The Authority of the Self

Meir Dan-Cohen

Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation

The Authority of the Self, 43 Law & Soc. Order 1159 (2011)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
THE AUTHORITY OF THE SELF

Meir Dan-Cohen*

I

When Graham Wallas famously quipped, “How can I know what I think till I see what I say?" he spoke for many, but not for commentators. We are expected to know what we think as soon as we see what our target said: we think the opposite! However, when the target for comment is a piece by Professor Waldron, the task is not so easy. Not only are his arguments characteristically cogent and insightful here, but the laudable tone in which he presents them, neither dogmatic nor polemic, further discourages opposition. Waldron seems to me a theoretical pluralist, careful to acknowledge the validity of alternative approaches even as he demonstrates the merits of his own. This is as it should be. Theoretical discussions of morality, politics, and law of the kind relevant here are simplifications of a multifaceted and complicated domain; the insight each offers is in part the product of its restricted tunnel vision. Only by traveling through many such tunnels can a reader compose with some accuracy and clarity a picture of the overall lay of the land.

At the risk of saddling Waldron with my own view of the matter, I would like to corroborate my impression of Waldron’s theoretical open-mindedness by alluding to the point in the latter part of his lecture, where he urges theorists who play the reflective equilibrium game to be bolder in suspending moral intuitions so as to explore more audaciously the implications of their theory. To be sound, and indeed safe, this recommendation must be tempered by the further realization that the theories in question are not self-applying, and so not in danger of running rough shod in practice over firm moral convictions. We can be more experimental, tentative, even playful in our theoretical reflection when we bear in mind that theories impact the world, if at all, only cumulatively—filtered through a thick layer of social action performed by numerous practitioners, guided by their own practical judgments.

* Milo Reese Robbins Chair in Legal Ethics, University of California at Berkeley School of Law.

1. GRAHAM WALLAS, THE ART OF THOUGHT 106 (1926).
3. Id. at 1133–34.
In this spirit, my aim in this comment is not to quibble with any of Waldron’s main conclusions, but rather to sketch a related, though in some respects alternative, route that leads to similar ones. That the conclusions I reach are similar rather than identical is at least partially a product of a certain degree of incommensurability among various theoretical approaches in this area. While different theories must, of course, share a vocabulary in order to join issues and engage in dialogue, the terms they use have inevitably somewhat different meanings. The reason is that the central terms in the relevant domains are not only, as has been famously argued, essentially contested, but they are also inescapably vague. Specifically, dignity, rights, and responsibility, which form Waldron’s agenda in this lecture, are part of our common fund of ideas and regular participants in ordinary discourse. In this capacity, however, such terms are used with greater rhetorical flourish than analytical rigor. To be philosophically fruitful, they must be regimented, and so assume a more precise meaning that derives in part from the other aspects of each specific theory and from the terms’ relationship to each other within that theory. We simply do not have a terminology that is both uniform and precise enough.

Given this state of affairs, my starting point is not a criticism of the terms Waldron has chosen to relate, but an observation that within one theoretical perspective, a broadly Kantian one, the choice would not be the most obvious. Rights are more naturally juxtaposed with duties than with responsibility. If responsibility requires a contrasting mate, I would propose autonomy as a better option. Within this perspective, autonomy and responsibility designate ground level phenomena, whereas rights and duties are their derivatives or incidents. So the first step on my alternative route is a terminological amendment, replacing rights with autonomy as the contrasting notion to responsibility. We could obviously maintain the terminological pairings I advocate in another way, i.e., by retaining the focus on rights, and substituting duty for responsibility. But the third term in Waldron’s trio, dignity, militates in favor of the former transposition: dignity is more intimately and directly bound up with autonomy and responsibility than with rights and duties. Within a Kantian cluster of ideas, people have dignity by virtue of their autonomy, and their autonomy in turn is inseparable from their responsibility; these are two sides of the same coin. I use this image advisedly to convey another point. The sides of a coin are not only inseparably linked together, but they also define the coin as such.

make it into a currency rather than just a chunk of metal, and, in doing so, they endow it with value and determine its denomination, which in regard to persons is measured in the metric of dignity. Since the coin here alludes to the self, this metaphor also helps convey the further, perhaps obvious, point—namely that autonomy and responsibility depend for their content and application on our conception of the self. To be responsible is, at least primarily, to be answerable for oneself, and to be autonomous is to govern oneself. So what precisely we are responsible for and how far our autonomy extends crucially depend on the composition and boundaries of the self.

