ABSTRACT - My aim is to introduce a hitherto unnamed but not unfamiliar juristic-cum-political value and to show how it might help us better understand the nature of modern law and political thought; I name this value 'opacity'. I elucidate that value by showing where, in our juristic and political thought, it is found. My main aim is to hold this alleged value up to the light, to illuminate exactly what it keeps dark, with a view to answering two questions: could this alleged value really be a value? And, if so, how might we demonstrate this value's weight? These questions are only posed here, since my expository purpose means there is insufficient time and space to attempt to answer them properly. The main focus of what follows is the common law world and Anglo-phone legal and political philosophy.

KEYWORDS - Opacity, Values, Equality, Dignity
William Lucy

Is opacity a value?


Opacity ... 1. The state of being in shadow; darkness, obscurity; ... The condition of not reflecting light ... being impervious to light; ... Darkness of meaning ... Denseness or obtuseness of intellect (The Shorter Oxford English Dictionary)

1. Introduction

My aim is to introduce a hitherto unnamed but not unfamiliar juristic-cum-political value and to show how it might help us better understand the nature of modern law and political thought.¹ I name this value ‘opacity’ despite the fact, confirmed by my epigraph, that that term and its animating idea seem to be utterly unappealing. In what follows I elucidate that value by showing where, in our juristic and political thought, it is found. The picture I sketch becomes more detailed as I proceed from one

¹ Law School, Durham University; w.n.lucy@durham.ac.uk. Parts of this paper have had a previous life in the form of talks given at a number of institutions. In particular, I thank audiences at the Universities of Durham, Hull, Edinburgh and Macquarie for helpful thoughts and comments. I am also grateful to Johanna Jacques and John Murphy.

¹ By ‘modern’ I mean only to draw a contrast between feudal legality, on the one hand, and the legal systems characteristic of industrial, mercantile societies on the other: see W. Lucy, Law’s Judgement, Hart, Oxford, 2017, 19–21 (hereinafter ‘LJ’ in all subsequent footnotes). Other cognate terms—‘capitalist’ or ‘liberal’ or ‘bourgeois’—could be used in its place.
source to another but the account is primarily expository. My main aim is to hold this alleged value up to the light, to illuminate exactly what it keeps dark, with a view to answering two questions: could this alleged value really be a value? And, if so, how might we demonstrate this value's weight? These questions are only posed here, since my expository purpose means there is insufficient time and space to attempt to answer them properly. As will be obvious, the main focus of what follows is the common law world and Anglo-phone legal and political philosophy.

2. Opacity: Unnamed but not Unknown

This alleged value has at least three distinct sources. I make no claim about the relative importance of these sources—my argument does not depend upon one being conceptually or practically more important than another. There are, as will be seen in section 3, some interesting connections, both functional and intellectual, between them.

2.1. Law

When we (addressees of the law) stand in the court room facing judgement, or read the copious and complex body of juristic ‘do’s and don’ts’ we find in statutes, court judgements and in our legal textbooks, one thing becomes obvious: the law is certainly not interested in every aspect of our character, conduct and context.

So, in English tort law, the main thing that matters about my conduct as a defendant in a negligence action is whether it reached the standard of a reasonably competent performer: a reasonably competent driver, surgeon, lawyer or the like. I cannot defend myself in such an action by showing that, when I crashed into you, my driving was impaired because I
was having a bad day—I was in the middle of a divorce, had flu and had slept badly. Nor can I exculpate myself by showing that I’m simply a bad driver who is only occasionally capable of reaching the standard of reasonable competence. Similarly, it is no defence to me, as an employer faced with a racial or gender discrimination action under the Equality Act 2010, to say that I’m just a racist or a misogynist: those features of my character are ignored for the purposes of exculpation, although the law does indeed register them as bases for initiating legal action. And, although there is a partial defence of loss of control (provocation) in English criminal law, the law ignores the fact that some of those accused of murder kill other people because they—the assailants—are very touchy, aggressive or bad tempered. Finally, note that the default standard of performance in English contract law is strict compliance: I simply must perform my contractual obligations and it is not good enough to try my best or make reasonable efforts. If trying my best or making reasonable efforts is insufficient to discharge my obligation, then I am—in the absence of a very few vitiating factors—in breach.

These features of English law are not unique—they are commonplace, but not absolutely ubiquitous, within the common law world and also in civil law legal systems. Nor are these features the only ones in the substantive law of these legal systems that have the effect of ignoring much, but not absolutely everything, about the character, conduct and context of the law’s addressees.² I label modern law’s tendency to ignore much about its addressees while, simultaneously, treating them in the same way and as if they were alike, ‘law’s abstract judgement’ (LAJ), and claim that it has at least three components. The first is the presumptive identity component, so named because modern law usually sees its addressees not in all their particularity, but as identical abstract beings. Addressees of the law are identical in two respects according to this component: they are regarded as if they were the same in terms of those

² See LJ at 4–19 for fuller discussion.
capacities, cognitive and physical, which enable humans to comply with achievable and intelligible legal standards; and they are taken to be identical in the sense of having the same entitlement to the same bundle of ‘formal’ rights and abilities.

