



HUMAN DIGNITY  
in Bioethics and Law

Charles Foster

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## HUMAN DIGNITY IN BIOETHICS AND LAW

Dignity is often denounced as hopelessly amorphous or incurably theological: as feel-good philosophical window-dressing, or as the name given to whatever principles give you the answer that you think is right. This is wrong, says Charles Foster: dignity is not only an essential principle in bioethics and law; it is really the *only* principle. In this ambitious, paradigm-shattering but highly readable book, he argues that dignity is the only sustainable Theory of Everything in bioethics. For most problems in contemporary bioethics, existing principles such as autonomy, beneficence, non-maleficence, justice and professional probity can do a reasonably workmanlike job if they are all allowed to contribute appropriately. But these are second order principles, each of which traces its origins back to dignity. And when one gets to the frontiers of bioethics (such as human enhancement), dignity is the only conceivable language with which to describe and analyse the strange conceptual creatures found there. Drawing on clinical, anthropological, philosophical and legal insights, Foster provides a new lexicon and grammar of that language which is essential reading for anyone wanting to travel in the outlandish territories of bioethics, and strongly recommended for anyone wanting to travel comfortably anywhere in bioethics or medical law.

'I never had any respect for the concept of human dignity. I thought it was a motherhood concept, empty of real practical import. But Foster converted me. Foster, uniquely, goes the right way round, identifying real human problems and trying to solve them, rather than starting with philosophical problems and theories and creating a concept of dignity that fits them. This is a book for people and progress. It's the best book on dignity I know.'

**Julian Savulescu, Uehiro Chair of Practical Ethics, University of Oxford**

'This book is the perfect antidote to the unseemly polemics that have dominated recent debates about the concept of dignity in bioethics. Foster takes the notion of dignity seriously and argues that it is indispensable to deliberations about pressing issues in bioethics such as informed consent, abortion, euthanasia, cloning, enhancement, and the use of body parts. He argues that the concept is more fundamental than our concepts of autonomy, rights, and justice, and requires us to think hard about more substantive issues such as what it means to be human and what it means to flourish as a human being. He presents an excellent overview of the current literature on dignity in bioethics, usefully collecting together in one place sources from philosophy, clinical bioethics, law, international conventions, and the blogosphere. While scholarly, it is accessibly written in lucid and lively prose. *Human Dignity in Bioethics and Law* is a substantial contribution that moves the debate on this contentious but important issue up to the next level.'

**Daniel P Sulmasy, Kilbride-Clinton Professor of Medicine and Ethics, University of Chicago**

'In *Human Dignity in Bioethics and Law* Charles Foster sets out an argument that is provocative in its simplicity: dignity is the 'bioethical theory of everything', the value by which all bioethical disputes should be adjudicated. Drawing extensively from both philosophical and legal debates, this book makes an important contribution to a central issue facing societies in the 21st Century. It deserves to be highly influential for academics and practitioners alike.'

**Suzu Killmister, Massey University**

'Wide-ranging and erudite, Foster's book 'Takes Dignity Seriously'. Dignity is shown to be a core value in law and bioethics, foundational, a lens through which to project hard cases. It is a rare book which finds a common thread to questions as disparate as euthanasia, sado-masochism, enhancement, cloning, abortion, refusals of medical treatment by children, and numerous other areas of controversy. But this is achieved thoughtfully, entertainingly, and persuasively, in the process throwing new light on many leading cases in the UK, USA, Germany and Israel. It is bound to provoke debate, even controversy. It will be a great assignment for university seminars.'

**Michael Freeman FBA, Professor of English Law, UCL**

‘Charles Foster’s *Human Dignity in Bioethics and Law* sets out clearly the state of the question regarding the basis of personal dignity. It also advances an original argument to defend a substantive content for the concept of dignity. It is worthy of study and re-study.’ **Patrick Lee, John N and Jamie D McAleer Professor of Bioethics. Director, Institute of Bioethics, Franciscan University of Steubenville**

‘Charles Foster has written a remarkably thoughtful and eloquent book, arguing persuasively that ‘human dignity’—not ‘autonomy’ or any other narrow principle—is the indispensable lens through which to view the perplexing moral landscape of contemporary bioethics. I learned much from this comprehensive, open-minded, and deeply humane volume.’

**Adam Schulman, co-editor of *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics***

‘This is a spirited study, engagingly written, deeply immersed in the relevant literature, and rich in insight. A valuable contribution to the study of human dignity from a bioethical perspective.’

