form, "We ought to do X," or, "We ought not do X." A normative analysis thus considers whether something is justified—whether it is right and obligatory in light of some objective criteria. One way to determine whether a particular claim is justified in a political society is to examine whether the claim is consistent with the basic tenets of the society's tradition. For example, societies that are broadly part of the liberal tradition conceive of persons as "free and equal." *Liberal* in this context thus

does not refer to contemporary political parties, as in a "liberal democrat" versus a "conservative republican." It rather refers to the broader political tradition espoused by people such as John Locke, whose philosophy profoundly impacted the framers of the Constitution and our system of government. Accordingly, a normative analysis might, say, make the claim that discriminatory policies in a liberal society are wrong by virtue of liberal political norms (e.g., that all people are free and equal), as well as norms of liberal legal systems.[14]

These initial observations thus give rise to normative questions about how the police—in their official role as law enforcement officers—may deal with persons they encounter. One of the reasons these questions are not easy to answer is because it is not easy to be a law enforcement officer. But neither is it easy to have a son or daughter killed or beaten by the police unjustifiably. In both the Stewart and the Bumpurs cases, there is clear evidence that the police encountered resistance when trying to execute an arrest. Such resistance is an affront to presumably legitimate state power, justifying a (legitimate) response to the resistance. Setting aside the "reasonableness" legal standard for the moment, one might ask a more fundamental question regarding how persons are conceived in the liberal polity and whether that conception constrains the police's response to resistance. For example, may the police treat a resisting suspect like a "wild animal," whatever that might entail?[15] More provocatively, are intoxicated graffiti artists and mentally disturbed elderly women more or less like rabid dogs? If not, then how do we balance competing values in the context of the police's treatment of persons? Although absolute answers to these questions may prove elusive, it is possible to receive some guidance from the tradition in which we find ourselves.

Ironically, one might say that there is little philosophical interest in brutality because brutality is so obviously wrong. But leaving it at that would surely be insufficient. Why is it

wrong? One reason it is wrong is that it is inconsistent with the conception of persons in the liberal polity (and no doubt other political traditions). One of the central goals of the book upon which this essay is based (*The Retrieval of Liberalism in Policing*) is to describe the liberal conception of persons and how that conception serves as a check on the state's power—often the police's power—to respond to injustice (e.g., through the use of tactics involving informants, deception, and surveillance). A tripartite conception of liberal personhood is proposed in the book: *reciprocator* and *moral agent*, which illuminate the third facet of *human dignity*. The basic idea is that persons as *reciprocators* possess an equal social and legal status in the liberal tradition. Given their voluntary membership in the political community, persons have certain legal and political rights (and obligations) that are based upon the state's (including the police's) duties in the political community. The conception of persons as *moral agents* is steeped in a particular way that one is valued in the context of the liberal state, namely, the value ascribed to one's capacity for certain natural properties (e.g., practical rationality, autonomy, voluntariness) that allow the state to treat one as free and responsible.

One of the book's interesting—and somewhat surprising—conclusions is how these first two facets of liberal personhood correspond to a multifaceted conception of human dignity in the liberal tradition. However, the limited goal of this essay is to sketch various conceptions of dignity and how those conceptions might be relevant to police brutality and legal rights. The next section will thus focus on the various ways that dignity may be understood, and the following section will discuss applications to police brutality in the legal context. The upshot will be that dignity is one way to express why brutality is wrong.