LAJ’s second feature is the uniformity component, which entails that, generally speaking, the law judges its addressees by reference to general and objective standards equally applicable to all. The idea that the same laws should apply to all addressees of the law is so powerful that it casts suspicion upon laws which apply to particular named persons or groups. This requirement, once apparently called ‘isonomy’, is probably identical to some versions of the generality requirement of the rule of law ideal. The limited avoidability component is the third feature of LAJ. It highlights the fact that in modern legal systems the application of the standards in play in the uniformity component is generally mitigated only by a limited number and range of exculpatory claims.

In modern legal systems justice is therefore not blind, but it does take a very limited view of its addressees: the law sees us, but not in all our particularity and detail. In modern law’s gaze, we look like the people animating Nicola L’s performance art piece, Red Coat (Same Skin for Everybody).³ Most of the differences that mark the actual people (there are eleven of them) who wear the coat are obliterated, but not all. We can see that there are different, real people in there, but in broad outline they are made to look more or less the same by the coat. It is a layer over them, subsuming them under the same guise—different but also strikingly alike. And LAJ, I claim, works in much the same way. It is not therefore an exaggeration to say that claimants and defendants, victims and accused, are seen only opaquely by modern law, the details of their many different features and diverse contexts remaining in shadow or darkness for most

Could this process of ignoring large swathes of information, of drawing a veil over many issues and characteristics, be morally significant, evidence of a value at work?

2.2. Values

I examine only two values—equality and dignity—although each is complex and has numerous interpretations. These values were originally the most salient because one of the tasks I set myself in Law’s Judgement was an examination of the possible normative bases or anchors for LAJ. Equality and dignity seemed obvious potential sources of such support. In the course of examining them, it became clear that each of the interpretations of the two values embodied a notion of opacity very similar to that in play in LAJ. In what follows I sketch a dual aspect account of dignity and two different conceptions of equality, the aim being to highlight how opacity features in each. I did not choose between these values and their different interpretations in Law’s Judgement because I claimed that each can support LAJ: I suggested that LAJ in particular, and law in general, can be normatively overdetermined. Finding sources of normative support for various social institutions and practices is not therefore a zero sum game, in which the claim that value 1 supports institution Y must refute the claim that value 2 also supports institution Y.

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4 I claim neither that LAJ is absolutely ubiquitous nor that it is realised to the maximum degree in common law legal systems; some aspects of the legal process and some areas of legal doctrine are indeed greatly concerned with the character and context of the agents involved: see LJ at 16.

5 See n 1, above.


7 See LJ at 27–28.
2.2.1. Two Conceptions of Equality

The two conceptions are (i) the right to equal concern and respect (hereinafter \textit{RECR}); and (ii) the social and political ideal of equality (\textit{SPIE}). I focus upon these two principally because they are the most plausible political conceptions of equality available; some competitor accounts of equality are neither morally acceptable nor genuinely political (and thus juridical) conceptions.\footnote{I discuss a couple of competitors in \textit{LJ} at 166–184.} The \textit{RECR} owes its formulation to Ronald Dworkin. It holds that

\begin{quote}
[g]overnment must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s \cite[272–273]{Dworkin:1978}.\footnote{In text and notes, \textit{TRS} refers to R. DWORKIN, \textit{Taking Rights Seriously}, Duckworth, London, 1978.}
\end{quote}

Thus “individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them” \cite{Dworkin:1978:180}. They should be “treated with the same respect and concern as anyone else” \cite{Dworkin:1978:227}.

The \textit{RECR} applies only to the conduct of ‘government’ and, presumably, some of its outcomes or consequences. The right is not exclusively concerned with the quantitative distribution of some ‘thing’, be that resources, welfare, advantage or opportunities for one or other of these. For, although it can in some circumstances have distributive
implications, the right always entails that certain interests of all individuals must be treated in the same way (TRS 227). The right is also clearly more specific than many general juridical equality provisions, principally because it sketches reasonably precisely what must be valued—agents’ ability to formulate and pursue conceptions of the good life as well as their capacities for suffering and frustration. Furthermore, the right tells us how this ‘bundle’ of interests, which presumably all agents have, must be treated by government, namely, with both equal concern and equal respect. It is therefore an exaggeration to claim that this right “does not have sufficient content to explain the precise nature of the wrongs that are done to people who are not treated with equal concern and respect”.