**George Kateb, William Nelson Cromwell Professor of Politics, Emeritus, Princeton University**

‘Charles Foster’s analysis and defence of the concept of dignity as fundamental in medical law and ethics is to be welcomed warmly by scholars and students of the field. It is written with his characteristic verve and panache, yet is at the same time thoughtful and scholarly. We are all in his debt for his analysis of the philosophical, historical, sociological and legal accounts of dignity. And even if you do not accept all his normative conclusions, his demonstrations of dignity-based reasoning in law and ethics are genuinely illuminating and helpful.’

**Richard Ashcroft, Professor of Bioethics, Queen Mary College, London**

‘Respecting patients’ *dignity* is one of the most commonly used ideas in bioethics: whether in professional guidelines, in legal judgments or in casual conversation. And yet philosophers, on the whole, don’t like it. Many argue that it is too vague and that it can be replaced by other, better concepts, such as autonomy. Indeed this was my position. Foster, however, swims strongly against this philosophical tide and has forced me to rethink. Those who want to sideline dignity will need to read this book and engage with Foster’s arguments. Those more open to the importance of dignity will enjoy Foster’s company as he informs and amuses the reader with bizarre legal cases and forceful analyses.’

**Tony Hope, Professor of Medical Ethics, University of Oxford**

'I never had any respect for the concept of human dignity. I thought it was a motherhood concept, empty of real practical import. But Foster converted me. Foster, uniquely, goes the right way round, identifying real human problems and trying to solve them, rather than starting with philosophical problems and theories and creating a concept of dignity that fits them. This is a book for people and progress. It's the best book on dignity I know.'

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‘Dignity has long been considered the most protean of ethical concepts—shape-shifting, frustratingly elusive, impossible to pin down—but in this invigorating book, Charles Foster argues powerfully for dignity to be reinstated at the heart of thinking about ethics in medical practice. Dignity is, in Foster’s hands, a richly empirical concept concerning the embodied and socially embedded moral lives of real people and what it is that makes it possible for them to ‘flourish’: the normative force of dignity being provided by empirical evidence about the interpersonal conditions under which humans either do or don’t thrive. Through an analysis of real and hypothetical cases, Foster argues that ethics should be concerned with the encouragement (the *maximisation* even) of such relationships. Foster believes that the normative force of dignity ‘is best appreciated in the wild places’, illustrating this through a number of worked examples concerning ‘places’ such as reproductive choice and ‘enhancement’. But ultimately, perhaps, it is in the interactions between human beings in the quotidian settings of health care practice, discussed in earlier chapters, in which dignity is shown at its most powerful as a way of knowing the difference between ethical and unethical practices and where dignity is or is close to being, as Foster argues—at the heart of everything.’

**Michael Parker, Professor of Bioethics, University of Oxford**

‘This brilliant, erudite, and yet common-sensical book is written by a moral philosopher and lawyer who reasonably hates Kant, sees clearly the limits of autonomy in describing who we are, and defends ably the dignity of the embodied, relational beings we are. I certainly agree that dignity has a substantial meaning that can be deployed by real people making challenging decisions, and I now know a lot more about why that is so.’

**Peter Lawler, Dana Professor of Government, Berry College, Georgia and author of *Modern and American Dignity***



All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Universal Declaration of Human Rights, Article 1

The account of human dignity we badly need in bioethics goes beyond the ... dignity of 'persons' to embrace the worthiness of embodied human life, and therewith of our natural desires and passions, our natural origins and attachments, our sentiments and repugnances, our loves and languages. What we need is a defense of the dignity of what Tolstoy called 'real life', life as ordinarily lived, everyday life in its concreteness. Our theories about human dignity need to catch up with its widespread, not to say ubiquitous, existence.

L. Kass, 'Defending Human Dignity', in E Pellegrino, A Schulman and T Merrill (eds), *Human Dignity and Bioethics* (Notre Dame, IN, University of Notre Dame Press, 2009) 313–14

Dignity is a vacuous concept. The notion of dignity should be discarded as a potential foundation for rights claims unless, and until, its source, nature, relevance and meaning are determined.

M Bagaric and J Allan, 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 257, 269

'If I am not for myself, who will be for me? And if I am only for myself, what am I? And if not now, when?'

Hillel, *Pirkei Avot* 1:14

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## FOREWORD BY LORD JUSTICE MUNBY

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Three years ago, Charles Foster wrote an important book, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law*, which, in his own words, was an assault on the presumption that autonomy ought to be the only voice heard in medical ethics and law. In that book, the idea of dignity made honourable appearance, though his primary focus was on non-maleficence, beneficence, justice, professional integrity and rights and duties as other contenders for a voice in the debate.