Although the coin metaphor provides a compendious way of making these observations, it does little to elucidate and support them. Indeed, in one way it is even bound to mislead. A coin is a physical object, and so the image the coin metaphor conjures up places the self in the same category. We do, of course, think of human beings as living organisms, not fundamentally different, ontologically speaking, from other animals, and so as physical objects of sorts. But this is not the only conception of human beings around, and not the one that I believe is the most apposite for the normative issues here at stake. Many thinkers have spoken of the self in dramaturgical, narrative, or semiotic terms. What conception of self lurks amidst these metaphors and imageries and makes them seem appropriate? A related and partially overlapping body of thought considers the self to be socially constructed. What kind of thing is the self assumed to be if construction by society is to be a significant option? One answer in both cases fixes on the idea of intelligibility: we are intelligible in a sense in which animals are not. What sense is this? More like plays and novels than like cats and giraffes, the self is constituted by meanings. Correspondingly, social construction takes place in the medium of meaning: the self is the product of the web of meanings we spin around various objects and events, most importantly the human body and its career. The self's composition and boundaries are the largely unintended by-products of individual actions and collective practices, including those of law and morality, whose primary orientation is not the creation of a self but the accomplishment of some individual or collective goals. This constructive conception of the self


6. The primary text is GEORGE H. MEAD, MIND, SELF, AND SOCIETY (1934).
underwrites a tight connection between a person’s rights and her duties, and relatedly between her autonomy and responsibility.

We can glimpse these connections by considering and reinterpreting one of Waldron’s own examples. He quotes approvingly Elizabeth Anscombe for the idea that certain rights, such as those of parents with regard to their children, are “like assignments of authority.” This, however, raises two questions: first, what is the connection between the parents’ rights and duties regarding their children on the one hand, and the parental role on the other? And second, how does the parental role relate to the parents, that is, to the persons whose role it is? The answer given by the constructive view to both questions is essentially the same. First, rights and duties regarding children are not tacked onto an independently conceivable status or position of parenthood, but are rather constitutive of it. To be a parent is to occupy a role that consists in large part in a system of special rights and duties, and so authority, with regard to the children. The same is true of the second question, about the relationship of the parental role to its holder. Parenthood is a constitutive role, in the sense that occupying it typically becomes part of the parent’s identity, an aspect of the answer to the question of who she or he is. Combining the two answers amounts to the view that by defining the parent’s authority with regard to the children, specific rights and duties give content to the parental role, thereby extending the boundaries of the parent’s self, which amounts to an expansion of the scope of the parent’s autonomy and responsibility as well.

III

Thus interpreted, this example teaches a number of lessons pertinent to Waldron’s broader claims. The correlation between autonomy and responsibility, and hence between a person’s rights and duties, is upheld, and is indeed provided with a firmer foundation, by being tied to the composition and boundaries of the self. But since these normative terms participate in constituting the self, the boundary they track is in part their own creation. Absent a stable, antecedently-given human subject, subject and norms are engaged in a dynamic and dialectic relationship in which neither side provides a starting point or a resting place relative to the other. To be sure, specific ascriptions of responsibility or affirmations of autonomy are supported by a pre-existing vision of the subject: she did it, we say, or it’s her own life, or her body. But when we probe such statements, philosophically or in cases in which they prove particularly

7. Waldron, supra note 2, at 1115.
contentious, it turns out that they rest at bottom on the sedimentation of myriads of similar statements in the past. If we wish to go beyond precedent or are forced to do so, what can we appeal to? What considerations can guide us if we confront the constructive enterprise head-on?

Although the thought that the norms we consider track the boundaries of the self does not by itself tell us where these boundaries ought to lie, it does nonetheless help draw them by introducing an important constraint. Seen as tracking the boundary of one and the same entity, these norms must be at least roughly coextensive; they must have the same scope. Consider our attitude toward responsibility. A responsibility often carries with it burdens, and so we are tempted to evade it. One way to do so is by enacting a more minimal, narrowly circumscribed self. For example, when we learn that the law applies some of its most draconian measures to what we take to be the operations of will, we may respond by contracting the will’s domain and instead describe various types of actions in a deterministic vocabulary designed to place them at the periphery of the self or even completely outside its boundaries. However, once we realize that responsibility helps define the boundaries of the self, we see the risk inherent in this maneuver. Evacuating regions of the self in order to escape the burdens of responsibility has, as a corollary, the contraction of the scope of our autonomy. The opposite is also true. People may incline to stake out claims to expansive autonomy. But here too, there may be potentially undesirable constructive implications: since these claims involve expanding the self, they also entail the assumption of greater responsibility.