What of opacity? The idea does not explicitly appear in any of the numerous formulations of the RECR, but its presence becomes obvious once we consider what implementing this right would entail. Since the right holds that agents cannot be discriminated against or favoured because of their status, conception of a good life, or overall ‘worthiness’, it in effect excludes those matters from public deliberation. Thus judgements about the baseness or worthiness of my lifestyle, the nature of my sexual preferences, my gender, ethnicity or religious commitments, cannot generally be invoked in decisions as to whether or not I am entitled to benefits (recognition, education, the right to vote) or subject to burdens.

10 I have in mind broad provisions like the XIV amendment of the US constitution.
12 In both R. Dworkin, Law’s Empire, cit., 222 and ch 8 and Id., Sovereign Virtue, Harvard UP, Cambridge, Mass., 2000, 1–3, 128, 131 and 184, the right to equal concern and respect became (just) the right to equal concern or equality of concern. In Id., Justice for Hedgehogs, Harvard UP, Cambridge, Mass., 2011, it appears in a form closer to its original guise: “[a] political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect” (330). It is also expressed there in the form of the equal concern principle (one of the “reigning principles” for government: ibid., 2; 14) and the equal-worth principle (ibid., 14 and 205).
(taxation, military subscription, imprisonment). These matters must remain opaque. Were the RECR to be explicitly embodied in a legal system, it would clearly prohibit juridical reference to many of the considerations about character and context that LAJ also embargoes. The RECR therefore works, like LAJ, as a means of ignoring many of the differences between agents, although the two do not function in exactly the same way: LAJ serves to construct the legal person, while the RECR is more obviously a constraint on decision-making.

The SPIE derives from Samuel Scheffler’s statement that equality is not, in the first instance, a distributive ideal, and its aim is not to compensate for misfortune. It is, instead, a moral ideal governing the relations in which people stand to one another. Instead of focussing attention on the differing contingencies of each person’s traits, abilities, and other circumstances, this ideal abstracts from the undeniable differences among people. It claims that human relations must be conducted on the basis of an assumption that everyone’s life is equally important, and that all members of a society have equal standing. As a moral ideal [SPIE] ... asserts that all people are of equal worth and that there are some claims that people are entitled to make on one another simply by virtue of their status as persons. As a social ideal, it holds that a human society must be conceived of as a cooperative arrangement among equals, each of whom enjoys the same social standing. As a political ideal, it highlights the claims that citizens are entitled to make on one another by virtue of their status as citizens, without any need for a moralized accounting of the details of their particular circumstances. Indeed, it insists on the very great importance of the right to be viewed simply as a citizen and to have one’s fundamental rights and privileges determined on that basis, without reference to one’s talents, intelligence,

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13 For some of Dworkin’s discussions of what equal concern and respect requires in the context of discrimination, privacy and sexual orientation, see TRS, chs 9 and 10 and Id., Sovereign Virtue, ibid., chs 10–14.
wisdom, decision-making skill, temperament, social class, religious or ethnic affiliation, or ascribed identity [emphasis mine].\textsuperscript{14}

This encapsulates the principal themes that unite all proponents of SPIE and Scheffler’s threefold division between moral, social and political ideals merits serious attention. For our purposes, though, it is SPIE’s political ideal that is most salient. That ideal has two strands, one of which is also contained in the moral ideal, the other being unique to the political ideal. That other is, as we will see, especially salient here.

Scheffler holds that the moral ideal asserts that “there are some claims that people are entitled to make on one another simply by virtue of their status as persons” (\textit{ibid}), this being narrowed in the political ideal to the assertion that “citizens are entitled to make [claims] on one another by virtue of their status as citizens” (\textit{ibid}; emphasis mine). Neither assertion is questionable within the egalitarian tradition, although unearthing their basis—showing, that is, the considerations that license them—is by no means an easy task. That task is, in fact, the job of arguing for the normative significance of equality and neither Scheffler nor other proponents of SPIE do that; they do, however, issue some promissory notes on the topic while registering how unsatisfactory it is to simply assume that the normative case for equality has been made.\textsuperscript{15} We can call this the entitlement strand.

The second strand of the political ideal is a matter of being able to stand among one’s peers in a group without anything like complete disclosure: one is viewed “simply as a citizen” (\textit{ibid}), “without any need for a moralized accounting of the details” (\textit{ibid}) of one’s context or character. Membership

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of a political community is not therefore determined by a life-course audit of one’s abilities and choices and the circumstances in which the former were exercised and the latter made, but by reference only to ‘formal’ requirements: place of birth, parentage and the like. For an egalitarian, Scheffler thinks, one’s rights and privileges, as well as one’s duties and liabilities, should flow from something like a formal assessment of standing or membership and he invokes the notion of citizenship to express the point. The most appropriate label for this strand of SPIE’s political ideal is surely ‘the opacity strand’, since it ignores a great deal of information about those subject to membership (are they in or out of this political community?) or allocative (are they subject to this burden or entitled to that benefit?) decisions. Much is kept in the dark.