Now, he has written an even more significant book, *Human Dignity in Bioethics and Law*, which gives pride of place to dignity. He makes a very large and important claim: “dignity is the key that, properly wielded, unlocks all problems in medical ethics and bioethics. It is the bioethical Theory of Everything.” What does he understand by dignity? He summarises it as *being human*. It is, he says, objective human flourishing. Every transaction must be managed so as to maximise the amount of dignity in it. But, as he emphasises, and this is a vital point, the dignity interests of all parties to the transaction—all the stakeholders—must be taken into account. One must, as he puts it, conduct an audit of dignity in general rather than the dignity of a particular patient.

How well does this ambitious claim fare?

On one level the argument is immediately attractive and indeed arresting. Only the autonomous can exercise autonomy, and the young, the demented and the mentally incapacitated are not autonomous. But every human being is entitled to dignity. Dignity is a universal principle. Indeed, being given pride of place in the Universal Declaration of Human Rights it is arguably *the* universal principle—something that autonomy can never be.

Moreover, and unlike that other familiar principle, the best interests of the individual (which itself, as our author points out, demonstrates the inadequacy of autonomy alone), dignity carries within it a meaningful concept and identifies the goal at which we strive. The best interests test does neither. As was famously said in the High Court of Australia, even though English judges seem immune to this painful truth, to assert that something is in the patient’s best interests is merely to record the result of a process in which what may be a complex moral and social question is transformed into a question of fact. The best interests approach does no more than identify the person whose interests are in question; it does not assist in identifying the factors which are relevant, it offers no hierarchy of values, “much less any general legal principle which might direct the difficult decisions to be made”.

So dignity avoids the problems inherent in both autonomy and best interests. It identifies a principle of universal application which is, indeed, the ultimate legal value. So far, so good. But if dignity is the overarching principle in play, what implications does this have for best interests and, in particular, for autonomy?

In relation to best interests there is no particular problem. On the contrary, the identification of dignity as the ultimate legal value provides the rationale for a best interests test and a benchmark for a best interests evaluation. So there is no conflict between dignity and best interests; the one merely complements and gives content to the other. As our author says, implicit in any holistic determination of best interests is a notion of the Good Life, of human thriving.

In relation to autonomy, on the other hand, matters are surely very different. Dignity, as our author explains it, and autonomy, at least as traditionally understood in this country, stand potentially in stark conflict with each other. Can dignity trump autonomy? He asserts that it must and shows that it can. This is powerful medicine indeed.

Whereas many jurisdictions in the United States of America take a more nuanced view, in this country autonomy is seen as absolute. The competent patient has an absolute right (now or by way of advance directive) to refuse treatment, for reasons good or bad, or indeed no reason at all, and even if the certain consequence is death. Now this is rather curious, for the absolute right which autonomy gives to *refuse* consent is not matched by an equally absolute right to *give* consent. There are some things that the law forbids us to consent to. I cannot consent to be killed. And as *Brown* shows, I cannot consent to be subjected to certain extreme forms of sado-masochistic sexual behaviour. That, says our author, was a case soluble only by the application of the notion of dignity. The persuasive conclusion which he draws is that since it is dignity which ultimately defines what we can consent to; so also dignity should be able to impose limits on what we can permissibly refuse consent to. If I cannot consent to be killed, why should I be entitled to bring about my death by refusing consent to life-saving medical treatment? After all, my purpose, my motive, my intention, may be the same in each case: I want to bring my life to an end. Why should the one means be licit, the other illicit?

Although, as our author comments, any decent dignity analysis will regard autonomous prior expressions of refusal very highly indeed, he suggests it is not inconceivable that there may be cases where the patient's countervailing dignity interests can trump an advance directive. He asserts that since dignity is a deeper concept than autonomy, which is merely a *manifestation* of dignity, so where autonomy is in conflict with other second-order principles, such as justice, it is to the parent principle of dignity that we must have recourse in resolving the conflict. The argument is powerful and compelling.

But if dignity is to serve these important ends, is the concept of dignity sufficiently robust to bear the burden? Is it, as a concept, adequate to do the fundamental legal work which our author demands of it? Can it be more than a mere rallying call for basic decency, important though that obviously is? After all, and

he does not shirk this, a common view, pervasive in the literature, is that dignity is merely a slogan to which resort is had when there is no better tool to hand, a makeweight or rhetorical flourish, a meaningless incantation designed, for example, to comfort the living or to assuage the consciences of those involved in making life and death decisions.