Philosophical Conceptions of Dignity

Although various conceptions of dignity may have overlapping features, there are at least four distinct ways to think about dignity: (1) *Kantian Dignity*: "a property of all rational beings, which gives the possessor the right never to be treated simply as a means, but always at the same time as an end," (2) *Aristocratic Dignity*: "the outwardly displayed quality of a human being who acts in accordance with her superior rank and position," (3) *Comportment Dignity*: "the outwardly displayed quality of a human being who acts in accordance with society's expectations of well-mannered demeanor and bearing," and (4) *Meritorious Dignity*: "a virtue, which subsumes the four cardinal virtues [courage, justice, wisdom, temperance] and one's sense of self-worth."[16]

Beginning with the two conceptions of dignity that might be described as "social," it is important to note both the connections and the disconnections between "aristocratic dignity" (relating to social status) and "comportment dignity" (relating to social expectations). As the name suggests, aristocratic dignity is a conception of dignity based upon one's high rank—whether secular or religious—and acting (outwardly) in accordance with that rank.[17] As Doris Schroeder put it, "Kings, popes, or other nobles would be regarded as dignified if their conduct befitted those of a higher rank," meaning that such dignity is "restricted to an infinitesimally small number of human beings and strongly associated with position."[18] Schroeder aptly notes how one may tease out a second conception of dignity from aristocratic dignity. For example, when a king walks in a stately manner wearing stately garb, he might be said to possess dignity *because* of his high rank and the outward display of that aristocratic rank. That said, one may nevertheless display seemly outward behavior even if one does not possess the high rank of an aristocrat. In other words, one may possess dignity based upon one's outward bearing—or

comportment—regardless of one's social status. So this second conception is not based upon social status (one may be impoverished and have comportment dignity), but rather social expectations (demonstrating actions that count as dignified behavior in society).

Elements of both these social conceptions of dignity are relevant to the liberal conception of dignity described in my book. For instance, one facet of the liberal conception of dignity is that *all* persons possess a high-ranking legal status that comprises a set of rights—with one's equal status establishing the content of certain legal rights—irrespective of one's social status or comportment.[19] Although the police may be justified in treating a person in a particular way based upon the person's comportment (say, resisting arrest), it must be done in a manner that does not denigrate the rights comprised by the person's high-ranking, equal, legal status.

Turning to "Kantian Dignity," one can see a conception that transcends social status based upon all human beings having the "capacity to legislate the moral law," which Michael Meyer reduces to two conditions: "Human beings attain their dignity because (1) they possess the capacity to make universal law—or the 'categorical imperative'; (2) they then render themselves subject to this law."[20] The basic idea is that humans have dignity based upon their ability to exercise rationality in a way that is guided by rules of conduct resulting from that rationality.[21] The larger point is that dignity is inherently part of what it means to be human because it is based upon uniquely human traits: "humanity itself is dignity."[22] In Kant's "kingdom of ends," where "everything has either a price or a dignity," it is thus clear where humans are situated: They are not valued merely by their contingent social status or rank; their value is inherent. This might be connected to policing in a variety of ways. For instance, while the police's use of informants is perhaps an indispensable investigative tool, there are moral limits to the police's power to use persons (informants) as a means to a law enforcement end.

Examples might include situations in which an informant has no real choice about whether to assist the police (calling into question the informants "consent" to assist the police), as well as situations in which the informant is subjected to inherently dangerous situations that would otherwise be addressed by the police in their law enforcement role. I devote a chapter to this topic in my book.

Obviously, much more could be said here, but the purpose is not to explicate a comprehensive account of Kant's conception of dignity. The goal is rather to draw out some of the central themes of his conception that are relevant to a liberal conception of dignity. For example, one facet of my liberal conception of dignity is that it expresses one's intrinsic value. And this facet of the liberal conception of dignity overlaps with the liberal conception of persons as *moral agents*: In other words, conceiving of persons as *moral agents* is based on the value assigned to a person's capacity for certain natural properties (conceptions of belief, desire, intention, autonomy, free will) that we use to make sense of behavior. These natural properties are important to us in part because they allow us to treat people as free and thus responsible for their actions. The idea is embraced in criminal law by the principle that *actus reus* ("guilty act") and *mens rea* ("guilty mind") are required for criminal responsibility. Of course, the principle of guilt is a doctrine about legal culpability, but it is equally a moral doctrine inasmuch as it holds that one is not (morally) blameworthy if one does not act voluntarily and with a guilty mind. And this is one way we respect a person's dignity: The state (including the police) is precluded from using its discretionary powers in a way that would pervert the law through an affront to a person's status as a moral agent.