2.2.2. Not Quite Two Conceptions of Dignity

The notion of dignity is complex and has a long history; it is not therefore surprising that there seem to be numerous different and incompatible accounts of it available. However, two accounts of dignity have particular salience now in the Anglo-phone world: a Kantian (or ‘value’) version and a contemporary, alleged alternative to it, the ‘status’ version. Although I have argued that these two accounts are ultimately compatible, being instead two different components of a single plausible account of dignity, that is not the most important point here. More apposite is the fact that both components of dignity embody a commitment to opacity, a veiling over or setting aside of some important information about the supposed bearers of dignity.

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16 My reasons (i) for regarding these two allegedly different accounts of dignity as particularly salient and (ii) as in fact different components of a single account are stated in ch 4 of LJ.
In Thomas Hill Jr’s hands, the value component of dignity begins with Kant’s second formulation of the Categorical Imperative.\(^\text{17}\) It holds that one should ‘[s]o act that you always use humanity, in your own person as well as in the person of any other, always at the same time as an end, never simply as a means’.\(^\text{18}\) This immediately raises two questions: what is humanity? And: what is it to treat something (i) as a means and (ii) as an end? As to the former, which is our sole focus here, Hill holds that a “review of Kant’s repeated use of ‘humanity in a person’ in The Metaphysics of Morals and elsewhere strongly suggests that ... Kant thought of humanity as a characteristic, or set of characteristics, of persons” (D 39). Hill shows that Kant mentioned at least five such characteristics, including two different sets of capacities and dispositions, namely, (i) to act for reasons; and (ii) to follow rational principles of prudence and efficiency. Alongside these there is (iii) “a power to set any end whatsoever” which includes what other animals lack, namely, the “ability to foresee future consequences, adopt long-range goals, resist immediate temptation, and even to commit oneself to ends for which one has no sensuous desire” (D 40–41). That power is accompanied by (iv), Kant’s claim that “humanity as rational nature necessarily ... includes acceptance (‘legislating to oneself’) of certain unconditional principles of conduct, that is, categorical imperatives, independently of ... punishment


\(^{18}\) I. Kant, Groundwork to the Metaphysics of Morals, revised ed. (ed. M. Gregor and J. Timmermann), Cambridge UP, Cambridge, 2012 (1785), 41. The first formulation holds that one should “act only according to that maxim through which you can at the same time will that it become a universal law” (at 34).
and reward”; and the recognition that (v) rational nature “encompasses theoretical as well as practical reason” (D 41). ‘Humanity’ in Kant is therefore not, for Hill, simply a synonym for humankind or persons; it is more complex than either of those notions, certainly as they appear in ordinary language, and it carries far more weight (and, some might think, baggage).

Where does dignity fit into this part of Kant’s picture? Humanity (and ends in themselves at large, if the latter constitutes a broader category than the former) is one of the things to which Kant attributes dignity. Kant ascribes dignity to other apparently different ‘things’, too, as Hill points out, but on closer inspection most of these seem to be different ways of describing the characteristics constitutive of humanity. So, for instance, persons, rational nature, rational beings, as well as persons who conform to duty and do duty for duty’s sake, are all regarded by Kant as having dignity (D 47). What, then, is dignity? Kant says it is an “unconditional and incomparable worth”19 which, to Hill, means (i) that dignity’s value is “not dependent upon contingent facts”; and (ii) that

whenever one must choose between something with dignity and something with mere price one should always choose the former. No amount of price, or value dependent on contingent needs and tastes, can justify or compensate for sacrifice of dignity. We may express this by saying that what has dignity is 

priceless [D 48].

Things with mere price “can be replaced with something else, as its equivalent; whereas what is elevated above any price, and hence allows of no equivalent, has a dignity”.20 To say humanity in persons has dignity is therefore to say humanity has an unconditional and incomparable worth.