Can dignity survive that most challenging and testing of all environments, the battle fought out in the court-room? An English judge, referring to what he called the purifying ordeal of skilled argument on the specific facts of a contested case, observed that argued law is tough law. Is dignity tough enough to pass the judicial assay? Our author asserts that it is, and, as it seems to me, succeeds in making good his case. He refers to decisions in a variety of jurisdictions, including what for a European lawyer are probably the most significant cases of all, if, as I fear, too little known to too many lawyers in this country: the decision of the French Conseil d'Etat in the 'dwarf-throwing' case and the opinion of the Advocate General and the decision of the First Chamber of the European Court of Justice in *Omega*. When one also remembers what the European Court of Human Rights has said about dignity, for example in *Pretty*, it is surely clear that dignity is increasingly seen by judges not merely as a fundamental principle of European law, and thus of our domestic law, but also as a practical and workable forensic tool.

The European Convention on Human Rights and Fundamental Freedoms surely provides, as our author suggests, more than adequate tools with which to give meaning and content to the concept of dignity. There is now a rich and subtle jurisprudence, developed both by the European Court of Human Rights and in our domestic courts, giving detailed texture to the basic principles laid down in Articles 3 and 8 of the Convention, and it is there that we can find, readily to hand, much of the straw with which to make our bricks. Article 3, with its prohibition of inhuman or degrading treatment, sets the minimum required to avoid obvious assaults on human dignity. Article 8, with its obligation on the State to "respect" private life, points the way to the more positive and aspirational manifestations of dignity; for, as the Strasbourg case-law shows, Article 8 embraces the protection of an individual's dignity, mental health, mental stability and moral and psychological integrity. Moreover, as our author points out, and this must be correct, Article 8(2) demands that the dignity interests of all stakeholders be assessed and a decision made in the light of that assessment.

He tests his thesis in a number of bioethical or medical contexts and, it may be thought, succeeds triumphantly in making good his thesis.

We are all indebted to Charles Foster for giving us the privilege of pondering the implications of this profoundly important and, as it seems to me, ultimately convincing book.

My only regret is that, writing as a medical lawyer, philosopher and ethicist, he concentrates mainly, though not exclusively, on the role of dignity in the medical or bioethical context. The criticism is, of course, unfair, because he has done what his title shows he set out to do. But I make the point because dignity, as he has analysed and explained it, has ramifications for many other equally important

*Foreword by Lord Justice Munby*

areas of our law. The dignity of the vulnerable is surely central to judicial and local authority decision-making in relation to what the Mental Capacity Act 2005 calls personal welfare matters. Dignity surely has a crucial role to play in the context of community care and adult social care, contexts in which, too often it might be thought, proper regard for the dignity of the vulnerable and disabled is sacrificed to economics. And, most scandalously of all, as continuing exposes of conditions in too many of our hospitals, care homes and other institutional settings disgracefully reveal, dignity at even the most elementary level is too often lacking.

Is it too much to hope that our author may yet be persuaded to add to this remarkable achievement by embarking in another book upon an examination of dignity in these wider contexts?

James Munby  
13 June 2011

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## PREFACE

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In *Choosing Life, Choosing Death*<sup>1</sup> I criticised the hegemony of autonomy in medical ethics and law. I resented at length the pervasive presumption that autonomy could give all the necessary answers.

That was an easy book to write. It is easy to say what the answer to something is not. This was not an easy book. It is much harder to do what I have tried to do here: to say what the answer is. And of course I have failed.

I set out my thesis in Chapter 1, and I will not repeat it here. But it is worth saying that this is a book about dignity rather than about, say, the right balance between Beauchamp and Childress's famous Four Principles,<sup>2</sup> or about respect for persons, or about professional probity. And that is because whenever I burrowed down into a bioethical problem of any type I eventually, if I went far enough, hit something that looked very similar to the substance I see when I look at a grand landscape, gave the sound I knew from listening to a piece of eternal music, and gave the sensation I get when I read something really moving. This was very strange to me. I did not expect it. I did not have a high, romantic view of the business of bioethics.<sup>3</sup> Indeed *Choosing Life, Choosing Death* is, at one level, a rough, pragmatic appeal for a bit of common sense in bioethical discourse. Anyone reading that book would know that I come from Yorkshire.

But I do, I suppose, have a high, romantic view of humans. The fact that this was not reflected in my thinking about bioethics is an indication that my bioethics was rigidly and dangerously separated from the rest of my reflection. I expect that's a fault common in lawyers, for whom compartmentalisation is often the only way to stay sane. But there's a price to pay for it, as their families and their readers know.

The President's Council on Bioethics commissioned a number of reflections on the term 'human dignity'.<sup>4</sup> Those reflections make up a substantial, learned and highly polemical volume, full of sound and fury, signifying that no one agrees about anything at all except that dignity—whatever it is—is important. The

<sup>1</sup> Oxford, Hart, 2009.