Finally, my interpretation of the parental role accommodates rights and duties as well. Seen as the more concrete incidents of autonomy and responsibility, they are like the outposts that mark our boundaries. But even though autonomy and responsibility are more fundamental than rights and duties, it does not follow in this instance that the foundation is to be laid first. The order of things is often reversed: rights and duties can be assigned on the basis of some perceived pragmatic need, an effective act of advocacy, a successful power gambit, or what not; and yet the result, often unintended, is to redefine the scope of autonomy and responsibility, and so shift a segment of the boundary of the self in ways that will affect future assignments of rights and duties.

IV

Roles occur in a metaphoric social space. But the drawing of the self’s boundaries through the assignment of rights and duties takes place within physical space as well. Let me briefly mention one example to illustrate
how in a similar vein private property can also be seen as an extension of the self. Under the U.S. Constitution, the inscription on a registration plate attached to a car counts as my expression every bit as does an oral message emitted from a mouth, provided that the car in the one case and the mouth in the other are mine. Consequently, to require a person to attach to her car a registration plate with the state motto “Live free or die” is to force her to speak, in violation of her free speech rights, as is requiring a demurring child to recite the Pledge of Allegiance.\(^8\) Note that in reaching this conclusion the Supreme Court cannot appeal to the party’s right, since the question is precisely whether such a right exists: is the appellee, a car owner, protected by a right against having the offending plate attached to his car? Rather, answering the question must rest on considerations that supposedly underlie and support the claim of right, such as the appellee’s expressive autonomy. When the Court holds in the appellee’s favor by acknowledging a right, it effectively includes the car within the scope of his expressive autonomy, thereby locating it within the boundaries of the self. But this in turn implies that one bears expressive responsibility for the car as well. So, for example, if someone were to attach a racist sticker to my car or post a racist sign on my lawn, it would be incumbent on me to remove the sticker or the sign on pain of being myself guilty of promulgating the offensive message. More generally, to own property is to have one’s authority expanded, and that involves an augmentation of autonomy as well as responsibility regarding objects other than the body.\(^9\)

V

Thus far I have sketched a picture that corresponds to the first half of Waldron’s lecture, and offers a reinterpretation of the tight connection between rights and responsibilities he proclaims. To recapitulate, on the account I favor, rights and duties help determine the contours of our autonomy and responsibility, thereby fixing the scope of our personal authority, which in turn amounts to drawing the boundaries of the self. A key example Waldron uses to support his position, and which I appropriate in support of mine, is that of the parental role. This example is also central to the transition to the second half of the lecture, where dignity assumes center stage. In turning to dignity, Waldron builds on his now familiar conception of dignity as universalized high social rank. The stepping stones

---

toward this conception of dignity are the more distinctive and circumscribed dignities (plural) associated with certain (elevated) roles:

One might speak of the dignity of a judge, in regard to his judicial appointment . . . . Or one might speak of the dignity of a clergyman, such as a bishop, in terms of his responsibility for the administration of a diocese, or even the dignity of a rector, in terms of his elementary right to administer the sacraments or direct their administration in a particular parish.10

Waldron sees “a natural fit between the idea of role-based dignity and the idea of responsibility-rights as [he has] defined them.”11 And so he proposes to explore “how far we can extend the responsibility analysis, moving step by step from specific roles like parenthood in the direction of certain responsibilities that people in general might be thought to have in relation to their human rights as such.”12 Along this trajectory, Waldron moves from the dignity he associates with the role of parents to that of citizenship. Proceeding, if somewhat hesitantly,13 even further, he finally proposes to extend the same approach to encompass the dignity of humanity and support universal human rights.14

Once again I find the picture appealing and the conclusions sound. And yet here too I propose an alternative approach, not so much in the form of an alternate route to the same destination as a suggestion that we reverse the direction of travel. Waldron’s procedure is to start with concrete roles, each vested with a certain dignity, and build his way up, through increasing abstraction, to the universal standpoint of humanity as a whole, where human rights come into view. On this approach, the dignity of a human being is modeled on, or derived from, that of parents or citizens. In a more Kantian picture, by contrast, the primary bearer of dignity is the person, abstractly conceived: Kantian dignity resides in the first place in our shared humanity. Relatedly, the order of derivation regarding the dignity attached to more specific roles is reversed. No dignity attaches to the roles as such; to speak of the dignity of an office or a role would be a category mistake.15 Rather, an elevated value accrues to a role because of its integration within a person’s life. The dignity of a parent is not to be understood as a worth that resides in the parental role, and which the parents themselves have in