Some very important implications follow from this, for Hill and for Kant, but only one is significant for us. It is that “certain attitudes and

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19 See I. KANT, *Groundwork to the Metaphysics of Morals*, cit., 47.

symbolic gestures, and the avoidance of others, might be required”, since humanity surely “should be honoured and respected or at least not mocked, dishonored or degraded” (D 50–51). This means not only that those convicted of crimes, for instance, do not forfeit their humanity; it also leads Hill to espouse something like a precautionary principle with regard to agents whose humanity might not yet have developed or might be in abeyance (D 50). Respect is required not just for actual but also for potential and former bearers of humanity: they neither are, nor do they become, morally insignificant features of the universe on a Kantian view. The default position for Hill, then, is the assumption that, at the very least, all human beings are actual or potential bearers of humanity and thus of dignity. And, the interesting thing about this position for us is what it eschews: no tests are required in advance to see whether particular human beings are indeed bearers of humanity. They are assumed to be so, a veil being drawn, at the outset at least, over the matter of their actual capacities and whether or not they support humanity. That issue is left in the dark until we have special reason to examine it. Is it odd that this seemingly fundamental matter is left opaque?

The status component of dignity owes its existence to Jeremy Waldron and he regards it, mistakenly I argue, as an independent competitor to the value account (or component). Here is a typically clear statement as to what dignity is, according to him:

what I mean by the term ... is something like this:

Dignity is the status of a person predicated on the fact that she is recognised as having the ability to control and regulate her actions in accordance with

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21 See also T. Hill’s discussion in Respect, Pluralism, and Justice, cit., 101–109.
her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others’ attitudes and actions towards her, and in social life generally.\textsuperscript{23}

Stated thus, the substance of this component is not obviously incompatible with that of the value component. Waldron’s emphasis upon the recognition of agents’ ability to control and regulate their conduct is very similar to some of the characteristics Kant regards as constitutive of humanity and thus as bearers of dignity. Indeed, those characteristics and the respect they generate encompass most of what Waldron regards as crucial to dignity in the latter part of this quotation: a Kantian understanding of (recognition) respect is just as much a matter of giving, and being entitled to give, an account of one’s conduct while having that account, and one’s agency in general, taken seriously—‘accommodated in the lives of others’—as it is for Waldron. Needless to say, some notion of autonomy surely looms in the background of Waldron’s conception of dignity just as it connects with dignity in Kant (although I don’t imply by this that Waldron invokes anything like a Kantian understanding of autonomy).

By far the most important difference, for Waldron, between his account of dignity and the value account is the notion of status.\textsuperscript{24} He holds that any “good account of dignity will explain it as a very general status”


\textsuperscript{24} Another difference between the status and value accounts Waldron emphasises is that the former is a significantly legal notion: “Dignity seems at home in law: law is its natural habitat” (J. WALDRON, \textit{Dignity, Rank, and Rights}, cit., 13; hereinafter in text and notes ‘\textit{DRR}’). While this point is up front and central in that book and in \textit{How Law Protects Dignity}, cit., it is far less obvious in \textit{Dignity and Rank}, cit.
(DRR 22), that status being “normative” (DRR 18). Furthermore, the status human beings currently have is high since “the modern notion of dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility” (DRR 33). Human dignity currently “involves universalising, rather than superceding, the connotations of status, rank and nobility that ‘dignity’ traditionally conveyed” (DRR 67). In an almost Nietzschean moment, Waldron characterises the change that the notion of dignity has thus undergone as a transvaluation of values. What the notion once valued above all else—the incidents of aristocratic status and good patrician bearing—were enjoyed only by a few; what it celebrates now is something akin to that high aristocratic standing, but it is ostensibly ascribed to all.25

What about opacity? The high sortal status humanity now has is, for Waldron, absolutely the same for all and no assessment of particular agents is necessary in order to determine this. “Sortal status categorizes legal subjects on the basis of the sort of person they are. One’s sortal status defines a sort of baseline ... represent[ing].. a person’s permanent situation and destiny so far as the law is concerned”.26 What is that baseline? Once there were many: lord/bondsman, freeman/slave, man/woman, black/white, Christian/non-Christian, to name a few. Now there is only one. Thus,

the idea behind sortal status is that there are different kinds of person ... [and] it is precisely this ... claim that the principle of human dignity denies. There are not different kinds of person, at least not for human persons....


26 DRR, 58–59.
There is basically just one kind of human person in the eyes of the law, and condition status is defined by contrast with this baseline [emphasis mine].

Discriminations cannot therefore be made between persons on the basis of their sortal status; factors which may lead us to distinguish one person or group from another are embargoed or excluded. They are left in the dark.

