

# Roman Precursors of Modern Human Rights Doctrine: Cicero and Tertullian

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Abstract – The modern theory of Human Rights, as developed especially since 1948 by the United Nations in the *Universal Declaration of Human Rights* and its successors, treats Human Rights as derived from an inherent Human Dignity. Two Roman sources have been held to anticipate both of these ideas: Cicero, *De Officiis* 1.105–107, for the concept of Human Dignity; and Tertullian, *Ad Scapulam* 2.2, for a resulting Human Right to freedom of religion. This paper discusses the extent to which these sources do in fact represent precursors. I suggest that, although the evidence is admittedly less than robust, both the modern conceptions may well have originated in the philosophy of the Middle Stoa (ca. 150–50 BCE). My conclusion discusses the more general problem of how important ethical ideas such as these originate and come to inform moral discourse.

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The first part of this paper provides a brief, rather simplified account of the intellectual structure of modern International Human Rights theory as it emerged during and after the United Nations adoption of the *Universal Declaration of Human Rights* in 1948.<sup>1</sup> The entire intellectual substructure of Human Rights

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<sup>1</sup> The purpose of this simplified account is mainly to establish a paradigm against which the scattered ancient sources can be understood and evaluated. For a much richer summary of modern views on Human Dignity and Human Rights, see C. McCrudden, “Human Dignity,” in C.

remains controversial, but I present what I will term the Prevailing View in the scholarly literature on the subject. The Prevailing View hinges on its two important components: an extensive list of Human Rights to which all human beings are believed to be entitled (a list that has been considerably lengthened by subsequent international instruments); and the concept of Human Dignity as being, in some sense, the foundation of these Human Rights and the justification for their promulgation.

In the next two parts, I look at two short passages of Latin literature, one from the late Republican statesman Cicero (106–43 BCE) and the other from the early Christian polemicist Tertullian (fl. 190–220 CE). These two passages have often been thought (as I believe, correctly) to anticipate both the major components of the Prevailing View. The passages, I should stress at the outset, also constitute striking departures from otherwise habitual ancient thought, which, as a rule, never coherently recognizes and deals with the subject of Human Rights. It is accordingly possible that they (one or both) represent only casual thoughts – we might almost call them “accidental breakthroughs” – which their respective authors did not fully develop, perhaps because the ideas seemed strange even to them. This possibility cannot be conclusively ruled out for either passage.

Nonetheless, I believe that the two passages should be taken more seriously. On the basis of their wording and intellectual framework, I will argue that, if they are considered together, both passages (although evidently unconnected) convey elements of an intelligible and even potentially “modern” pattern of thought that the evidence suggests may have originated in the Late Hellenistic (or Middle) Stoa. As such, the passages are important for what they might be held to say about possible ancient thinking on Human Rights, an importance that may perhaps also be indicated by their considerable resonance in later writers. This evidence, although to be sure not robust, is at the very least suggestive.

My conclusion deals with a persistent problem in intellectual history: how to think about the emergence of important concepts especially in the realm of general morality.

# I. The prevailing modern view: Human Dignity as the basis for Human Rights

On December 10, 1948, the recently constituted United Nations General Assembly unanimously approved the *Universal Declaration of Human Rights*, a list of 30 basic rights that all persons in the world can claim. In its preamble, the *Universal Declaration* outlines the theory that underlies it: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world, . . .” Article 1 picks up this framework: “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.”<sup>2</sup>

Important here is the forceful juxtaposition of “the equal and inalienable rights” of all humans with their “inherent dignity,” a phrase which, in this context, can only serve as an intellectual basis for the list of human rights. However, the juxtaposition is left unexplained in the text. Two subsequent International Covenants from 1976,<sup>3</sup> after repeating the formulation in the *Universal Declaration*, spell out the relationship in slightly more detail: “[T]hese rights derive from the inherent dignity of the human person . . .” But the two Covenants do not further elucidate exactly how the derivation is thought to have occurred. The phrase “Human Dignity” or its variants also recur commonly in subsequent Human Rights declarations as well, including, in some

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<sup>2</sup> See A. Bisset, ed., *International Human Rights Documents*, 13th ed. (Oxford 2023), 10. (The *Declaration*, although originally a non-binding statement of principles of rights, became enforceable as International Law through the 1968 *Proclamation of Tehran* (Bisset, 480–82) and by virtue of its being enshrined in other legally binding instruments and being adopted by many States as binding national legislation; see H. Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law,” *Georgia J. Int’l & Comp. L.*, 25 (1995/1996), 287–397.) Alison Bisset’s collection picks up most documents relevant to the general subject. UNESCO has dealt separately with human rights in connection with the ethics of medical and biological research; see esp. UNESCO, “Universal Declaration on Bioethics and Human Rights” (Oct. 19, 2005), an intricate subject I will not deal with here.

<sup>3</sup> Bisset (note 2), 33–45, at 33 (*International Covenant on Civil and Political Rights*), and 49–56, at 49 (*International Covenant on Economic, Social and Cultural Rights*). Slightly more expansive is the preamble to the 1993 *Vienna Declaration and Programme of Action*: “[A]ll human rights derive from the dignity and worth inherent in the human person . . .” (Id., 492). A good brief summary of current mainstream thinking is in J. R. May and Erin Daly, *Advanced Introduction to Human Dignity and Law* (Cheltenham 2020).

instances, constitutional or legislative declarations by nations or regions.<sup>4</sup>

What is Human Dignity? In one standard definition, it denotes “a kind of basic worth or status that purportedly belongs to all persons equally, and which grounds fundamental moral or political duties or rights. In this sense, many believe that dignity is a defining ideal of the contemporary world, especially in western society.”<sup>5</sup> Over the past 75 years much ink has been spilled, both by human rights experts and by philosophers, in trying to define Human Dignity, isolating its relationship to the list of international Human Rights, determining whether a better intellectual basis can be found for the list, and even questioning how and in what sense Human Dignity itself and the resulting Human Rights can be said to exist independently of positive law.<sup>6</sup> There appears to be little likelihood of consensus on resolving such debates,<sup>7</sup> but by and large what I will call the Prevailing View appears to have survived, at any rate certainly in practice, as the best available basis for enforcing claims of Human Rights.

It may help to lay out explicitly the salient features of the Prevailing View.<sup>8</sup> In the first place, *the theory applies only to human beings*,<sup>9</sup> and further, most commonly, only to human beings

<sup>4</sup> See R. Brownsword, “Human Dignity from a Legal Perspective,” in M. Düwell, et al., eds., *The Cambridge Handbook of Human Dignity* (Cambridge 2014), 1–8.

<sup>5</sup> R. Debes, “Dignity,” in E. N. Zalta and U. Nodelman, eds., *The Stanford Encyclopedia of Philosophy* (Feb. 18, 2023) (online).

<sup>6</sup> See especially the essays in R. Cruft, et al., eds., *Philosophical Foundations of Human Rights* (Oxford 2015), and C. McCrudden, ed., *Understanding Human Dignity* (Oxford 2013).

<sup>7</sup> The debate is summarized in J. Nickel and A. Etinson, “Human Rights,” in E. N. Zalta and U. Nodelman, eds., *The Stanford Encyclopedia of Philosophy* (May 31, 2024) (online); see esp. C. R. Beitz, *The Idea of Human Rights* (Oxford 2009) and J. Griffin, *On Human Rights* (Oxford 2008). See also A. Etinson, ed., *Human Rights: Moral or Political?* (Oxford 2018).

<sup>8</sup> In what follows, I broadly follow the schema set out in Brownsword (note 4), 3. See also P. Tiedemann, *Philosophical Foundation of Human Rights*, 2nd ed. (New York 2023), 23–140, arguing that Human Dignity provides a solid basis for articulating Human Rights, unlike competing theories (utilitarianism, Aristotelian ethics, or social contractarianism). As Benjamin Stroumann points out to me, Cicero, at *Off.* 3.28, tentatively develops a theory of humanity as a contractual partnership (*societas*) that might serve as a basis for imposing reciprocal rights and duties between people.

<sup>9</sup> On human uniqueness, see, e.g., G. Kateb, *Human Dignity* (Cambridge, MA 2011), 113–73.

as individuals (not as groups or collectives).<sup>10</sup>

Second, *humans are regarded as equals in their dignity*, irrespective both of their personal inability to exercise their rights themselves (e.g., infants or the cognitively disabled), and also of their other politically, socially, or economically defined attributes (their civic position, class, age, sex, disabilities, and so on).

Third, *Human Dignity is regarded and treated as inherent*, vested in humans solely by virtue of their being living humans, with no further requirement. In this sense, Human Dignity is treated as axiomatic, whether or not it can also be justified through argument or empirical observation. Nor does inherence result from any form of supernatural creation or a specific endowment by “Nature or . . . Nature’s God”; the framers of the *Universal Declaration* quite deliberately eschewed all such language, obviously in the hope of achieving broad multi-cultural approval.<sup>11</sup> In this respect, the axiom of Human Dignity can be described as “naturalistic” since it relies on an assertion about human nature;<sup>12</sup> it does not stem from or depend upon “any other external causes, like acts of government, courts, legislatures, or international assemblies.”<sup>13</sup>

<sup>10</sup> My colleague Steven Ratner alerted me to exceptions; e.g., the 1981 *African Charter on Human Rights and People’s Rights* in Bisset (note 2), 422–31. An example is its Article 19, beginning: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. . . .” Against such extensions, see Tiedemann (note 8), 324–28.

<sup>11</sup> See J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia 1999), 284–96 (quotation at 290).

<sup>12</sup> See S. Mazurkiewicz, *Grounding Human Rights in Human Nature* (New York 2023).

<sup>13</sup> Morsink (note 11), 290. On the concept of inherence, see the essays in A. J. L. Menuge and B. W. Bussey, eds., *The Inherence of Human Dignity: Foundations of Human Dignity*, 1 (London 2021). That is to say, this concept of Human Dignity is ontological (as in Natural Law), rather than ethical (as in Kant) or theological (as in Catholic thinking); see A. Autiero, “Human Dignity in an Ethical Sense: Basic Considerations,” *Interdisciplinary Journal for Religion and Transformation in Contemporary Society*, 6 (2020), 9–21; also S. Riley and G. Bos, “Human Dignity,” in *Internet Encyclopedia of Philosophy* (accessed July 1, 2024). The modern concept owes much, to be sure, to both of these alternative traditions. See, for instance, the essays in Parts I and III of M. Düwell, et al., eds., *The Cambridge Handbook of Human Dignity* (Cambridge 2014), and also O. Sensen, *Kant on Human Dignity* (De Gruyter 2011), and E. Weber-Guskar, *Würde als Haltung: Eine philosophische Untersuchung zum Begriff der Menschenwürde* (Münster 2016). There are general surveys in H. Baker, *The Image of Man: A Study of the Idea of Human Dignity in Classical Antiquity, the Middle Ages, and the Renaissance* (Gloucester, MA 1947/1961), and M. R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley

Fourth, *Human Dignity, like the Human Rights that then come to be associated with it, is inalienable.* It cannot be removed or abbreviated either by voluntary agreement (through contract or the like), or by private coercion, or through a governmental action such as a judicial judgment or executive order.

Fifth, *specific Human Rights have been and continue to be enumerated with the stated goal of protecting the core of Human Dignity.* In principle, at least, the original articulation, development, and execution of these rights always looks toward what it is that the preservation of individual Human Dignity requires. “Examples of human rights are the right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, and the right to education.”<sup>14</sup>

Sixth, *these Human Rights are held to establish what are essentially moral claims* (and now, frequently, legal claims as well) that their bearers possess irrespective of their immediate enforceability. Such claims are available both against other persons and against legal persons such as, in particular, the government.<sup>15</sup> Because of and through their existence, these claims impose corresponding moral (and, often, legal) duties on all relevant able persons and human entities.

So far the theory: compact, coherent, and, it might seem, intuitively appealing. However, each of these elements of the Prevailing View is open to, and has occasioned, vigorous academic criticism.<sup>16</sup> The theory’s overt “speciesism” (privileging humans

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2008). However, the present essay focuses on the period prior to the emergence of this later thinking. The concept of inherent moral cognition is well treated in J. Mikhail, *Elements of Moral Cognition: Rawls’ Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (Cambridge 2011), developing a Rawlsian argument.