---

10. See Waldron, supra note 2, at 1121.
11. Id.
12. Id.
13. “Here I admit the analysis starts to become a little strained.” Id. at 1125.
14. See, e.g., id. at 1126–27.
15. Which is not to say that Waldron commits such a mistake, but rather that he employs a different category.
part by virtue of assuming this role. It is the other way around: performing the parental role is a site of dignity and calls for respect because of the way it fits into the parents’ life and identity. The person’s dignity comes first—that of the role is derivative or secondary.

VI

What difference does it make, though, whether the role borrows its value from the value of its holder or instead bestows that value on her? As a practical matter, do these two not come down to the same thing? After all, roles do not exist separately from people who occupy them, and so cannot realize whatever value we associate with them other than in conjunction with the role-holder, on whom in Waldron’s view they bestow dignity. And vice versa: people’s identity, or as I put it earlier, meaning, derives at least in part from the roles they hold, and so their worth must be realized and recognized in connection with their performance of these roles. Even so, the order in which we proceed, upwards or downwards, matters. Though the two pictures, Waldron’s and the Kantian, broadly overlap, there are some significant differences nonetheless. I will mention three.

The first concerns the universality of dignity. As I have already noted, Waldron acknowledges a “strain” in extending the role-based conception of dignity to the universal standpoint of humanity. For those, like Waldron himself, who care much about human rights, and who, like him, link them to the notion of dignity, the strain should be a worry: it makes universal human rights seem rather precarious. This worry is allayed when dignity is vested in humanity from the start: being human is all it takes to have an elevated moral worth.

But ascribing dignity to humanity seems to raise a corresponding worry, associated with another possible strain: how do we move from the alleged moral worth of the species to that of each of its individual members? Isn’t ascribing dignity to abstract humanity bound to eclipse the value of individual lives and their concrete engagement with the kinds of specific roles which form Waldron’s starting point? The answer, which forms the second distinguishing mark of the present account, is to deny the equivalence between the two questions I have just posed. The relation of humanity as a whole to human individuals raises some intractable questions, which I cannot even begin to tackle here. But a simplified contrast can indicate some of the issues involved. When we think of human beings in biological terms, we do think of humanity as a species, and we envisage the relationship of *Homo Sapiens* to individual human beings as akin to that between, say, *Loxodonta Africana* and individual elephants. But when we
think of the human self along the lines I have sketched as intelligible and constituted by meaning, *humanity* labels at a high level of abstraction the meaning or content that individual human beings express or enact in endlessly ramified and divergent ways. If to encounter a human being is to encounter an intelligible being, it is to encounter a being with whom communication and, hence, mutual interpretation and understanding are in principle possible. And this entails a capacity to abstract from the more detailed engagements and preoccupations that form one’s own life and identity, and attain to a universal standpoint that is occupied by everyone else as well. Seen in these terms, the value of abstract humanity and of the concrete individual is the same value, since it is the value of one and the same thing. To talk about your dignity as a human being, as an American citizen (if that is your citizenship), as the parent of your children (if you have any), and as an individual, is to talk in various ways and at different levels of abstraction about *your* moral worth.

The final point is this. Insisting that the only proper subject of dignity is the human person draws our attention to the possibility that not all roles, no matter how important, are sites of dignity. To be such a site, a role must be integrated into our lives; it must form an aspect of the bearer’s identity. Only when a role falls within the boundaries of the self does its performance become an occasion for the exercise of autonomy and a basis for personal responsibility. But not all roles are enacted in this way. Some are enacted in a detached, impersonal and strategic manner. We engage in them only due to some external inducement, a threat or a reward, but otherwise maintain them outside the scope of our identifications and on the periphery of the self. The performance of such roles falls outside the scope of the person’s dignity as well. As an example, the parental role can be contrasted in this regard, at least in our society (where “our” is left inevitably vague), with that of a shareholder. To make the point all too briefly, limited liability shareholding is common and acceptable in a way that limited liability parenting is not. So in assessing the dignitary significance of a role, we must pay attention not only to the nature and importance of the task involved, but quite apart from that to its location within the geography of the self.