3. Opacity: links, content and value

Is there is an obvious common thread between these different instances of opacity? LAJ aspires or purports to treat everyone in the same way and it assumes we are all the same; to that end, it ignores a great deal about the abilities, character and context of law’s addressees. And, as we have noted, our two sample conceptions of equality also ignore—or set aside—a good deal of information about those to whom they apply. In a community governed by the RECR, government decisions must eschew reference to factors assuredly salient in the lives of the agents affected by them. As ‘mere’ agents we are often highly attentive to other agents’ good or bad character and their overall moral standing; we sometimes judge them, for good or ill, on the basis of their beliefs, tastes and appearance. Furthermore, on occasion we form views about their worth on the basis of how well or badly their lives have gone. But, if we are agents wielding government power in a Dworkinian ‘community of principle’, all of these considerations and the judgements to which they give rise are prima facie prohibited. SPIE’s opacity strand also excludes such judgements and their underlying considerations from the domain of ‘citizenship’ decisions. My membership of the political community must not turn upon an

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27 Ibid., 59.
28 See R. DWORKIN, Law’s Empire, cit., ch 6, for discussion.

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assessment of my abilities, affiliations or choices—nor should my entitlement to benefits or liability to burdens which result from membership.

The status and value components of our sample account of dignity work in a similarly exclusionary way. The status component ascribes the same high standing to all of us, the value component the same inestimable value. We are ascribed high status by dignity’s status component independently of an audit to establish our similarity: no attempt is made to show, by means of an assessment of our capacities, traits and skills that we are all actually the same and thus deserving of the same high status. Similarly, dignity’s value component assumes we all possess, to the same degree, humanity’s constitutive capacities and characteristics: it does not insist we undergo a series of tests before making this judgement, being uninterested in determining and calibrating the differences and similarities between us in terms of our rational and deliberative powers.

Similarity in some respects—standing (for SPIE’s opacity strand and the RECR), status (for one component of dignity), the capacities and characteristics of humanity (for the other), and the capacities and entitlements underpinning LAJ—is therefore assumed by all these notions or, what in practice amounts to the same thing, differences along these dimensions are ignored. The assumption of similarity seems irrebuttable within dignity’s status component and the opacity strand of SPIE, but not on the value component nor under the components of LAJ. That the assumption of similarity is rebuttable for Kant and Hill is obvious because they accept that some human beings may lack some, possibly even all, of the characteristics and capacities constitutive of humanity. The capacities presupposed by LAJ’s three components, which are in effect those elements of basic responsibility assumed but also to some extent modified by almost all substantive legal doctrines, are taken to be present until the contrary is shown.
If we tie these ostensibly different strands or articulations of the notion of opacity together, do we get anything coherent? Is there something here with determinate and plausible content? I think so. It is this: opacity is a presumptive unwillingness both to (i) look beneath the surface of our assumed agency and hence similarity, to chart and measure the exact details of our particularity; and (ii) to assess precisely our individual worth or value. The default attitudinal stance when we embrace opacity is that all are the same, in terms of capacities, standing and value and that all should be treated in the same way. Opacity therefore has two aspects. Its ‘first-person’ aspect entitles me to stand among others without disclosure of anything other than the bare fact of my agency, while its ‘third-person’ dimension requires us, when encountering others, to be content with that. We must

adopt... a perspective ... external to the person, ... holding back from evaluating any of the variable capacities upon which ... moral agency supervenes, be they capacities for rational thought or capacities for evaluative judgement or capacities for awareness and understanding of one’s place in the world.

Opacity’s third-person dimension embodies a stance ‘we’—products of liberal polities—regard as most appropriate to the relation between citizens. For a view of citizenship that demands more than this is not one that accords with anything like a liberal view of the way citizens interact with the state. One defining feature of political liberalism is a high degree

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29 Some commentators on this paper have suggested it is a mistake to lump opacity as found within LAJ together with opacity as it occurs within our sample accounts of dignity and equality. That is because opacity in the former is an institutional manifestation of opacity in the latter and, furthermore, opacity in the latter functions as an axiomatic or baseline commitment about which little or nothing can be said.

of caution about state power. That finds expression not just in affirmations of individual rights and liberty, but also in a broader ‘attitudinal’ concern manifest in thoughts like the state should not snoop upon, or pry into, the lives of its citizens nor humiliate them in any way. Citizens should not be made to beg for state assistance or protection; neither should their private lives—conversations, correspondence and domestic habits—be objects of state surveillance (except in tightly defined circumstances). Their patterns of worship, sexual choices and sartorial decisions are all things that, in a liberal polity, should be left to them.\(^{31}\) A commitment to opacity is obviously at home in this kind of political view and to some extent defines it. It is therefore no great surprise to find that that commitment features in both value and status components of dignity, on the one hand, and in \textit{LAJ} and our two selected conceptions of equality, on the other. \textit{LAJ}, alongside each component of dignity and each conception of equality, has come to prominence hand-in-hand with the rise of liberal conceptions of the polity.