<sup>14</sup> Nickel and Etinson (note 7).

<sup>15</sup> The extent to which Human Rights can be effectively asserted against private persons and non-governmental entities (such as corporations) remains contested, however. See, e.g., I. Ziemele, “Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies,” *Working Papers of the Academy of European Law*, European University Institute, 2009/08, PRIV-WAR Project.

<sup>16</sup> Marcus Düwell catalogues and discusses the main stress points in the Prevailing View: M. Düwell, “Human Dignity: Concepts, Discussions, Philosophical Perspectives,” in M. Düwell, et al., eds., *The Cambridge Handbook of Human Dignity* (Cambridge 2014), 27–42. They are: 1) the relationship between Human Dignity and Human Rights; 2) the relationship between a moral and legal interpretation of Human Dignity; 3) the problem of who has dignity (herein of, e.g., the problems of abortion and

above all other animate beings) may give one pause, for instance,<sup>17</sup> and likewise the apparently authoritative influence of conspicuous Western values such as individualism.<sup>18</sup> It is likewise hard to deny that the modern enunciation of Human Rights often presupposes a relatively high level of social, political, and economic development, as when the 1966 *International Covenant on Economic, Social and Cultural Rights* posits “the right of everyone to social security, including social insurance” (Article 9), or “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to continuous improvement of living conditions” (Article 11.1).<sup>19</sup>

For present purposes, nonetheless, I will largely ignore dissenting or doubting voices. Still, I think it germane to pause on perhaps the most troubling part of the Prevailing View: the nature of the undefined “inherent dignity” of humans. Some critics have

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euthanasia); 4) the normative content of Human Dignity; and 5) the necessary presuppositions for a commitment to Human Dignity. F. M. Kamm, *Rights and Their Limits: In Theory, Cases, and Pandemics* (New York 2022), now discusses many higher-level philosophical problems associated with the concept of Human Rights; e.g., do future generations have rights (14–16)? See also esp. Riley and Bos (note 13).

<sup>17</sup> See the classic article by Bonnie Steinbock, “Speciesism and the Idea of Equality,” *Philosophy*, 53 (1978), 247–56; also the essays in M. Challenger, ed., *Animal Dignity: Philosophical Reflections on Non-Human Existence* (London 2023). Many commentators have expressed concern about the potential trivialization of Human Rights if the concept is extended beyond humans or to an excessive number and variety of claims. For a general discussion of this problem: J. T. Theilen, “The Inflation of Human Rights: A Deconstruction,” in *Leiden J. Int’l L.*, 34 (2021), 831–54.

<sup>18</sup> See, for instance, the essays in B. de Sousa Santos and B. Sena Martins, eds., *The Pluriverse of Human Rights* (Abingdon 2021); M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton 2003); P. Alston and F. Megret, eds., *The United Nations and Human Rights: A Critical Appraisal*, 2nd ed. (Oxford 2014). Still more critical: C. Sampson, *The Colonialism of Human Rights: Ongoing Hypocrisies of Western Liberalism* (Cambridge 2020). Nonetheless, the Prevailing View’s concept of dignity has found a legal and cultural home even in areas of the world, such as South and Southeast Asia, that had once seemed resistant: J. C.-S. Hsu, ed., *Human Dignity in Asia: Dialogue Between Law and Culture* (Cambridge 2022). On the more troubling case of Africa, see B. Ibhawoh, *Human Rights in Africa* (Cambridge 2018). But see in general S. L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge 2016).

<sup>19</sup> Admittedly, the text contains reservations, e.g., that these rights be implemented “to the maximum of [each State’s] available resources” (Article 2.1); one could drive a truck through such reservations.

regarded “dignity” as “squishy” or “hopelessly vague.”<sup>20</sup> Arthur Schopenhauer famously described Kantian dignity (*Würde*) as “the shibboleth of all the perplexed and empty-headed moralists who concealed behind that imposing expression their lack of any real basis of morals, or, at any rate, of one that had any meaning.”<sup>21</sup> Such caution may be understandable or even justified in the face of the concept’s axiomatic character. As the philosopher Remy Debes remarks, with more than a trace of resignation,

So, what exactly is dignity? Do its different connotations hang together in any principled way? Does dignity understood as “universal human worth,” for example, have any meaningful connection to “social rank” or “personal integrity”? Is dignity primarily a moral concept or a political and legal one? Even assuming we can make sense of its different meanings, what does dignity demand of us? What does it mean to recognize or respect it? Does it ground rights? If so, which ones? And where does the idea of dignity come from? What, in other words, is its history?<sup>22</sup>

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<sup>20</sup> So, for instance, R. Macklin, “Dignity is a Useless Concept,” *British Medical Journal*, 327 (2003), 1419–20: “In the absence of criteria that can enable us to know just when dignity is violated, the concept remains hopelessly vague”; and S. Pinker, “The Stupidity of Dignity,” *New Republic* (28 May 2008): “. . . a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it.” (Both are writing of the concept as it relates to Bioethics.) M. Bagaric and J. Allan, “The Vacuous Concept of Dignity,” *Journal of Human Rights*, 5 (2006), 260: “The concept of dignity . . . is so elusive as to be virtually meaningless.” J. Waldron, “Is Dignity the Foundation of Human Rights,” in R. Cruft, et al., eds., *Philosophical Foundations of Human Rights* (Oxford 2015), 117–37, has a more measured general critique. In the same volume, see, more generally, R. Cruft, et al., “The Philosophical Foundation of Human Rights: An Overview,” 1–41; and J. Tasioulas, “On the Foundations of Human Rights,” 45–70; also C. McCrudden, “In Pursuit of Human Dignity: An Introduction to Current Debates,” in C. McCrudden, ed., *Understanding Human Dignity* (Oxford 2013). Perhaps the best answer to extreme skepticism can be found in John Rawls, *Political Liberalism*, 2nd ed. (New York 2005) and *Law of Peoples* (Cambridge, MA 1999). – Similar doubt attends the concept of Human Rights itself; see G. Ulrich, “Human Rights Scepticism,” in C. Binder, et al., eds., *Elgar Encyclopedia of Human Rights*, 2 (Cheltenham 2022), 478–83.

<sup>21</sup> A. Schopenhauer, *The Basis of Morality*, trans. Arthur Brodrick Bullock (1903; reissued Indianapolis 2019), 100; on which, see Debes, (note 5), section 4 (“Skeptical Worries”).

<sup>22</sup> Debes (note 5); compare Riley and Bos (note 13). Helpful in clarifying this discussion are M. Rosen, *Dignity: Its History and Meaning* (Cambridge, MA 2012), and McCrudden (note 1). Brownsword (note 4), 8–13,

For the foreseeable future, there will be no end of controversies. Sufficient for present purposes, however, is a familiar definition of Human Dignity somewhat along these lines: the fundamental moral worth or status belonging to all persons equally; the right of persons to be valued and respected for their own sake, and to be treated ethically, regardless of their nationality, ethnic group, or other conventional or morally less weighty features.<sup>23</sup>

In this line, human dignity should be seen as an expression that signifies a status which other human beings and political institutions have to respect. This respect can be interpreted primarily in a sense of moral obligations or – as happened in the twentieth century – in the sense of individual rights that can be legally enforced. And since this respect is of immanent importance from a moral point of view, it can be seen as a reason to understand the entire legal and political state and international order as based on respect for the dignity and rights of each individual human being. This concept of “human dignity” . . . is *universal*: it signifies a status that cannot be lost, and thus may provide a foundation of rights.<sup>24</sup>

To take just one example of how human dignity works as a principle, Article 5 of the *Universal Declaration* states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This proposition has been thought to

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isolates another important strain of controversy that is especially important in the legal context, between a “liberal” (extensive) understanding of Human Rights, and a “conservative” (restrictive) interpretation of them.

<sup>23</sup> Adapted from R. Debes, ed., *Dignity: A History* (Oxford 2017), 1, and P. Gilabert, *Human Dignity and Human Rights* (Oxford 2019), 1, who then observes: “By understanding human dignity, we can explain the content and force of human rights as the urgent ethical and political project that puts humanity first.” See also C. Bird, *Human Dignity and Political Criticism* (Cambridge 2021), 222.

<sup>24</sup> Düwell (note 16), 27. It may seem tempting, therefore, to fold Human Dignity and Rights into broader concepts of Social Justice; see, e.g., P. Gilabert, *Human Dignity and Social Justice* (Oxford 2023), and Bird (note 23); see also B. Scharffs and E. Ochab, *Dignity and International Human Rights Law: An Introduction to the Punta del Este Declaration on Human Dignity for Everyone Everywhere* (Abingdon 2021). But that view should be resisted, since individual Human Rights may not infrequently obstruct policy measures that could otherwise be justified through broader societal considerations. See generally J. M. A. Linhares and M. Atienza, eds., *Human Dignity and the Autonomy of Law* (New York 2022), with articles discussing aspects of this problem.

flow almost automatically from the axiom of Human Dignity.<sup>25</sup>

In the immediate aftermath of World War II and the horrific events attending and surrounding it, the drafters of the *Universal Declaration of Human Rights*, although certainly conscious of preceding traditions, sought to inaugurate a new and more vigorous era. Their choice of the word “dignity,” despite acknowledged precedent in philosophy, religion, and law, drew and has drawn a good deal of its current meaning from the concurrent or ensuing ascription of specific rights. These Human Rights could be thought to define what it is today for a human to have “dignity”; and, in turn, as the list of rights has grown, this attributed “dignity” has come to serve as a general organizing principle – a recursive process, familiar to lawyers,<sup>26</sup> that has gradually established international Human Rights as a powerful contemporary institution, no matter the observable extent to which the world and its sundry nations still fall far short of fully implementing them.<sup>27</sup>

Indeed, as Christopher McCrudden has observed, in the last analysis it is also perhaps the very vagueness and malleability of the concept “Human Dignity” that has been a source of its rhetorical and ultimately its judicial strength, since, despite differences in nuance, all modern societies not only appear to have at least broadly corresponding societal norms, but on frequent occasions to have felt themselves compelled or at least powerfully stimulated to apply them.<sup>28</sup>

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<sup>25</sup> See also the 1984 United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (in Bisset (note 2), 75–84), the preamble of which states that: “the equal and inalienable rights of all members of the human family . . . derive from the inherent dignity of human persons” (75). However, even this seemingly easy example can be quite difficult in practice; see Kamm (note 16), 276–304; M. Neuhaus, *Ist Rettungsfolter erlaubt?: Die Diskussion über die Legitimität von Folter als letztes Mittel in Notsituationen* (Leiden 2023).

<sup>26</sup> See, e.g., G. C. Christie, “Vagueness and Legal Language,” *Minnesota L. Rev.*, 48 (1964), 885–911. Compare, for instance, phrases like “equal protection” and “due process.”

<sup>27</sup> I will not deal with contemporary Human Rights and their enforcement; but for a full recent treatment see C. W. Chen and A. D. Renteln, *International Human Rights: A Survey*, new ed. (Cambridge 2022).

<sup>28</sup> C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights,” *European J. of Int’l Law*, 19 (2008), 674: “The absence of a consensus substantive meaning of the concept [of dignity] beyond that minimum core has not, it seems, prevented it being used to enable a much looser co-ordination of human rights adjudication to take place, with significant room for disagreement and divergence over specific practical applications. Rather than providing substantive meaning, a significant use

In sum, the interrelationship of inherent Human Dignity with Human Rights is not an easy one, but probably the best that we can now do. However this may be, it is the very early and extremely tentative Roman contributions to formulating the Prevailing View that I am seeking to investigate in the remainder of this paper. That is to say, I am examining a handful of important and unusual ancient Roman sources in their relation to the Prevailing View, while for the most part ignoring both the critically important intervening intellectual and institutional history and the many other possible modern approaches.