Dignity and Legal Rights

The varying philosophical conceptions of dignity raise questions about how dignity's multifaceted nature relates to rights: The content of a moral conception of dignity can be said to include a set of moral human rights (e.g., rights based upon the value ascribed to one's capacity for natural properties that make one free and responsible), and the content of a socio-legal conception of dignity can be said to include a set of morally justified legal human rights (e.g., rights based upon one's equal status in society). This yields a multifaceted conception of liberal dignity with overlapping parts involving both moral worth and socio-legal status. With this philosophical sketch of dignity in mind, we can return to the issue of how a concept as (admittedly) amorphous as dignity might have bearing in the practical context in which this section began: policing and brutality. To do this, it makes sense to consider, as Neomi Rao puts it, "how the various concepts of dignity reflect different underlying conceptions of individual rights within a community."[23] Rao identifies three different concepts of dignity that constitutional courts use to adjudicate individual rights: (1) inherent dignity, (2) substantive conceptions of dignity, and (3) dignity as recognition.[24]

"Inherent dignity" in the law most closely resembles "Kantian dignity" in that it expresses the inherent worth of all persons, irrespective of external norms such as social expectations about status, rank, and behavior. Rao points out that this sort of dignity is typically reflected in U.S. constitutional law decisions regarding "freedom from interference by the state in areas such as freedom of speech, privacy, and sexual relationships…because "[t]his dignity encompasses the liberal notion of negative freedom—of creating a space for individual choice."[25] Accordingly, inherent dignity is respected under the law when the state does not impede one's autonomy.

Rao describes "substantive conceptions of dignity" as conceptions that "serve as the grounds for enforcing various substantive values" based upon one "*living in a certain way*."[26] Unlike Kantian and inherent dignity, then, substantive conceptions of dignity are connected to external social expectations. This places substantive connections of dignity closer to "comportment dignity" (because they look to whether one outwardly displays qualities that are in accordance with society's expectations) and "meritorious dignity" (because they look to whether one displays particular social virtues). Rao provides a variety of examples that might count as ways that the state enforces a substantive conception of dignity, including "paternalistic policies that prevent individuals from choosing a vocation or a way of life that might be 'undignified' in the view of the social and political community."[27] Here, Rao cites the well-known example of certain municipalities in France that banned "dwarf throwing" because it is an affront to public norms of dignity—even though some dwarves desired to earn a living from the practice.[28]

That said, it is worth noting how "substantive conceptions of dignity" might be more complex than paternalist policies promulgated by the state. For instance, suppose it *is* true that dwarf throwing is *undignified*. Even so, that does not necessarily mean that states should forbid the practice. Indeed, people are free to engage in all sorts of "undignified" behavior in society (especially in liberal societies). But the dignity analysis does not stop there: There may still be questions about the relationship between a person's right to engage in undignified behavior and the state's duty to *treat the person with dignity*—especially persons over whom the state has leverage (such as informants and criminals). So, for example, states might be constrained from punishing persons in an "undignified" manner, which might show how in some cases "substantive conceptions of dignity" overlap with a variation of "inherent dignity" that constrain the state's treatment of any person.

The point is simply that dignity continues to be a complex (if not elusive) concept in both the legal and philosophical context. And substantive conceptions of dignity may be viewed from the perspective of restraints on state acts (given certain substantive commitments of the state), not simply paternalistic policies that restrain persons from "undignified" acts. So while banning private acts of "dwarf-throwing" might entail an overly paternalistic substantive conception of dignity (assuming the person wanted to be thrown, and so on), prohibiting the police (as an agent of the state) from subjecting people to "undignified" acts is different altogether: Given certain substantive commitments of the state, perhaps we ought not allow the police to subject people to certain "undignified" acts (e.g., compelling an informant to engage in a sex act as a means of gathering evidence regarding the solicitation of prostitutes).[29]