What about citizens’ relation with one another? They are free to arrange and structure that however they wish, consistent with one another’s equal standing. But the default relationship among citizen-strangers is surely much the same as that between citizens and government: we stand together and relate to one another not (although we sometimes do) as intimates whose personal histories are shared and intertwined. Rather, we are all holders of a status, our entitlement to that equal rank being, in the normal run of events, taken for granted.\(^{32}\)

Let us suppose that the idea of opacity has content and that it does indeed look like a value. How might we try to show that this appearance is correct, that this ostensible value is a genuine value and, furthermore, how

\(^{31}\) It might be thought, in light of the many egregious moves in the ‘war on terror’ in the Western democracies over the last 20 or so years, that this and the previous sentence are intended ironically. They are not.

\(^{32}\) See I. Kant, \textit{Groundwork to the Metaphysics of Morals}, cit., 104 for Kant’s observations on the ‘dignity’ of the status of citizenship.
might we show the exact value—or weight—of this value? These two questions are distinct, since showing that X is a value need tell us nothing about its weight, its place—high or low—within a value scheme. Assuming that an argument showing X is a value always shows its exact place or weight in a value scheme is likely to be a mistake. Contemporary moral and political philosophers rarely set themselves to show that some particular value is indeed a value—they are more often preoccupied with showing the exact contours or implications of some or other widely accepted value. When they do attempt what we might call a ‘first-order’ demonstration of an alleged value’s value, they can adopt one of the following three strategies.33

First, consider an argument from self-evidence. An argument of this form alleges that the value in question is valuable to anyone who properly understands its nature and that any attempt to deny its value not only misunderstands it, but might also be self-defeating. It is not the fact that important reservations exist about the plausibility or even permissibility of such arguments that lead me to suggest that they should be set aside here. It is, rather, a reservation about opacity itself. For that alleged value does not seem to me to be as fundamental as some allegedly self-evident values and goods. It is not, I think, as deeply a significant part of a good human life as, for example, friendship, love or knowledge.34 That is not, of course, to say that alleged values less fundamental than these cannot be proved to be valuable by an argument from self-evidence; the range and content of

33 I suggest neither that these are the only available options, nor that they are utterly incompatible with one another (the second and third strategies can surely be combined). One potential strategy I do not mention is that of reflective equilibrium; the reasons for this omission are nicely summarised in E. Milgram’s *Ethics Done Right*, Cambridge UP, Cambridge, 2005, 7–11.

34 These are some of the entries on John Finnis’s list of self-evident basic goods; his discussion is a paradigmatic modern instance of an argument from self-evidence: see J. Finnis, *Natural Law and Natural Rights*, Clarendon, 2nd ed., Oxford, 2011, chs III and IV.
such arguments is surely not limited in that way. What I doubt is that opacity has anything like the apparently universal salience for all agents that allegedly self-evident values such as ‘life’ have: those values seemingly have a ‘reach’ across all contexts and all agents that opacity lacks.

The second strategy is an argument from integration (or the way of the Hedgehog). Such arguments embody an holistic position about value, holding that both the worth and truth of each of our values is, either in part or in full, a function of how well each fits with the rest of our values. Ronald Dworkin espoused this kind of view, which he characterised as

full value holism—the hedgehog’s faith that all values form an interlocking network, that each of our convictions about what is good or right or beautiful plays some role in supporting each of our other convictions in each of those domains of value.35

There are stronger and weaker versions of such a view and, it seems, Dworkin endorsed a variety of the former, holding that “in political morality integration is a necessary condition of truth. We do not secure finally persuasive conceptions of our several political values unless our conceptions do mesh”.36 If we take ‘integration’ and ‘mesh’ in these sentences to amount to something like an ‘interlocking framework’, then that yields the bold conclusion that a set of values so related is a true set of values. We could show that opacity is a value on this view by showing that it plays a role in our web of values; opacity is a value because it keeps the company of, and is integrated with, other moral and political values. Equality and dignity are two obvious candidates, opacity seemingly being integrated—in the sense of being a component of—each.

The third strategy is an instrumentalist argument. Such arguments aim to show the good or goods that commitment to an alleged value either

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35 R. DWORKIN, Justice for Hedgehogs, cit., 120.
36 Ibid., 5–6.
secures or increases. They also assume that illuminating the instrumental role played by an alleged value serves to show that it is indeed a value in its own right and not solely a means of realising other values. This point is important because it might be maintained that opacity, as realised in LAJ and other institutional manifestations, is a surrogate for the values of dignity and equality. We might need a surrogate for these values in particular institutional-cum-bureaucratic settings in order to avoid repeating and re-arguing what, exactly, those values require every time we have a decision to make upon which those values impinge. If those values can be realised through a commitment to opacity rather than by recourse to arguments from first principles, then that demonstrates opacity’s value. This argument is, however, doubly limited: it sees, first, opacity purely as a means, having no independent value of its own; and, second, it does not explain opacity’s presence in our two conceptions of equality or in our account of dignity. If opacity is merely a means to realise those values, then how can it also be a component of those values?