## II. Cicero and Human Dignity

As is well known, our word dignity derives from Latin *dignitas*, which, with some distinctions in nuance depending on context, meant one's esteem and self-esteem particularly in relation to one's social and political surroundings. Thus, it involves an interaction between a person's self-perception and sensitivity to his or her setting, and how community members perceive and respect that person<sup>29</sup> – in essence, a Janus-like concept with both internal and external aspects.<sup>30</sup> In a society as starkly socially stratified as Rome's was, one's *dignitas* was a powerful concept that, when assailed, could sometimes motivate extreme reactions. For instance, Julius Caesar claims that he crossed the Rubicon and began a Civil War because he felt his political opponents had impugned

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is institutional: providing a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights." See also the essays in E. A. Kolodziej, ed., *A Force Profonde: The Power, Politics and Promise of Human Rights* (Philadelphia 2003).

<sup>29</sup> See, for instance, C. Bur, *La Citoyenneté dégradée: Une histoire de l'infamie à Rome (312 av. J.-C. – 96 apr. J.-C.)* (Rome 2018), 272.

<sup>30</sup> This "internal" *dignitas* is still a strongly social concept: an individual's self-assessment of his or her own place in the world and what it entails by way of appropriate respect and treatment from others. However, starting with Aristotle, Greek philosophers already pursued a more sophisticated view: J. Milbank, "Dignity Rather Than Rights," in C. McCrudden, ed., *Understanding Human Dignity* (Oxford 2013), 191–98. Still, the current scholarly discussion of internal vs. external dignity is distinguishable since it arises out of the modern concept of dignity. – As for "external" *dignitas*, it can be argued, as is suggested in K. Bayertz, "Human Dignity: Philosophical Origin and Scientific Erosion of an Idea," in K. Bayertz, ed., *Sanctity of Life and Human Dignity* (Dordrecht 1996), 73–90, that "respect for the dignity of others" survives from the ancient understanding of *dignitas* and deeply informs the modern concept of Human Dignity; see also J. G. Hernandez, "Human Value, Dignity, and the Presence of Others," *HEC Forum*, 27 (2015), 249–63.

his *dignitas*.<sup>31</sup> In his earliest work (*De Inventione* 2.166), Cicero defines *dignitas* as “a person’s moral authority arising from his way of life, his office, and his sense of his proper place.”<sup>32</sup>

This meaning of *dignitas* is also widely found in legal sources. For example, the late Classical jurist Callistratus observes: “Reputation (*existimatio*) is a position of unimpaired social standing (*dignitatis inlaesae status*) that is upheld by laws and by customs, but which, because of our misconduct, is either diminished or taken away under the authority of laws.”<sup>33</sup> Modern attempts to link legal holdings of the Roman jurists to the modern idea of Human Dignity or Human Rights are unpersuasive, although, to be sure, the jurists’ persistence in understanding social interactions through the lens of rights and duties may have had an indirect but more profound influence.<sup>34</sup>

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<sup>31</sup> Caes. *Civ.* 1.7; compare Cic. *Att.* 7.11.1. See esp. M. T. Griffin, “Dignity in Roman and Stoic Thought,” in R. Debes, ed., *Dignity: A History* (Oxford 2017), 47–66 (50: “*Dignitas* is an attribute signifying a certain standing or rank in the community . . . It includes the idea of worthiness and the respect inspired by that worthiness. . . . *Dignitas* is inherently comparative.”; V. Pöschl, *Der Begriff der Würde im antiken Rom und später* (Heidelberg 1989). This meaning of “dignity” still survives, of course. On the roughly equivalent classical Greek concept *axiōma* (of persons, normally “reputation” or “rank”), see P. Rankine, “Dignity in Homer and Classical Greece,” in R. Debes, ed., *Dignity: A History* (Oxford 2017), 19–45.

<sup>32</sup> *Dignitas est alicuius honesta et cultu et honore et verecundia digna auctoritas*. Accordingly, as Cic. *Inv.* 2.160, contends, “Justice is a frame of mind bestowing on each person his own *dignitas* while preserving the common interest” (*Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem*). Compare Cic. *Inv.* 2.65, and *Part.* 129–130; also *Rhet. Her.* 3.2.3.

<sup>33</sup> Callistratus (1 *de Cognitionibus*), D.50.13.5.1: *Existimatio est dignitatis illaesae status, legibus ac moribus comprobatus, qui ex delicto nostro auctoritate legum aut minuitur aut consumitur*. Compare, e.g., Ulpian (24 *ad Edictum*), D.25.4.1.13, of changeling newborns: *publice enim interest partus non subici, ut ordinum dignitas familiarumque salva sit* (“it is in the public interest that newborns not be switched, so as to preserve the *dignitas* of the social classes and of households”); J.4.4.7: *nam secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae* (“The damages for an *iniuria* (a personal affront) are increased or diminished according to level of *dignitas* and the probity of life (of the plaintiff)”).

<sup>34</sup> See J. Giltaij and K. Tuori, “Human Rights in Antiquity? Revisiting Anachronism and Roman Law,” in P. Slotte and M. Halme-Tuomisaari, eds., *Revisiting the Origins of Human Rights* (Cambridge 2015), 39–63, against esp. T. Honoré, *Ulpian: Pioneer of Human Rights*, 2nd ed. (Oxford 2002), 76–93, who admits that, for Ulpian, “All are equal in that they possess dignity, but, in contrast with modern thinking, the degree of dignity

A more promising source, it might be thought, is Stoic philosophy, with its stress on Natural Law and the natural equality of human beings; both these would, of course, be highly influential in the subsequent development of Human Rights theory.<sup>35</sup> But this source too seems unlikely, as the Stoics, at least in their older “canonical” phase, appear not to have proceeded beyond these milestones to develop a broader and more independent social policy.<sup>36</sup> The older Stoics were perhaps deterred by the difficulty of dealing with a slave-holding, stratified society (which potentially made their emphasis on equality seem hypocritical),<sup>37</sup> but even more by

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varies from person to person” (85). But this position is fully in accord with general Roman usage. A similar problem in R. A. Bauman, *Human Rights in Ancient Rome* (London 1999). More realistic is S. F. Wiltshire, *Greece, Rome, and the Bill of Rights* (Norman, OK 1992), 25–50. The jurists apparently get no further than recognizing the “natural” (inherent) freedom of humans: O. Behrends, “The Natural Freedom of the Human Person and the Rule of Law in the Perspective of the Classical Roman Legal Theory,” *The Tulane European and Civil Law Forum*, 26 (2011), 1–31, on esp. Florentinus (9 *Inst.*), D.1.5.3 pr. (= J.1.2.1), *Libertas est naturalis facultas eius quod cuiusque facere libet, nisi si quid vi aut iure prohibetur* (“Freedom is the natural ability of doing what one wishes, except if something is forcibly or legally prevented”). Compare also P. Birks, “Harassment and Hubris: The Right to an Equality of Respect,” *Irish Jurist*, 32 (1997), 1–45, dealing especially with the delict of *iniuria*. On the role played by juristic “rights thinking” in the development of Human Rights, see N. Lenski, “Rights in Ancient Law,” in C. Ando, M. Canevaro, and B. Straumann, eds., *Cambridge History of Rights* [I. *The Ancient World*] (forthcoming); also D. Edelstein and B. Straumann, “On the Liberties of the Ancients: Licentiousness, Equal Rights, and the Rule of Law,” *History of European Ideas*, 49 (2023), 1037–60.

<sup>35</sup> P. Mitsis, “The Stoic Origin of Natural Rights,” *Philosophical Inquiry*, 28 (2006), 159–78; L. E. Hill, “Stoic Cosmopolitanism and the Birth of Universal Rights,” APSA 2013 Annual Meeting Paper, American Political Science Association 2013 Annual Meeting (2013) (available at SSRN). On the eventual contribution of Natural Law to the development of Human Rights doctrine, see T. Sparks, “Natural Law Theories,” in C. Binder, et al., eds., *Elgar Encyclopedia of Human Rights*, 2 (Cheltenham 2022), 539–45.

<sup>36</sup> See P. Klingenfied and E. Brown, “Cosmopolitanism,” in E. N. Zalta and U. Nodelman, eds., *The Stanford Encyclopedia of Philosophy* (Oct. 17 2019) (online). They note that, by contrast with earlier Greek Stoics, “Roman Stoics extend citizenship [in their cosmopolis] to all human beings by virtue of their rationality. On the other hand, local citizenship becomes more demanding.” A key source is Cic. *Off.* 1.50–59. See also M. J. Meyer, “Stoics, Rights, and Autonomy,” *American Philosophical Quarterly*, 24 (1987), 267–71.

<sup>37</sup> C. E. Manning, “Stoicism and Slavery in the Roman Empire,” in *Aufstieg und Niedergang der römischen Welt* [III.36.3. *Philosophie, Wissenschaften, Technik. Philosophie (Stoizismus)*] (Leiden 1989), 1518–43; K.

their preference to found their ethics on the upright conduct of the “Sage” as the only truly free person, alone possessing virtue and knowledge and hence alone able to be termed happy regardless of external circumstances.<sup>38</sup> By and large, Stoics seem to have understood and used *dignitas* (as also its probable Greek equivalent *axiōma*) in its usual ancient sense of “(self-)esteem.”<sup>39</sup>

However, there is one noteworthy exception to this pattern: Cicero, *De Officiis* 1.105–107. Cicero composed this three-book treatise “On Duties” at lightning speed (perhaps in less than a month) in late 44 BCE, amid the tumultuous events following the assassination of Julius Caesar.<sup>40</sup> For the first two books of this treatise Cicero, as he himself states, drew heavily on a lost Greek work (*Peri tou Kathēkontos*, “On Duty”) by Panaetius of Rhodes (ca. 185–109 BCE), a major Stoic philosopher of the later second century BCE.<sup>41</sup> In the area of ethics, Panaetius is renowned for his “more practical emphasis on the moral situation of ordinary men and a reduced emphasis on the morally perfect sage.”<sup>42</sup> His treatise on duty is characterized by a preference for moral casuistry and creating rules accessible to people in general, rather than concentrating so heavily on the ideal Sage. Panaetius and his followers Hecaton and Posidonius, principal figures of the so-called Middle Stoa, had close ties to the late Republican Roman elite and were

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Harper, “Christianity and the Roots of Human Dignity in Late Antiquity,” in T. S. Shah and Allen D. Hertzke, eds., *Christianity and Freedom* [I. *Historical Perspectives*] (Cambridge 2016), 128–30. Some older Stoic views on slavery are described in, e.g., Diog. Laert. 7.121–122.

<sup>38</sup> J. E. Garret, “The Doubtful Descent of Human Rights from Stoicism,” *Nordisk Tidsskrift for Menneskerettigheter*, 26 (2008), 77–90; R. Bett, “Did the Stoics Invent Human Rights?,” in R. Kamtekar, ed., *Virtue and Happiness: Essays in Honour of Julia Annas* (Oxford 2012), 148–69. See also Griffin (note 31), 54–60; but also W. Johncock, *Beyond the Individual: Stoic Philosophy on Community and Connection* (Eugene, OR 2023). On Sen. *Ben.* 3.18.2, which might be interpreted as ascribing a “human right” (*ius humanum*) to slaves, see below.

<sup>39</sup> Griffin (note 31), 54–65.

<sup>40</sup> For the evidence, see Andrew R. Dyck’s authoritative *A Commentary on Cicero, De Officiis* (Ann Arbor 1997), 8–10; M. Testard, *Cicéron, Les Devoirs*, 1, 2nd ed. (Paris 2002), 7–21.

<sup>41</sup> A full discussion in Dyck (note 40), 17–39; also Testard (note 40), 25–49. Cicero acknowledges his debt to Panaetius, as also his abridgement: *Off.* 2.16, 3.7–12; *Att.* 16.11.4.

<sup>42</sup> B. Inwood, s.v. “Panaetius,” in *Oxford Classical Dictionary* (Oxford 2016) (online).

largely responsible for popularizing Stoic ideas among them.<sup>43</sup>

In adapting Panaetius' Greek text, Cicero abbreviated the original (from three books to two), and also eliminated much of Panaetius' illustrative material while introducing Roman *exempla* of his own; but he seems to have preserved most of his source's structure and thinking, to such an extent that the *De Officiis* is often treated, albeit with appropriate caution, as a substitute for the lost original.<sup>44</sup>

The passage in question comes from an extended discussion (*Off.* 1.93–151) of the duty and social virtue of *decorum*, literally “seemliness” or “propriety,” conformance to conventionally accepted standards of behavior or morals. Cicero's discussion is far ranging and carefully organized, if occasionally also a bit difficult to grasp in part because of Cicero's alterations.<sup>45</sup> At least in Panaetius' original presentation, the analysis of *tò prépon* (what Cicero renders as *decorum*<sup>46</sup>) rests on a division between “the person who performs the action; the rôle or rôles that the agent has to play, whether of his own choosing or imposed by external circumstance,” on the one hand (105–121); and the assurance that “within certain spheres certain actions are appropriate or inappropriate per se,” on the other (roughly, 126–140).<sup>47</sup> In a quite literal sense, the actor is juxtaposed to the act.