<sup>2</sup> See T Beauchamp and J Childress, *Principles of Biomedical Ethics* (Oxford, Oxford University Press, 1994). Although, as I argue in ch 1, there is a sense in which my contentions here might be said to amount to a plea to listen properly to the conversation between those principles.

<sup>3</sup> Throughout this book I use 'bioethics' and 'medical ethics' more loosely than some would like. Nothing turns on the distinction.

<sup>4</sup> E Pellegrino, A Schulman and T Merrill (eds) *Human Dignity and Bioethics* (Notre Dame, IN, University of Notre Dame Press, 2009).

## Preface

religious excoriate the reductionists for their shallowness, and the reductionists lambast the religious for their credulity.

I wanted to get beyond all this: to try to communicate some of the sense of what I found at the end of my own bioethical tunnelling; to connect it with my own experience of sick children, exhilarating talk, palliative care wards, old Burgundy, infected wounds, forgiving friends, Do Not Resuscitate decisions, and surf.

The chapters may seem to be arranged rather eccentrically. It may seem more logical to have set out my stall and then gone through human life chronologically, as I did in the earlier book, from before conception to after death, taking in consent, confidentiality, enhancement and so on en route. But bear with me. The topics are taken in the order they are in order best to develop a cumulative argument.

Until we get to enhancement and cloning, I look at how dignity analyses might be used to describe various types of medical actions and omissions. I continue that look in the following chapters on the unborn, end-of-life decision-making, and the use of body parts, but in the enhancement and cloning chapter I use a dignity analysis to question fundamentally whether medical therapy itself is ethically acceptable. This chapter concludes most of the *argument* of the book, and sets the tone for the remaining chapters. These remaining chapters are accordingly shorter than many might expect them to be. They are principally concerned with illustrations of the way that the courts have wielded the notion of dignity in these areas. There has been a lot of wielding, but it is not terribly interesting.

Chapters 2 to 5 are primarily concerned with the history of the notion of dignity, and with the meanings it has in today's literature. Those chapters will be frustrating and trite to philosophers and experts in the history of ideas, and hard going for lawyers. The alternatives were to leave them out (which would have left me having merely to *assert* that my notion of dignity fell exegetically within the meanings given by others), or to write a much longer book, which would have pleased nobody other than the sort of people I do not want to please. I anticipate that the most significant criticism of my thesis will be that I am not writing about dignity at all, but am simply making some suggestions as to how, in various bioethical situations, I might give beneficence some workably substantive content, or how 'respect for persons' might work. The defence to that allegation is primarily exegetical.

Since writing *Choosing Life, Choosing Death*, my dislike of Kant has deepened—which is saying a lot. I would like to think that this is the sort of book he would have loathed: that is to say, an *embodied* book, marked, and perhaps characterised, by the flaws that come from messing round unscientifically, and in defiance of Pure Reason, in playgrounds, hospitals, courtrooms and graveyards. Only an embodied book can deal properly with humans, who are, I've now reminded myself, the real substrate of bioethics.

Charles Foster  
Green Templeton College  
Oxford

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**M**any people prodded me along the road that led to (but did not end with) this book. It is invidious to name names, but some of the most important are Professor Tony Hope, Professor Michael Parker, Professor Julian Savulescu, Dr Mikey Dunn, Dr Dominic Wilkinson, Dr Mark Sheehan, Dr Jane Kaye, Dr Karen Melham, Dr Paula Boddington, Dr John William Devine, Mr Jonathan Herring, Professor Roger Crisp and Professor Aharon Barak. Many of the thoughts and illustrations spilled out in the course of conversations. I haven't always been able to trace their origins: sorry.

To the Principal, Fellows and students of Green Templeton College, Oxford: thank you so much. The college is a happy crucible where some very exciting intellectual syntheses occur.

The manuscript was read in draft by Professor Timothy Endicott, Professor Tony Hope, and Jonathan Herring, all of whom made penetrating and often depressing comments. If the book isn't completely incoherent, a lot of the credit is theirs. And if it is completely incoherent, it's because I didn't hear them properly.

Richard Hart and the team at Hart Publishing have been tremendous. It was brave to take on a book like this, which doesn't fall neatly into any established genre within legal publishing, but they have kept their nerve and their cheeriness throughout it all. I'm very grateful.

This book has been more than usually onerous for my family. I feel ever more acutely the debt I owe to them all. As well as not moaning at my moodiness and absence, they have also taught me most of the little I know about how to be a human being. Which is the subject of this book.



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