Finally, Rao explains how constitutional courts view dignity in terms of "recognition," which she describes as relating to the "*attitude* possessed by others and the state" toward a person.[30] This form of dignity might become manifest in "laws against defamation and hate speech," which require "respect for one's fellow citizens" and the state's adoption of "policies that express the equal worth of all individuals and their life choices, such as requiring gay marriage, not just legally equivalent civil unions, because of the expressive and symbolic importance of marriage."[31] Rao views this conception as not only the one that does the most work in contemporary constitutional courts, but also the one that expresses a new political demand for respect that is not associated with rights regarding "freedom or liberty or a minimum standard of living."[32] Paradoxically, dignity as "recognition" is in one sense similar to "aristocratic dignity" inasmuch as dignity as recognition involves an attitude of symbolically "validating individuals *in their particularity*," as Rao puts it.[33] To put it a bit differently, in the same way a small group (aristocrats) was recognized as possessing aristocratic dignity

historically, a relatively small group might require recognition with respect to, say, gay marriage. But where aristocratic dignity is about an expression of exclusivity, dignity as recognition is about an expression of inclusivity—an expression of the equal (not greater) worth of the group in question. In other words, dignity as recognition—like the other conceptions—is a layered conception, and one is likely to find both connections and disconnections with other conceptions under each layer.[34] We perhaps see examples of this in the recent cultural debates about free speech. Hate speech is generally protected in the United States, but some argue that it should be unprotected speech that is criminalized because it undermines the rights of particular groups by denigrating the equality of those groups. Such debates highlight the complexity of dignity as recognition and how it might be viewed as entailing either an exclusive right for certain groups or an inclusive rights that promotes equality among all groups.

There are no doubt many reasons for dignity's messiness. One reason is simply that there are multiple conceptions of dignity that have multiple meanings and uses. Another reason is that political and legal institutions (such as constitutional courts) are not always consistent in their use of dignity and clear about what they mean by dignity. In light of these difficulties, how can one make sense of the role that dignity plays with respect to the liberal conception of persons? The broader goal of my book is to answer a particular question—*What are the moral limits of police powers in the liberal tradition?*—and one way to make sense of dignity is to examine how it becomes manifest within the context of that question's answer. The scope of this essay is much more limited. By considering the wrongness of police brutality, one is led naturally to the idea of dignity—dignity being one way to express why brutality is wrong. The hope is that the essay's brief sketch of dignity begins to point toward a modest conclusion: One of the police's

duties is to secure (not violate) rights that emanate from a person's dignity—even when engaged in law enforcement roles that involve using force to seize persons.

[1] LOU REED, *Hold On, on* NEW YORK (Sire 1989).
[2] Isabel Wilkerson, *Jury Acquits All Transit Officers in 1983 Death of Michael Stewart*, N.Y. TIMES, November 25, 1985.
[3] *Id*.
[4] *Id*.
[5] Michael Wilson, *When Mental Illness Meets Police Firepower; Shift in Training for Officers Reflects Lessons of Encounters Gone Awry*, N.Y. TIMES, Dec. 28, 2003.
[6] *Id*.
[7] *Id*.
[8] Law enforcement agencies—from smaller, regional agencies to the FBI—are governed by a wide array of laws and regulations beyond the Fourth Amendment that are based upon both formal (internal policy) and informal ("us or them") norms. See ROBERT JACKALL, STREET STORIES 24 (2005), for an example of the latter ("Better a dead Shorty…than a wife living off…[the officer's] insurance policy, dancing her nights away with some NYPD bozo named 'Ricardo' and saying 'Jeff was such a nice guy.'") Although a different issue, it is interesting to note that according to a report by Amnesty International USA, "[e]very state in the US fails to comply with international standards on the lethal use of force by law enforcement officers." Oliver Laughland and Jamiles Lartey, *All 50 US states fail to meet global police use of force standards, report finds*, THE GUARDIAN, June 18, 2015.
[9] Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989). Of course, there are many other cases and sources of law that govern the use of force, and nuance is required when dealing with deadly force police. Here, the idea is to provide a broad overview of some of the legal factors that are relevant to questions of brutality.
[10] *Garner*, 471 U.S. at 3.
[11] *Connor*, 490 U.S. at 396
[12] *Id*. at 397.
[13] It has been difficult to open a newspaper without seeing a headline about the questionable killing of a person by a police officer. These cases often involved police officers shooting persons in the back who did not have weapons and who were fleeing, and they often involved a white officer and a black victim. The headlines were not only about shootings, but also about police officers who allegedly used unnecessary force against persons—such as unauthorized chokeholds—that resulted in death. *See, e.g.*, Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES, April 8, 2015, at A1 ("A white police officer in North Charleston, S.C., was charged with murder on Tuesday after a video surfaced showing him shooting in the back and killing an apparently unarmed black man while the man ran away."); Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. TIMES, November 25, 2015, at A1 (describing a