With regard to the actor, Panaetius proposed an apparently

<sup>43</sup> On the “Middle” Stoa, see, e.g., B. Inwood, “How Unified is Stoicism Anyway?,” in R. Kamtekar, ed., *Virtue and Happiness: Essays in Honour of Julia Annas* (Oxford 2012), 223–44; T. L. Tieleman, “Panaetius' Place in the History of Stoicism: With Special Reference to his Moral Psychology,” in A. M. Ioppolo and D. N. Sedley, eds., *Pyrrhonists, Patricians and Platonizers* (Naples 2007), 103–42; D. Sedley, “The School, from Zeno to Arius Didymus,” in B. Inwood, ed., *Cambridge Companion to the Stoics* (Cambridge 2003), 20–24. On their relationship to the Roman aristocracy, see R. Brouwer, *Law and Philosophy in the Late Roman Republic* (Cambridge 2021), 32–33, with bibliography.

<sup>44</sup> A. Erskine, “Cicero and the Shaping of Hellenistic Philosophy,” *Hermathena*, 175 (2003), 5–15. Cicero, although not himself a Stoic, was quite familiar with Stoic writings and makes use of them when he finds them helpful.

<sup>45</sup> Dyck (note 40), 238–41. On *decorum*, see also M. Pohlenz, “*Tò prépon*” (1933), reprinted in H. Dörrie, ed., *M. Pohlenz: Kleine Schriften*, 1 (Hildesheim 1965), 100–39; M. Schofield, “The Fourth Virtue,” in W. Nicgorski, ed., *Cicero's Practical Philosophy* (Notre Dame 2012), 46–47; M. C. Hawley, “Individuality and Hierarchy in Cicero's *De Officiis*,” *European Journal of Political Theory*, 19 (2020), 87–105.

<sup>46</sup> Cicero's rendering of the Greek word is not unproblematic: Dyck (note 40), 241–49.

<sup>47</sup> Id., 240–41.

novel division into four “roles” (*personae*; Greek *prósōpa*).<sup>48</sup> As in Greek, the Latin word *persona* has a range of meanings, starting from a theatrical mask or character, but over time gradually evolving into a designation for an individual human being’s self-manifestation as a distinct “personality.”<sup>49</sup> Panaetius’ roles are: 1) a “human nature” shared by all humans; 2) a person’s inborn individual character; 3) a role imposed by an individual’s contingent circumstances; and 4) a role resulting from individual choice. This typology allowed Panaetius to separate out the generalizable “human” from other, more singular or contingent characteristics of individual humans.

It is, in fact, with the first of these *personae* that we are concerned.<sup>50</sup> The crucial passage is *De Officiis* 1.105–107:

(105) Sed pertinet ad omnem officii quaestionem semper in promptu habere, quantum natura hominis pecudibus reliquisque beluis antecedit; illae nihil sentiunt nisi voluptatem ad eamque feruntur omni impetu, hominis autem mens discendo alitur et cogitando, semper aliquid aut anquirit aut agit videndique et audiendi delectatione ducitur. Quin etiam, si quis est paulo ad voluptates propensior, modo ne sit ex pecudum genere (sunt enim quidam homines non re, sed nomine) sed si quis est paulo erectior, quamvis voluptate capiatur,

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<sup>48</sup> On the theory of *personae*, see esp. H. Cancik, “*Persona* and Self in Stoic Philosophy,” in A. J. Baumgartner, ed., *Self, Soul and Body in Religious Experience* (Leiden 1998), 335–46 (cited from H. Cancik, *Europa – Antike – Humanismus: Humanistische Versuche und Vorarbeiten* (Bielefeld 2011), 311–28); C. Gill, “Personhood and Personality: The Four ‘Personae’ Theory in Cicero, ‘De Officiis,’” *Oxford Studies in Ancient Philosophy*, 6 (1988), 169–99; Schofield (note 45); Brouwer (note 43), 68–82; also D. Machek, “Die Vier-Personae-Theorie in *De Officiis*,” in P. Brüllmann and J. Müller, eds., *Cicero: De Officiis* (Berlin 2023), 107–22. I follow almost all scholars, including Dyck, in attributing the four-*personae* theory mostly to Panaetius; but P. H. De Lacy, “The Four Stoic ‘Personae,’” *Illinois Classical Studies*, 2 (1977), 169, and Gill (this note), 183–85, suggest some reasons for caution. Victor Caston points out to me that Panaetius’ four *personae* may have links to older Stoicism’s four ontological categories, to which they bear a more than passing resemblance; see D. Sedley, s.v. “Stoicism,” in *Routledge Encyclopedia of Philosophy* (2005), section 6 (online); S. Menn, “The Stoic Theory of Categories,” *Oxford Studies in Ancient Philosophy*, 17 (1999), 215–47.

<sup>49</sup> In later juristic terminology, *persona* comes to designate those possessing legal rights, including not only free individuals, but also institutions or groupings that have been accorded legal personality.

<sup>50</sup> Cicero introduces the latter two roles, without advance warning, at *Off.* 1.115.

occultat et dissimulat appetitum voluptatis propter verecundiam.

(106) Ex quo intellegitur corporis voluptatem non satis esse dignam hominis praestantia eamque contemni et reici oportere, sin sit quispiam, qui aliquid tribuat voluptati, diligenter ei tenendum esse eius fruendae modum. Itaque victus cultusque corporis ad valitudinem referatur et ad vires, non ad voluptatem. Atque etiam, si considerare volumus, quae sit in <nostra> natura excellentia et dignitas, intellegemus, quam sit turpe diffuere luxuria et delicate ac molliter vivere, quamque honestum parce, continenter, severe, sobrie.

(107) Intellegendum etiam est duabus quasi nos a natura indutos esse personis; quarum una communis est ex eo, quod omnes participes sumus rationis praestantiaeque eius, qua antecellimus bestiis, a qua omne honestum decorumque trahitur et ex qua ratio inveniendi officii exquiritur, altera autem quae proprie singulis est tributa. Ut enim in corporibus magnae dissimilitudines sunt, alios videmus velocitate ad cursum, alios viribus ad luctandum valere, itemque in formis aliis dignitatem inesse, aliis venustatem, sic in animis existunt maiores etiam varietates.

(105) But relevant to every inquiry into duty is always to bear in mind how much human nature (*natura hominis*) exceeds that of farm animals and other beasts, which understand nothing but the pleasure to which every instinct impels them. But the human mind is nourished by study and reflection, it always either investigates or does something, and it is led by the pleasure of seeing and hearing. Indeed, even if an individual is somewhat more open to pleasures, provided he is not on the level of farm animals – for such people are not human in fact, but (only) in name – but if someone is (at least) a little more upright, then even if he is enticed by pleasure, because of shame he conceals and disguises his craving for pleasure.

(106) From this we understand that bodily pleasure is insufficiently worthy of human preeminence (*non satis esse dignam hominis praestantia*<sup>51</sup>), and should be reviled and rejected. But if a person gives some weight to pleasure, he must strictly keep this enjoyment measured. Our eating and bodily care are therefore related to health and strength, not to

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<sup>51</sup> The ablative here is that of specification: worthy of what?

pleasure. And also, if we wish to reflect upon what in our nature (*in <nostra> natura*) constitutes superiority and dignity (*excellētia et dignitas*),<sup>52</sup> we will realize how debased it is to abandon ourselves to excess and to live in a voluptuous and unmanly fashion, and (on the other hand) how moral (it is to live) frugally, temperately, austere, soberly.

(107) For we must understand that we are, as it were, invested by Nature with two roles (*duabus personis*). Of these, one is common to all, arising from everyone's sharing in reason and the excellence<sup>53</sup> by which we surpass beasts; from this derives all that is moral and proper, and from this comes rationality in discovering our duty. The other (role) is that assigned to each person individually. For just as there are great dissimilarities in bodies and we see how some persons with speed for racing and others with strength for wrestling, and likewise in appearance some have dignity and others attractiveness, so in intellects there exists even larger diversity.

The passage begins<sup>54</sup> with a strong statement of the gulf between humans and other living beings – a “speciesism” that, as we have seen, is also found in modern Human Rights doctrine. In Panaetius' view, animals are instinctively driven solely to satisfy

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<sup>52</sup> As the singular verb *sit* indicates, *excellētia et dignitas* is a hendiadys, the expression of a single idea by two words: something like “human superiority by virtue of *dignitas*.” *Dignitas* probably translates the Greek word *axiōma*, or possibly *axia* (“worth”). — The transmitted clause *si considerare volumus, quae sit in natura excellētia et dignitas, intellegemus*, seems highly likely to have omitted a word indicating that humans are being discussed. Restoring *<nostra>* before *natura* is reasonably straightforward paleographically (the missing word was omitted through haplography, the inadvertent omission of a similar word). Some commentators prefer instead to restore *<hominis>* after *dignitas*, but the resulting phrase (“dignity of man”) may force the text toward a desired meaning.

<sup>53</sup> The phrase *rationis praestantiaeque eius* is also a hendiadys: “superiority by virtue of reason.”

<sup>54</sup> What follows is strongly influenced by the perceptive interpretation in Hubert Cancik, “Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* 1.105–107,” in D. Kretzmer and E. Klein, eds., *The Concept of Human Dignity in Human Rights Discourse* (Alphen aan den Rijn 2002), 19–39 (cited from Cancik (note 48), 327–53); Rosen (note 22), 11–15. I am grateful to Brad Inwood, who helped me to understand this passage above all in its close relation to Cic. *Off.* 1.11–14. See B. Inwood, “*Oikeiōsis* and the Origin of Virtue,” in R. Woolf, ed., *Cicero's “De Officiis”: A Critical Guide* (Cambridge 2023), 63–77, who vigorously defends the attribution of these ideas to Panaetius.

their appetites.<sup>55</sup> By contrast, humans by their nature (*hominis natura*), i.e., innately, seek to investigate and understand their world, and delight in doing so. Only if humans instead individually prefer to give themselves over to corporeal pleasure do they descend to the level of animals (in Cicero, they are said actually to become animals, *Off.* 1.105).<sup>56</sup> By contrast, humans who live more disciplined lives temper their hunger and restrain their physical pleasure (1.106). In these two sections, the quality distinguishing humans from animals is their capacity to control appetite voluntarily (and not yet, for instance, higher-order human rationality).<sup>57</sup> Already, however, Cicero foregrounds the concept of human *dignitas* as well as emphasizing its equal distribution among all humans – what he later calls *universa natura* as opposed to *nostra natura*, each person's individual nature (1.110).<sup>58</sup>

In *Off.* 1.107, these ideas are then integrated into the theory of human *personae* through two additional concepts. As regards the first *persona*, the familiar Stoic concept of Nature (*natura*)<sup>59</sup> is treated as having endowed all persons with the “excellence” (*prae-stantia*) that exalts humans over other animate beings; this innate quality is vested in every individual (*omnes participes*), evidently without regard to any other personal attributes (which Panaetius

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<sup>55</sup> Compare Cic. *Off.* 1.50, arguing that animals lack justice, fairness, and goodness because they lack reason; also 1.11–12. This is a standard Stoic view, see Dyck (note 40), 88–89, on *Off.* 1.11, and Sedley (note 43), section 14 (“*Oikeiosis*”). But Panaetius/Cicero lays far more emphasis on *ratio* and its connection to social virtues; B. Inwood, *Later Stoicism 155 BC to AD 200: An Introduction and Collection of Sources in Translation* (Cambridge 2022), 66, notes “Panaetius’ systematic emphasis on the importance of reason in differentiating us from animals.” Truly noteworthy is the omission, at least in Cicero’s account, of Natural Law as one element of moral cognition.