One particularly interesting instrumental argument attempting to show opacity’s value claims that it serves as a barrier to social cruelty. Opacity therefore instantiates and protects a diverse range of goods that are undermined when such cruelty obtains. Andrea Sangiovanni claims that the means of achieving those goods are the conditions necessary for an integral sense of self. He thinks there are three such conditions: that agents have control over their self-presentation, that they exist in a social context as member and participant, and that they have control over their bodies. What Sangiovanni calls ‘opacity respect’ entails that, when encountering others,

37 The argument derives from ch 2 of A. Sangiovanni’s Humanity Without Dignity, Harvard UP, Cambridge, Mass., 2017. Sally Golovic made a similar point to me in correspondence, claiming that “[o]pacity is a powerful tool for the disempowered”.
38 Ibid., 82–86.
you are disposed to treat any aspect of their person that is not relevant to the
task at hand and which they do not present to you as a target for social
interaction—... their general virtues and accomplishments, their well-being
and live plans—as opaque to you. But, on the other hand, you are also
disposed to recognize that the individual has a life and person independent of
their social role—a life in which they pursue life plans, projects, etc., outside
of their role, and in which their accomplishments, virtues, etc., are not
defined solely in terms of their role.\textsuperscript{39}

This kind of respectfulness limits the judgements one can legitimately
make about others, inhibiting any tendency toward infantilising,
stigmatizing and dehumanising them or using them as mere means. And
the prevention or restriction of such judgements and attitudes allows the
three conditions for an integral sense of self to flourish.

Now the details of this argument deserve far greater attention than
they can be given here. But for our purposes, only three points matter.
First, that this argument is obviously instrumental, showing opacity’s role
as a means of upholding certain conditions and attitudes the existence of
which facilitates the realisation of a range of goods. Second, that the
argument does allow opacity to be both the bearer of value and a means for
the realisation of value. The value opacity embodies, on this view, is a form
of respectfulness that inhibits social cruelty. Third, this argument, like
other instrumental arguments, need not endorse utilitarianism or full-
blown consequentialism about values. It need not therefore hold that the
only way in which a value’s value can be established is by showing that it
increases the greatest good of the greatest number or leads to more or
better levels of preference satisfaction.

If opacity can be shown to be a value by one of these strategies, or in
some other way, then we must establish its precise weight, its position
within a value scheme. I have no illusions about the difficulty of this task
and, of course, will not attempt to discharge it here. I will, however, make

\textsuperscript{39} Ibid., 94; emphasis in the original.
two points which serve as preliminaries to that task. The first is to note how the instrumental and the integration strategies for demonstrating that opacity is indeed a value might also provide some guidance as to the value’s weight. Since both strategies map opacity’s relationship to other values—the ways in which it might advance or uphold some or other value or its exact position in a network of values—they could also, simply by virtue of such mapping, give a sense of its relative importance.

The second point is about opacity’s relative importance. Whatever the instrumental and integration strategies might tell us about this, I cannot believe that either—or any other argument about opacity’s weight—will reveal that opacity is as important as primary values like liberty, equality and dignity. It is not, I think, the fact that these values seemingly have value *tout court* and across a wide, possibly unlimited range of contexts, that distinguishes them from opacity. Rather, it is that opacity is *subsidiary* to some of these values or a component of them; it therefore hardly ever receives independent acknowledgement. It is thus no surprise that it never appears in political slogans (could we really go to the barricades behind a banner declaring ‘Liberty, Equality, Opacity’?).

This is not to deny opacity’s importance; it is simply to rank it in the bluntest way, as being less important than some other values and as deriving some of its importance from them. That is what I mean by labelling it ‘subsidiary’, although opacity’s subsidiary status has another dimension, already touched upon. When considering instrumentalist arguments attempting to establish opacity as a value, we dismissed one argument that regarded opacity as nothing more than a means of realising equality and dignity in institutional contexts. But if opacity is a subsidiary component of some accounts of equality and dignity it can both bear the value those values have and help realise them in various institutional contexts. As a subsidiary component of those values, opacity can function not just as a bearer of the value they embody, but also as a means of upholding or realising it.
4. Conclusions

Contemporary legal systems might ignore much about their addressees for the same reason that some contemporary accounts of dignity and equality ignore much about the agents to whom they apply: they do so in the name of opacity. And, although it often seems morally counter-intuitive, a commitment to opacity, in the forms examined above, may simply echo our broader and deeper egalitarian and dignitarian commitments. Opacity could be a value after all.