video showing a "young man running and then walking past officers in the middle of the street and spinning when bullets suddenly strike him down."); Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES, July 19, 2014, at A1 (describing how Eric Garner died during an arrest that involved what appeared to be a chokehold). The central point is that these sorts of cases often involve highly questionable encounters, circumstances, and tactics. *See* John Kleinig, *To Protect & Serve*, THE CRITIQUE, May 24, 2016.

[14] Luke William Hunt, *Norms, Narratives, and Politics*, 101 SOUNDINGS: AN INTERDISCIPLINARY JOURNAL (2018).

[15] This rhetorical question is not intended to imply that animals may be subjugated or harmed because they lack "*human* dignity." For a discussion of this point, see Michael Meyer, *The Simple Dignity of Sentient Life: Speciesism and Human Dignity*, 32 JOURNAL OF SOCIAL PHILOSOPHY 115 (2001) (endorsing the following: "(1) the pain of nonhuman sentient creatures—or animals—has genuine moral significance, and (2) animals and some of their interests have independent moral standing.").

[16] Doris Schroeder, *Dignity: Two Riddles and Four Concepts*, 17 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 230-38 (2008). See *id*. at 234-35, for an overview of "meritorious dignity."

[17] *Id*. at 233.

[18] *Id*.

[19] *See* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012).

[20] Michael J. Meyer, *Kant's Concept of Dignity and Modern Political Thoughts*, 8 HISTORY OF EUROPEAN IDEAS 319, 327 (1989) (referring to Kant's GROUNDWORK OF THE METAPHYSICS OF MORALS).

[21] *Id*.

[22] *Id*. (quoting Kant's *The Metaphysical Principles of Virtue*).

[23] Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV.183, 186 (2011).

[24] See *id*. at 187-92, for an overview of these three concepts.

[25] *Id*. at 187.

[26] *Id*.

[27] *Id*. at 188.

[28] *Id*. Rao also cites the French government's "ban on the burqa on the grounds that such a ban furthers the dignity of Muslim women, despite the fact that some Muslim women choose to wear the burqa as an expression of their faith," as well as "social-welfare rights or protection by the state from poverty and violence." *Id*.

[29] *See, e.g.*, Alexander v. DeAngelo, 329 F.3D 912 (7th Cir. 2003).

[30] Neomi Rao, *supra* note 25, at 188.

[31] *Id*. at 188-89.

[32] *Id*. at 189.

[33] *Id*. at 188.

[34] Rao rather describes dignity as recognition as derivative of other individual rights. Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VIRGINIA LAW REVIEW ONLINE 29, 29-32 (2013). If that is all there is to it—a right to recognition "standing alone"—then dignity may very well be derivative in some sense. However, regardless of how a particular constitutional court might conceive of dignity, the liberal conception of dignity is not so narrowly constrained.