<sup>56</sup> S. C. Shershow, *Deconstructing Dignity: A Critique of the Right-To-Die Debate* (2019), 53–64, makes unduly heavy weather of this supposed contradiction. But still today it is possible to query whether those guilty of unspeakable evil can appeal to Human Dignity and Rights for themselves; see H. Mahmoudi, “Introduction,” in H. Mahmoudi and M. L. Penn, eds., *Interdisciplinary Perspectives on Human Dignity and Human Rights* (Leeds 2020), 7–9.

<sup>57</sup> This discussion is presumably aimed at Epicureanism; compare, for instance, Cic. *Fin.* 3.1, contrasting Epicurean *voluptas* with *dignitas*.

<sup>58</sup> To this extent, J. W. Atkins, “Patriotism and Cosmopolitanism in Cicero’s *De Officiis*,” in R. Woolf, ed., *Cicero’s “De Officiis”: A Critical Guide* (Cambridge 2023), 222, is surely mistaken to insist that for Cicero’s Stoic sources, “‘dignity’ remained an attribute to be attained.”

<sup>59</sup> On Stoic naturalism and its later reception, see, e.g., T. H. Irwin, “Stoic Naturalism and Its Critics,” in B. Inwood, ed., *Cambridge Companion to the Stoics* (Cambridge 2003), 345–64.

deals with in his remaining *personae*). Equality as a premise had been tacitly present already in the two earlier sections, but is now made explicit.

The second and much more important concept is Reason (*ratio*), an endowment that constitutes the perceptible essence of that “excellence.”<sup>60</sup> It is the linchpin of the preceding insistence on human dignity, since it affords not only the general human striving to understand the world and to act upon that understanding (*Off.* 1.105, cf. 12–14), but also, foremost, the mechanism for developing “all morality and propriety” (107: *omne honestum decorumque*), and, in particular, “the rational method of ascertaining our duty” (*ratio inveniendi officii*) – by which is meant, I would assume, not only the duty of temperance, but also the numerous other duties that Panaetius/Cicero explore. As Hubert Cancik explains,<sup>61</sup>

The mind functions as the steering centre . . . of human actions. It controls the drives . . . and represses the irrational affects . . . In this way, reason governs, rules our actions. Cicero does not postulate the extinction of urges or desire, nor the mortification of man, but moderation and respect (*verecundia*). It is from this rule of reason over the irrational forces that Cicero derived the “dignity of our nature”. The dignity of man resides in his first *persona* – reason and free moral decision.<sup>62</sup>

At an earlier point in the *De Officiis* (1.11), the same distinction is laid out at greater length:

But the most significant difference between humans and beasts is this: since beasts are only affected by the senses, they only respond to what is at hand in the present and are aware of the past and future to a very limited degree. But human beings have a share in reason (*rationis particeps*) and as a result they perceive consequences, discern causes and are not unaware of the preconditions and results of things. They make

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<sup>60</sup> On the central role of rationality in the Stoic view of humanity, see T. Brennan, “Stoic Moral Psychology,” in B. Inwood, ed., *Cambridge Companion to the Stoics* (Cambridge 2003), 260–263. But Panaetius powerfully foregrounds this quality: Schofield (note 45), 44–45.

<sup>61</sup> Cancik, *Europa* (note 48), 336 (footnote omitted). As Cancik notes, a good deal of this emphasis on rationality is found elsewhere in Stoic writing, although without the concept of *dignitas*. Nonetheless, the move here remains startling. As Schofield (note 45), 48, observes, “Making a *role* out of our shared humanity obviously stretches the notion of a *persona* to the limit.”

<sup>62</sup> As Dyck (note 40), 271, observes, “the human possession of *ratio* [is] the foundation of Panaetius’ doctrine of *officia*.”

comparisons between things that are similar and draw connections between future situations and the present; they can readily see the whole course of life and make the necessary preparations for living that life.<sup>63</sup>

In subsequent sections (1.12–19), this rationality is used to explain the origin of human *oikeiōsis*, affinity or natural attachment, in Stoicism the process whereby one recognizes something as familiar and belonging to oneself, and which became, in Panaetius, the rational basis for forming bonds of sociability with family and community, as well as for establishing the social virtues such as Justice, Generosity, Magnanimity, and Propriety.<sup>64</sup> Although in 1.105–107 Cicero makes no explicit reference back to this earlier discussion, much of it should doubtless be understood as carried forward. Inherent human *excellentia et dignitas* then becomes the higher moral presentation of all this rational activity.

To be sure, there is much more that we would like to know about this theorizing. It seems certain that, in *Off.* 1.105–107, Cicero sharply abbreviated his source in Panaetius' writings, for it is unlikely that the Greek philosopher would have left the discussion of the first *persona* so open.<sup>65</sup> Perhaps Cicero simply found Panaetius' ideas too strange, or just too difficult to understand. In any case, Cicero, eager to get on to his much more extensive treatment of naturally endowed and distinctive individual personalities (1.107–114), hurries past what is for us the more

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<sup>63</sup> Trans. Inwood (note 43):

Sed inter hominem et beluam hoc maxime interest, quod haec tantum, quantum sensu movetur, ad id solum, quod adest quodque praesens est se accommodat, paulum admodum sentiens praeteritum aut futurum. Homo autem, quod rationis est particeps, per quam consequentia cernit, causas rerum videt earumque praegressus et quasi antecessiones non ignorat, similitudines comparat rebusque praesentibus adiungit atque adnectit futuras, facile totius vitae cursum videt ad eamque legendam praeparat res necessarias.

<sup>64</sup> See Inwood (note 54), 63–77; Dyck (note 40), 83–86. See also Cic. *Off.* 1.50–58. On *oikeiōsis* more generally in Stoic philosophy: S. G. Pembroke, “Oikeiosis,” in A. A. Long, ed., *Problems in Stoicism* (London 1971), 114–49; G. Striker, “The Role of *Oikeiōsis* in Stoic Ethics,” in her *Essays on Hellenistic Epistemology and Ethics* (Cambridge 2012), 281–97. On reason (*ratio*), see also below.

<sup>65</sup> There are other signs of abbreviation; for instance, Cicero does not deal systematically with potential ethical conflicts between the various *personae*, except briefly at *Off.* 1.110 and 120. But Panaetius could hardly have ignored this problem. See esp. C. Gill, “Cicero's *De Officiis* on Practical Deliberation,” in R. Woolf, ed., *Cicero's “De Officiis”: A Critical Guide* (Cambridge 2023), 97–116.

important human endowment. But, of what he does have to say on the first *persona*, a sympathetic reading, such as Cancik's, informed by reference to other Stoic writings, may be able to tease out further insights from this brief passage, even if it is now impossible to determine precisely what the original source might have looked like.<sup>66</sup>

Critics have varied considerably in their appraisal both of the Cicero passage and of its contribution to subsequent thinking on Human Rights. Some scholars have treated the passage rather roughly. For instance, the philosopher Steven Darwall writes:<sup>67</sup>

[N]othing in the Ciceronian notion of human dignity requires, or even leads naturally to, basic human rights. The proposition, for example, that "sensual pleasure" is "unworthy" of human dignity is less a thesis about what human beings are in a position to claim from one another by virtue of their dignity than it is an ethical standard to which we are to live up.

Remy Debes quotes Darwall approvingly, but also suggests that he may be using the wrong metric, since his criticisms "resonate strongly with contemporary moral-political talk of dignity."<sup>68</sup> The Cicero passage can hardly be asked to do work it was not intended for; and Cicero, like Panaetius before him (and ancient ethics in general) focuses on duties and not on rights. Even when Cicero, in Book 1 of the *De Officiis*, turns to moral duties to benefit others, he does not think in terms of beneficiaries' rights to demand such performance save in very special circumstances (such as famine), and only so long as benefit can be conferred "without disadvantage to oneself" (*Off.* 1.51: *sine detrimento*).<sup>69</sup> Whether Human Dignity, or some version of it, can ever ultimately provide an adequate

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<sup>66</sup> Much the best attempt to reconstruct the passage's thought is Malcolm Schofield (note 45). The connection that Cicero appears to draw between human experience, rationality, and dignity is, I think, easier to understand in a more modern presentation by M. Mahlmann, *Mind and Rights: The History, Ethics, Law and Psychology of Human Rights* (Cambridge 2023). I'm grateful to Christopher McCrudden for discussing this issue with me.

<sup>67</sup> S. Darwall, "Equal Dignity and Rights," in R. Debes, ed., *Dignity: A History* (Oxford 2017), 183.

<sup>68</sup> Debes (note 5). Debes also argues that the association of the Cicero passage to the Human Rights tradition is a "platitude," but concedes that: "while most Romans used *dignitas* only in its merit sense, a few, and Cicero in particular, had a proleptic understanding of *dignitas* that anticipated today's moral-political sense."

<sup>69</sup> See Griffin (note 31), 60–65, a discussion continued in my Conclusion.

moral basis for a coherent articulation of Human Rights, is a recurring conundrum for modern philosophers and lawyers to solve, but certainly was not one for Panaetius or Cicero, or at least not directly.

On the other hand, it seems strange (or at least it does to me) that modern scholars often have difficulty discerning and prizing the spectacular feat that Panaetius (and his faithful confederate Cicero) pulled off in transforming *axiōma* / *dignitas* from a social concept based on distinctions of rank and reputation between individuals, into a social concept expressing what all individuals are thought to share in common. As Nathan Rotenstreich observed,<sup>70</sup>

Human dignity is man's position in the world, his uniqueness in the cosmos, and no longer essentially his position in a social-function relationship *vis-à-vis* his peers. Paradoxically, when that shift to the cosmic aspect occurs, the mark of self-estimation and self-evaluation becomes even more prominent. As long as dignity was viewed in the interpersonal domain, one's dignity could be viewed as related to the social response it evoked, that is to say to the estimation by one's fellow man. But if human dignity is viewed against the cosmic background, it becomes a universal feature of mankind. It is not one's function in the world that is esteemed; it is one's essential human position and qualities.

To this extent, at least, Panaetius/Cicero may well have succeeded in articulating one possible – if doubtless rather idealistic<sup>71</sup> – moral basis upon which a theory of Human Rights might subsequently have been constructed.<sup>72</sup>

In a short monograph published in 1989, the eminent classicist

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<sup>70</sup> N. Rotenstreich, *Man and His Dignity* (Jerusalem 1983), 12 (writing of Pico della Mirandola). See also Hawley (note 45), 99–101, on how “Cicero’s two concepts of human nature allow him to establish a moral hierarchy that leaves ample room for individuals to develop their unique qualities” (99).

<sup>71</sup> As Schofield (note 45), 56, observes: “Cicero is writing as a Roman citizen to other Roman citizens of his own class, not least, of course, the addressee of *De Officiis*, his son Marcus. So his prescriptions are naturally not universalizable as they stand, and none the worse on that account.”

<sup>72</sup> Rationality was also the principal basis on which Kant later founded his theory of Human Dignity; see A. W. Wood, *Kantian Ethics* (Cambridge 2008), 85–105; T. E. Hill, Jr., “Kantian Perspectives on the Rational Basis of Human Dignity,” in M. Düwell, et al., eds., *The Cambridge Handbook of Human Dignity* (Cambridge 2014), 215–21. The Kantian view remains quite popular today. For a critique, see Debes (note 5), acknowledging: “This is the greatest dogma about dignity in philosophy.”

Viktor Pöschl, writing in full consciousness of the important modern developments in international Human Rights, traced the evolution of the ancient word *dignitas* into the modern idea of Human Dignity. He immediately recognized the oddity of the Cicero passage, and thought of himself as having discovered it.<sup>73</sup> In reality, Pöschl had “re-discovered” it and re-introduced it into modern scholarship, since, in a more distant time when the Classics had a wider circulation, the passage had already influenced a considerable number of prominent contributors to the tradition of Human Dignity, from the Renaissance humanists Gianozzo Manetti and Giovanni Pico della Mirandola, to Natural Lawyers such as Samuel von Pufendorf, and even to the Enlightenment philosopher Immanuel Kant. By Kant’s time, however, the passage was already dropping from favor, and soon its novelty would be nearly forgotten.<sup>74</sup>

### III. Tertullian and Human Rights

Tertullian was a prolific and extraordinarily energetic (and ultimately heretical) Christian writer from Carthage in the Roman province of Africa.<sup>75</sup> Little is known about his life, except what can be inferred from his writing. He was widely educated in ancient literature and also obviously had a robust rhetorical education, as virtually every sentence of his tracts demonstrates. I suspect, in fact, that he was or had been a forensic advocate, as is indicated by his adopting emphatic and often controversial positions even while he is simultaneously careful to accommodate the values of his intended audience; as Geoffrey Dunn remarks, “An appreciation of

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<sup>73</sup> Pöschl (note 31), 38–40 (39: “in den zahlreichen Abhandlungen zur Menschenwürde bisher nicht beachtet”).

<sup>74</sup> See Cancik (note 54). On the interrelation between the *De Officiis* and Kant’s political theories, see B. Straumann, “Enforceable Duties: Cicero and Kant on the Legal Nature of Political Order,” *Jus Cogens*, 5 (2023), 255–75.

<sup>75</sup> On his life, Timothy Barnes, *Tertullian: A Historical and Literary Study* (Oxford 1971/1985), remains the standard account; see also H. M. Zilling, *Tertullian: Untertan Gottes und des Kaisers* (Paderborn, DE 2004); G. D. Dunn, “Tertullian,” in P. P. Esler, *The Early Christian World*, 2nd ed. (Abingdon 2017), 959–75. Barnes (22–29) rejects the view that he should be identified with a near contemporary jurist also cited as Tertullian, but I do not find his argument entirely compelling. On Tertullian’s intellectual qualities, see E. Osborn, *Tertullian, First Theologian of the West* (Cambridge 1997) (143–86 on the persecutions); also K. Taliaferro, “Arguing Natural Law: Tertullian and Religious Freedom in the Roman Empire,” in her *The Possibility of Religious Freedom: Early Natural Law and the Abrahamic Faiths* (Cambridge 2019), 104–27.

Tertullian's rhetorical abilities is essential when it comes to interpreting his writing.<sup>76</sup> This is important because Tertullian directly addresses many of the issues confronted by Christians in their encounters with the surrounding pagan world. When he writes for a non-Christian audience (as in the tracts examined below), he emphatically affirms his own faith, yet consciously avoids, for the most part, argument from Biblical or Patristic texts, while acknowledging the authority of non-Christian authors like Plato, Aristotle, and the Stoics.<sup>77</sup>

A number of Tertullian's surviving works are concerned with contemporary Roman persecutions of Christians.<sup>78</sup> At this date, so it is thought,<sup>79</sup> the outbreak of persecutions was largely sporadic and regional, sparked often by local rumors or random incidents; the great empire-wide persecutions date from the mid-third to early fourth centuries. Still, at least to judge from Tertullian, the local persecutions could already be frightening for Christian communities.

The *Apologeticum*, written probably in late 197,<sup>80</sup> is a lengthy

<sup>76</sup> Dunn (note 75), 962. Barnes (note 75), 211, describes him as "The Christian Sophist," referencing the Second Sophistic (a Greek literary movement 60–230 CE) the aim of which was not just to persuade, but to "dazzle" through extravagant style. See generally R. D. Sider, *Ancient Rhetoric and the Art of Tertullian* (Oxford 1971); J.-C. Fredouille, *Tertullien et la Conversion de la Culture Antique*, 2nd ed. [Collection des Études Augustiniennes. Série Antiquité 47] (Paris 2012); G. D. Dunn, *Tertullian* (Abingdon 2004), 25–29, and "Rhetoric and Tertullian: A Response," in *Studia Patristica*, 65 (2013), 349–56, the latter noting Tertullian's intellectual inconsistencies and "the difficulty in determining just what he believed if he changed his arguments to suit his situation" (349).

<sup>77</sup> See P. Livermore, "Reasoning with Unbelievers and the Place of Scriptures in Tertullian's Apology," *The Asbury Journal*, 56 (2001), 61–75, esp. 63–64.

<sup>78</sup> The background of Tertullian's persecution tracts is described by T. S. Shah, "The Roots of Religious Freedom in Early Christian Thought," in T. S. Shah and Allen D. Hertzke, eds., *Christianity and Freedom* [I. *Historical Perspectives*] (Cambridge 2016), 33–61, who stresses how slowly the written Christian resistance developed. Tertullian provides the first fully developed counterattack, far outdistancing his late second-century fore-runners Justin Martyr and Athenagoras of Athens. As Shah shows (37–43), both the Judeo-Christian and the non-Christian traditions offered little guidance for handling religious persecution.

<sup>79</sup> On the persecutions, see just W. Kinzig, *Christian Persecution in Antiquity*, trans. M. Bockmuehl (Waco 2021); H. B. Workman, *Persecution in the Early Church* (Bloomington, IN 2014).

<sup>80</sup> For the chronology here and below, I have relied on Barnes (note 75), 30–56. My argument does not depend on exact dating, however. On the

pamphlet addressed in its opening words to “the overseers of the Roman empire” (1.1: *Romani imperii antistes*); its target audience, at least ostensibly, is the ruling class, who are held to control the persecutions. (Whether any of them actually read the pamphlet is more doubtful.) Formally, Tertullian aims to attack the judicial basis for the persecutions by arguing that Christians are blameless of the charges against them and constitute no genuine threat to the empire, but also that the proceedings against them are illegitimate. Larded throughout, however, are lengthy affirmations of Christian faith and attacks on the absurdity of other imperial religions that are not being similarly treated.

In chapter 24, about halfway through the pamphlet, there occurs a short passage (*Apologeticum* 24.5–7) that has attracted considerable scholarly attention.

(5) Colat alius deum, alius Iovem; alius ad caelum manus supplices tendat, alius ad aram Fidei manus; alius (si hoc putatis) nubes numeret orans, alius lacunaria; alius suam animam deo suo voveat, alius hirci. (6) Videte enim, ne et hoc ad irreligiositatis elogium concurrat, adimere libertatem religionis et interdiceret optionem divinitatis, ut non liceat mihi colere quem velim, sed cogar colere quem nolim. Nemo se ab invito coli volet, ne homo quidem. (7) Atque adeo et Aegyptiis permissa est tam vanae superstitionis potestas avibus et bestiis consecrandis et capite damnandi qui aliquem huiusmodi deum occideri<n>t.

(5) Let one person worship God, and another person, Jupiter; let one raise prayerful hands to the sky, another to the altar of *Fides* (the goddess protecting oaths). Let one, if this is what you believe (*si hoc putatis*), count the clouds while praying, and another the ceiling coffers. Let one offer his own life to his god, and another (the life) of a goat (in an animal sacrifice). (6) For be careful that you not face an indictment for promoting impiety (*irreligiositas*) by removing freedom of religion (*adimere libertatem religionis*) and precluding the choice of a godhead, such that I may not worship whom I wish but am forced to worship whom I do not wish. No one, not even a human (scil. much less a god), wants to be worshiped by an unwilling person. (7) And indeed the Egyptians have even been allowed the power of such an absurd superstition for deifying

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organization of the *Apologeticum*, see G. D. Dunn, “Rhetorical Structure in Tertullian’s *Ad Scapulam*,” *Vigiliae Christianae*, 56 (2002), 48–51, which cites earlier scholarship.

birds and animals, and that those who kill any god of this kind be capitally condemned.

On first reading, the sequence of thought in this excerpt may seem opaque, but context helps considerably. Among the accusations that Tertullian describes as being leveled at Christians is a charge of sacrilege, *sacrilegium*, for their failure to worship the Roman gods (*Apolog.* 10.1). Tertullian equates this charge to impiety, *irreligiositas*, and, by a series of ingenious arguments, takes pains to turn the charge against the accusers (13.1 ff., esp. 24.1–2). The quoted fragment begins (24.5) by positing a society – say, the Roman empire – in which multitudinous religions, some respectable and some absurd, are practiced by willing worshippers with little official restriction or regulation; Tertullian slyly mixes apparent references to Christianity with sarcastic versions of other religions (worshippers who pray while looking upward are counting up clouds or ceiling coffers). The catalogue of preposterous religions then continues in 24.7 (as well as in subsequent sections).

This line of argument is briefly interrupted by 24.6, a warning to the authorities that abolishing “freedom of religion” (*libertas religionis*) and disallowing individual choice of a deity (*optio divinitatis*) may result in them facing a counter-charge of impiety (*irreligiositas*). How so? It stems from banning worship of “my” ability to worship whom I wish (something, so it is alleged, that no divinity would want) and forcing me to worship one I do not want. But how is this constraint impious? Evidently because Tertullian deems it impious to force worshippers into abandoning a true religion, in favor of hypocritical adherence to a false one (so 24.2).<sup>81</sup>

It is hardly surprising that many commentators have seized on the phrase *libertas religionis* in order to argue that Tertullian is advocating “religious freedom,” in a sense at least crudely analogous to the modern concept.<sup>82</sup> But the phrase is decidedly more

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<sup>81</sup> On Tertullian’s argument against religious compulsion, see M. Kahlos, *Forbearance and Compulsion: The Rhetoric of Religious Tolerance and Intolerance in Late Antiquity* (Richmond 2009), 22–25.

<sup>82</sup> Supporters of this view are catalogued in G. Aragione, “L’émergence des notions de tolérance et de liberté religieuses dans l’antiquité chrétienne,” *Revue d’Histoire et de Philosophie Religieuses*, 99 (2019), 356 n.47; note especially R. Bélanger, “Le plaidoyer de Tertullien pour la liberté religieuse,” in *Studies in Religion / Sciences Religieuses*, 14 (1985), 281–91; V. Arena, “Tolerance, Intolerance, and Religious Liberty at Rome: An Investigation in the History of Ideas,” in G. A. Cecconi and C. Gabrielli, eds., *Politiche religiose nel mondo antico e tardo antico: Poteri e indirizzi, forme del controllo, idee e prassi di tolleranza* (Bari 2011), 147–64; Shah (note 78);

ambiguous than it may initially appear.<sup>83</sup> Depending on context, it could mean one or more of at least four things:<sup>84</sup> 1) the unregulated ability to believe in the religion of one's choice; 2) the unregulated ability to practice that religion publicly;<sup>85</sup> 3) a governmental enactment granting one or both of these powers (as in the so-called Edict of Milan of 313 CE,<sup>86</sup> or in the First Amendment to the U.S. Constitution); or 4) a Human Right to practice one's own religion, irrespective of any national law or policy to the contrary (as in the *Universal Declaration of Human Rights*, Article 18).<sup>87</sup>

In Tertullian's view, Roman authorities are persecuting those who believe in Christianity, and for their belief alone, in what he calls "a battle over a name," *nominis proelium* (*Apolog.* 2.19), for instance in the following passage (2.13):

Vociferatur homo: "Christianus sum." Quod est dicit; tu vis audire quod non est. Veritatis extorquendae praesides de nobis solis mendacium elaboratis audire. "Hoc sum," inquit, "quod quaeris an sim. Quid me torques in perversum? Confiteor et

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and R. L. Wilken, *Liberty in the Things of God: The Christian Origins of Religious Freedom* (New Haven 2019), 7–23, esp. 11–13, who is perhaps the leading exponent. See also E. G. Wallace, "Justifying Religious Freedom: The Western Tradition," *Penn State L. Rev.*, 114 (2009), 502–504.

<sup>83</sup> As my colleague Caroline Humfress observes, part of Tertullian's problem in writing the *Apologeticum* is that the Latin word *religio* meant something considerably different to non-Christians than to Christians. This is no doubt why he spends so many pages explaining the nature of Christian *religio* (*Apolog.* 39–47).

<sup>84</sup> In each case, it is assumed that the religion in question is not directly subversive or acting contrary to pressing public interests. At *Apolog.* 38.1, "banned groups" are referred to as *illicitae factiones*.

<sup>85</sup> On the distinction here, see T. Harrison, "Belief vs. Practice," in E. Eidinow and J. Kindt, eds., *The Oxford Handbook of Ancient Greek Religion* (Oxford 2015), 21–28. Disbelief (atheism or agnosticism) is often thought to be included in freedom of religious belief.

<sup>86</sup> Lactant. *De Mort. Pers.* 48, the Edict of Constantine and Licinius (1 May 313, at Nicomedia): *daremus et Christianis et omnibus liberam potestatem sequendi religionem quam quisque voluisset* ("[W]e might grant to the Christians and others full authority to observe that religion which each preferred"). Greek version in Eusebius, *Historia Ecclesiastica* 8.17 and 10.5.

<sup>87</sup> M. Giagnorio, "Ideological Premises and Legal Strategies in the 'Turning Point' in Constantine's Attitude towards Christian Communities," in D. Dainese and V. Gheller, eds., *Beyond Intolerance: The Meeting of Milan of 313 AD and The Evolution of Imperial Religious Policy from the Age of the Tetrarchs to Julian the Apostate* (Turnhout 2017), 129–50, persuasively observes the important distinction between a governmental grant of a fundamental right, on the one hand, and a Human Right, on the other. A Human Right exists irrespective of a governmental grant, and on occasion in opposition to positive law.

torques; quid faceres, si negarem?" Plane aliis negantibus non facile fidem accommodatis: nobis, si negaverimus, statim creditis.

Someone cries out: "I am a Christian." He says what he is; you want to hear what he is not. As the authorities extorting the truth, from us alone you struggle to hear a lie. "I am," he says, "that which you ask if I am. Why do you twist me toward the wrong? I confess and you twist; what would you do if I denied? Certainly you give little credence when others deny; (but) you immediately believe us if we deny.

Tertullian expounds the basics of Christian doctrine at length (*Apolog.* 17–23). Nonetheless, he not unreasonably presumes a close connection between Christian belief and practice, and, in fact, much of his argument is given over to the latter. Indeed, so he argues, Christianity not only constitutes no threat to imperial order, in fact it sustains it not only through the divine ordinance of its god (*Apolog.* 25), but also through the earnest prayers of Christian worshippers (25–35).

Nowhere, however, does Tertullian hint that he is seeking any more than a cessation of persecutions ("Leave us alone"). At least in the *Apologeticum*, he is clearly not anticipating a governmental grant of religious freedom such as would eventually occur with the Edict of Milan;<sup>88</sup> what he wants from the governing authorities is only a policy of passive tolerance for (or indifference toward) Christian worshippers. This interpretation of the text appears to be the increasingly accepted view in the scholarship.<sup>89</sup>

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<sup>88</sup> At *Apolog.* 35.1 Tertullian might appear to argue that Christianity "should be reckoned among permitted organizations" (*inter licitas factiones . . . deputari oportet*), but in context the emendation <il>licitas seems certain.

<sup>89</sup> See esp. H. Cancik, "Die Frühesten antiken Texte zu den Begriffen 'Menschenrecht', 'Religionsfreiheit', 'Toleranz'," in K. Girardet and U. Nortmann, eds., *Menschenrechte und europäische Identität: Die antiken Grundlagen* (New York 2005), 94–104 (cited from Cancik, *Europa* (note 48), 135–50); Aragione (note 82), esp. 352–58. J. W. Atkins, "Tertullian on 'The Freedom of Religion'," *Polis*, 37 (2020), 145–75, goes a step or two further, arguing that Tertullian develops a political theory of "non-domination" (defined as "the rule of law, rule in and responsive to the interests of citizens, and citizens' rights"); this idea is attractive, but seems to go well beyond the text. Ostensibly, Tertullian is only pleading for the exoneration of accused Christians, or at least that they not be condemned before their side of the case has been fully heard (*Apolog.* 1.2–4, 2.3, etc.). By contrast, G. G. Stroumsa, "Tertullian on Idolatry and the Limits of Tolerance," in N.

Fifteen years later, in 212, Tertullian penned a second text on the same subject. Evidently a new persecution had erupted in the province of Africa.<sup>90</sup> His open letter, addressed to P. Julius Scapula the Roman governor of Africa, reprises (at times verbatim) much of the argument in the *Apologeticum*, but it is much shorter and also elegantly crafted.<sup>91</sup>

The letter begins with a confident proclamation that, because of their promised afterlife, Christians rejoice when they die for their beliefs (*Scap.* 1.1–2); but soon it settles into its central argument, that, simply because Christians love their enemies, they feel obligated to warn them of the fearsome retribution they will suffer for their persecutions (1.3–4) – a divine retribution that has befallen even the provincial governors who ordered them (3.4–5). In the course of his argument, Tertullian advances the following propositions (2.1–2):

(1) Nos unum Deum colimus, quem omnes naturaliter nostis, ad cuius fulgura et tonitrua contremiscitis, ad cuius beneficia gaudetis. Ceteros et ipsi putatis deos esse, quos nos daemonas scimus. (2) Tamen humani iuris et naturalis potestatis est unicuique quod putauerit colere; nec alii obest aut prodest alterius religio. Sed nec religionis est cogere religionem, quae sponte suscipi debeat, non vi, cum et hostiae ab animo libenti expostulentur. . . .

(1) We (Christians) worship the one God, known by nature to all of you, at whose lightnings and thunders you tremble, and in whose benefits you rejoice. You (our governors) think there are other gods as well, ones whom we know to be demons. (2) Nonetheless, it is a matter of human right and natural capacity (*humani iuris et naturalis potestatis*) for each person to worship what he believes; nor does one person's religion harm or help another. But it is no matter of religion to compel religion,

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Stanton Graham and Stroumsa, eds., *Tolerance and Intolerance in Early Judaism and Christianity* (Cambridge 1998), 173–84, argues, with considerable textual support, that Tertullian in this passage and elsewhere did not actually advocate general religious freedom.

<sup>90</sup> On the date of the *Ad Scapulam*, Barnes (note 75), 31, 38, 55. P. Julius Scapula was *consul ordinarius* in 195 CE and a distinguished member of the Severan aristocracy; see P. Leunissen, *Konsuln und Konsulare in der Zeit von Commodus bis Severus Alexander* (Amsterdam 1989), 217. (The identification is likely but not certain.) It may be noted that the sisters Felicitas and Perpetua, later Saints, had been martyred at Carthage in 203.

<sup>91</sup> See Dunn (note 80).

which ought to be undertaken willingly and not by force, since even sacrificial victims are required to be of willing mind. . . .

It is the assertion in the first sentence of 2.2 that has rightly attracted scholarly attention. Ostensibly, the *Ad Scapulam* does not differ from the *Apologeticum* in its overriding goal, that the Romans cease from persecution; this is all that is being asked. Tertullian's proposition is that each person (evidently irrespective of their status or other qualifications, all persons being equal in this respect) may worship what they believe (*est unicuique quod putauerit colere*),<sup>92</sup> but the basis for this proposition is now alleged to rest in "human right and natural capacity," which is apparently another hendiadys in which the two parts develop aspects of a single idea. Robert Louis Wilken suggests this formulation of the idea: a "right' [that] precedes and is independent of any action by the ruling authorities."<sup>93</sup>

This idea is reached through its two components, which, he implies, when taken together self-evidently support the right of each person to worship what he or she believes, with no need of further explication. Neither component is easy, but we may start with *naturalis potestas*. *Potestas* is the power or capacity of a person to do something.<sup>94</sup> Tertullian describes this power as *naturalis*, meaning that it stems from "Nature," i.e., that it is innate and not imposed by outside circumstance. Christian writings of this period already identify Nature with God.<sup>95</sup> On this interpretation, the individual power to pick one's own religion would be tacitly described as being of divine origin. But this freedom to choose is not readily understandable as Christian doctrine (there is nothing comparable in earlier Christian sources), and, especially given that Tertullian is arguing to a non-Christian audience, the phrase is more easily understood in relation to the Stoic doctrine whereby Nature endowed all humans with the power to reason morally, as

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<sup>92</sup> As A. Quacquarelli, *Tertulliani Ad Scapulam: prolegomeni, testo critico e commento* (Rome 1957), 78 *ad locum*, notes, the grammar here is unexpected: a dative dependent on *est*; normal would be *unumquemque . . . colere*.

<sup>93</sup> R. L. Wilken, "The Christian Roots of Religious Freedom," in T. S. Shah and Allen D. Hertzke, eds., *Christianity and Freedom* [I. *Historical Perspectives*] (Cambridge 2016), 64.

<sup>94</sup> The standard *Oxford Latin Dictionary* (Oxford 1982), s.v. *potestas*, lists somewhat varying senses of the word; the most apposite is "Opportunity to choose or decide, power of choice, discretion, control."

<sup>95</sup> See, e.g., Tert. *De Cor.* 6.1; Minucius Felix, *Octavius* 19.10, 29.8. On the role of Nature in Tertullian's thinking, see the thoughtful discussion of Taliaferro (note 75), 115–23, who stresses the Stoic influence.

described in Cicero, *De Officiis* 1.107, and in other Stoic sources discussed above.<sup>96</sup> *Naturalis* in the sense of “innate” is quite common in pre-Christian Latin, starting with the *Ad Herennium*’s famous description of *memoria naturalis*, “which was imbedded in our minds and born simultaneously with thought” (*quae nostris animis insita est et simul cum cogitatione nata*: 3.28; ca. 85 BCE).

More difficult is *ius humanum*. This phrase – which might be translated either as “human law” or “human right” – must, in the context of the *Ad Scapulam*, be sufficiently robust to ground a moral privilege that enables individuals to choose a religion for themselves by exercising their innate power to do so. In Latin, to be sure, *ius humanum* usually designates law that lies within the control of humans and governs purely human interactions (as opposed to divine law, for instance), and it extends to rules that may be only a matter of generally recognized morality rather than of positive law.<sup>97</sup> As a general rule in such texts, “human law” is a better translation than “human right” since no actual right, even a moral one, is being claimed.<sup>98</sup> Nonetheless, under the circumstances of a persecution, Tertullian can hardly be arguing that Roman law or general custom supports his proposition.

However, there is at least one text, from the Stoic philosopher Seneca the Younger (ca. 4 BCE – 65 CE), that departs from the more usual pattern. Seneca, in his *De Beneficiis* 3.18.1–2, discusses whether a slave is per se unable to benefit his master. Some had affirmed a slave’s inability to confer benefit on the theory that a slave could only convey a *ministerium*, a service, since “his position imposes upon him that he charge to his superior nothing that he confers.”<sup>99</sup> Seneca rejects this view, arguing as follows: “anyone who denies that a slave sometimes gives a benefit to his master is unaware of a human right (*ignarus est iuris humani*), for what matters is the giver’s intent, not his status. No one is precluded

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<sup>96</sup> As to Stoic influences on Tertullian, Barnes (note 75), 206, observes that: “Tertullian had thoroughly assimilated . . . the Stoic ideas which always tended to prevail in Latin intellectual circles” (with bibliography in footnote). Osborn (note 75), 35 (footnote omitted): “More and more work reveals the extent to which Tertullian is marked by classical culture. He is a Stoic in logic as in ethics and metaphysics.”

<sup>97</sup> Bauman (note 34), 28–30. Seneca, *De Clementia* 1.18.2, illustrates the broad sweep of the concept: abuse of slaves should be tempered by the *commune ius animantium*.

<sup>98</sup> J. W. Atkins, *Roman Political Thought* (Cambridge 2018), esp. 154–58.

<sup>99</sup> *Ben.* 3.18.1: *Sunt enim qui ita distinguant . . . ministerium esse servi, quem condicio sua eo loco posuit, ut nihil eorum, quae praestat, imputet superiori.*

from virtue; it lies open to all, it admits and attracts all, both the freeborn and freedmen and slaves, both kings and exiles; . . . ”<sup>100</sup>

Seneca states that the question had been raised by Hecaton of Rhodes, a Greek Stoic philosopher (fl. ca. 100 BCE) and a disciple of Panaetius. Hecaton, who concentrated heavily on ethics, is regarded as a major figure in the so-called Middle Stoa and was a frequent source for Seneca especially in this treatise.<sup>101</sup> Like as not, Seneca preserves at least the gist of Hecaton’s solution to the problem of slave benefits to their masters. After raising the problem, Seneca, in a long discussion (*Ben.* 3.18–28), gives his somewhat fuzzy solution at 3.21.2: “Whatever exceeds the norm for a slave’s duty (*servilis officii formulam*), provided that it is tendered not on command but voluntarily, is a benefit so long as it can also be called that if some third party tendered it.”<sup>102</sup>

It is, of course, difficult to relate Seneca’s discussion to any modern Human Rights concern, but this issue had considerable gravity in a slave-holding society with a powerful tradition of reciprocity for benefits bestowed,<sup>103</sup> at the start of the *De Beneficiis*, Seneca counts ingratitude “among the most common and the gravest moral failings” (1.1.2: *inter plurima maximaque vitia*). But more important than Seneca’s topic is the structure of his analysis. He raises two questions, one overtly and one tacitly. The first is whether a slave, because of his status, is actually capable of bestowing a benefit on his master. In accord with general Stoic principles, Seneca, responds with an emphatic yes, emphasizing

<sup>100</sup> *Ben.* 3.18.2: *Praeterea servum qui negat dare aliquando domino beneficium, ignarus est iuris humani; refert enim, cuius animi sit, qui praestat, non cuius status. Nulli praeclusa virtus est; omnibus patet, omnes admittit, omnes invitat, et ingenuos et libertinos et servos et reges et exules; . . .*

<sup>101</sup> See now C. Veillard, *Hécaton de Rhodes. Les fragments. Histoire des doctrines de l’antiquité classique* (Paris 2022); earlier, H. Gomoll, *Der Stoische Philosoph Hekaton: Seine Begriffswelt und Nachwirkung unter Beigabe seiner Fragmente* (Borsdorf 1933). Hecaton’s writings on ethics includes such topics as goods, the virtues, the emotions, final ends, and duties. After Panaetius and Posidonius, he is considered the most influential Stoic of the Middle period.

<sup>102</sup> *Ben.* 3.21.2: *Quidquid est, quod servilis officii formulam excedit, quod non ex imperio, sed ex voluntate praestatur, beneficium est, si modo tantum est, ut hoc vocari potuerit quolibet alio praestante.* See also *Ben.* 3.21.1.

<sup>103</sup> K. Verboven, *The Economy of Friends: Economic Aspects of Amicitia and Patronage in the Late Republic* (Brussels 2002), and “Cité et réciprocité: Le rôle des croyances culturelles dans l’économie Romaine,” *Annales. Histoire, Sciences Sociales*, 67 (2012), 913–42; M. T. Griffin, “*De Beneficiis* and Roman Society,” *JRS*, 93 (2003), 92–113.

the basic moral humanity that slaves share with their masters. As Tertullian would later put the idea, this is a matter of *naturalis potestas* that antecedes their legal or social status.<sup>104</sup>

The other question is tacit: when a slave does in fact confer a cognizable benefit on a master, does the slave have a right to expect from his master gratitude and even reciprocity? Seneca does not raise this question directly, except in the overall context of avoiding ingratitude. It is not difficult to understand his caution, since the question goes to the very core of master/slave relations in antiquity. If “human right” is the correct translation of *ius humanum*,<sup>105</sup> then the slave, notwithstanding his legal and social position, must be supposed to have at least a justified moral expectation (there being *ex hypothesi* no legal claim) of gratitude once he has bestowed a benefit on his master.

Does this mean that the master has a corresponding duty of gratitude and even of reciprocation? A model of propriety, Seneca never states this question directly, since it goes to the very heart of the master-slave relationship in antiquity. But, in recounting instances of slave benefits, he is careful to note masters who out of gratitude then manumitted their slaves (*Ben.* 3.23.3, 27.3), and even says that his analysis will “free” slaves (19.2). As he observes, “Does it seem fair to you . . . not to be grateful if they (slaves) do more than is due and typical?”<sup>106</sup> At 22.3, Seneca argues that such benefits should be considered not as flowing from a slave to a master, but from one human being to another – and, even, from a friend (21.1: *amici*). Although Seneca never straightforwardly imposes such a duty on a master, he does all in his power to bring these benefits within the normal patterns of Roman reciprocity among free persons.<sup>107</sup>

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<sup>104</sup> *Ben.* 3.18.4: “A slave can be just, can be brave, can be generous; therefore he can also give a benefit, since this also involves virtue. And so true is it that slaves can give benefits to their masters, that often they have made their very lives the subject of their benefit.” (*Potest servus iustus esse, potest fortis, potest magni animi; ergo et beneficium dare potest, nam et hoc virtutis est. Adeo quidem dominis servi beneficia possunt dare, ut ipsos saepe beneficii sui fecerint.*)

<sup>105</sup> This could be argued; *ius humanum* might just refer to customary morality. But Seneca’s language (especially *ignarus*) implies something stronger. See A. Long, “Seneca on Human Rights in *De Beneficiis* 3,” *Apeiron*, 54 (2021), 190–93. M. Griffin and B. Inwood, in *Lucius Annaeus Seneca, On Benefits* (Chicago 2011), 70, translate the phrase as “the rights he has as a human being.”

<sup>106</sup> *Ben.* 3.22.2: *An aecum videtur tibi . . . non haberi gratiam, si plus debito solitoque fecerint?*

<sup>107</sup> On the duty problem, see just Long (note 105), partially refuting Bett (note 38).

Tertullian in the *Ad Scapulam* likewise imposes no specific corresponding duties on the Roman administrators (apart from stopping the persecutions),<sup>108</sup> but, unlike Seneca, he also makes no extended intellectual argument defending a Human Right of religious freedom. Instead, he embarks on a bloodcurdling recital of disasters that have transpired for nonbelieving populations – famine, deluge, fire, and evil omens are mentioned (*Scap.* 3.1–3) – as well as the dire consequences that befell persecuting officials (3.4–5); and his claim is that he wishes, not to scare, but to save them through his altruistic warnings not to fight against God (4.1; cf. 1.3–4). For magistrates who had been more merciful to Christians, nothing but good times (4.3–6).

But the failure of Tertullian to articulate one's specific duties attaching to the rights of others should not be a source of concern. As Henry Richardson notes, a Human Right, particularly at an early stage in its development, is frequently expressed as “a monadic right that ‘implies in the circumstances’ that another individual has a duty arising from it.”<sup>109</sup> Such duties develop gradually but largely integrally from the monadic right.

In the last analysis, there is no questioning the significance of Tertullian's pamphlet. It contains the first and only proclamation of a basic Human Right that survives from the ancient pre-Christian world, a “radical innovation . . . : the first to argue that all human beings possess a natural right to believe and practice a religion of their choice without coercive interference.”<sup>110</sup> The exact origins of this argument are impossible to discern,<sup>111</sup> but, in a pamphlet designed for a non-Christian audience, its framing (*humani iuris et naturalis potestatis*) probably owes most to Stoic sources such as Panaetius and his students. Still, there is no decisive evidence that any of them had developed their views to the point of articulating this or any other Human Right in the modern sense. We are left to speculate on whether Tertullian was responsible for an important intellectual innovation, or rather whether he

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<sup>108</sup> Osborn (note 75), 86, paraphrases *Scap.* 2.2: “Freedom of conscience is a natural right . . . and must be respected by political authority.” The second clause, though doubtless implicit, Tertullian does not state directly.

<sup>109</sup> H. Richardson, *Articulating the Moral Community: Toward a Constructive Ethical Pragmatism* (Oxford 2023), 93.

<sup>110</sup> Shah (note 78), 55. See also Taliaferro (note 75). The phrasing here resembles that of the 1965 Vatican II *Declaration on Religious Freedom*.

<sup>111</sup> Certain elements of Tertullian's formulation do have Jewish and Christian origin, particularly his insistence (here and elsewhere) that worship must be fully voluntary; but other elements have no precedent in Christian thinking. See Shah (note 78), 55.

was just seizing somewhat serependitously upon a framework he thought might be recognizable and appealing to his audience. (I incline to the latter view.<sup>112</sup>)

Tertullian's affirmation of the freedom to determine one's own religion had little resonance for centuries, perhaps because of his failure to present a systematic argument in its favor.<sup>113</sup> What did survive, especially in Lactantius' various apologetica (written ca. 303–316 CE) and in the Edict of Milan (313), was a weaker advocacy of express official tolerance for Christianity;<sup>114</sup> and, of course, even this policy of tolerance evanesced after Christianity became a State religion in the fourth century.<sup>115</sup> As Robert Louis Wilken observes, "Tertullian's use of the term *freedom of religion* should not be taken to mean that in the early centuries Christian thinkers fashioned a doctrine of religious freedom. That was beyond their ken. . . . Only after many centuries and under quite different historical circumstances – the Reformation of the sixteenth century – would freedom of conscience be deemed a natural right."<sup>116</sup>

Tertullian's influence on the major figures of this change (Locke, Jefferson, Madison) is unusually hard to estimate, since "[s]eventeenth-century figures like Locke relied on the patristic texts, sometimes without attribution," and later advocates in turn

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<sup>112</sup> Osborn (note 75), describes Tertullian as a committed Christian apologist who uses whatever philosophy was at his disposal to point out the truths of the Christian faith. See also Taliaferro (note 75), 107–10. Fredouille (note 76), 243–45, points out that Tertullian's arguments, when directed to non-Christians, are heavily Stoic in inspiration.

<sup>113</sup> Still, his statement is so confident that we might be tempted to return to *libertas religionis* in the *Apolog.* and interpret the phrase more broadly, against the context.

<sup>114</sup> On Lactantius, see E. DeP. Digeser, "Lactantius on Religious Liberty and His Influence on Constantine," in T. S. Shah and Allen D. Hertzke, eds., *Christianity and Freedom* [I. *Historical Perspectives*] (Cambridge 2016), 90–102, and "Lactantius," in *Great Christian Jurists and Legal Collections in the First Millennium*, ed. P. L. Reynolds (Cambridge 2019), 239–51. On Constantine and the changes in imperial religious policy during the fourth century, see now P. Heather, *Christendom: The Triumph of a Religion, AD 300–1300* (New York 2023), 1–153. On the Edict of Milan, see N. Lenski, "Il valore dell'editto di Milano," in R. Macchioro, ed., *Costantino a Milano: L'editto e la sua storia (313–2013)* [Biblioteca Ambrosiana *Fonti e Studi*, 28] (Rome 2017), 5–58.

<sup>115</sup> See just Wallace (note 82).

<sup>116</sup> Wilken (note 82), 24–25.

relied on Locke.<sup>117</sup> But there are occasional indications that Tertullian had not been forgotten. Wilken discovered in Jefferson's library a copy of Tertullian in which Jefferson had underlined the *Ad Scapulam* passage examined above, probably because he was struck by the resemblance between Tertullian's words "nor does one person's religion harm or help another" and his own previously written "It does me no injury for my neighbor to say that there are twenty gods, or no God." Jefferson's sentence comes from his *Notes on the State of Virginia* (1785), a book that profoundly influenced the wording of the First Amendment, including its provisions on religion.<sup>118</sup>

#### IV. Conclusion: on moral innovation

The texts of Cicero and Tertullian that I have examined above have almost never been considered together, presumably because they are housed in different academic "bailiwicks."<sup>119</sup> It is certainly not my contention that there is any source link between them; I see no sign that Tertullian was aware of Cicero's remarks or specifically of Panaetius' theorizing.<sup>120</sup> But the two texts do complement each other to a considerable, perhaps even a surprising, degree. Between them, they contain all the major elements of the modern Prevailing View (except possibly for inalienability). To be sure, there are still some major unknowns and considerable gaps in our knowledge. Nonetheless, the intellectual pattern that emerges in these two sources is more than just passively suggestive.

Two further points need to be made about these sources. First, although the literary record is sparse (and it clearly provides an insufficient basis to reject the null hypothesis in my introduction's second paragraph), the "traces" that ancient thinking on Human Rights issues left in later literary sources do indicate that this thinking may well have reached its peak at the margins of

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<sup>117</sup> M. L. Movsesian, "Tertullian and the Rise of Religious Freedom," *The Russell Kirk Center* (Aug. 11, 2019) (online), reviewing Wilken (note 83). On the influence of early Christian writings (including Tertullian) on Locke, see J. D. Chatterjee, "Christian Antiquity and the Anglican Reception of John Locke's Paraphrase and Notes on the Epistles of St. Paul, 1707–1730," in *Locke Studies*, 20 (2020) (online), esp. Part 2 ("John Locke and Christian Antiquity").

<sup>118</sup> Wilken (note 82), 189–91. See also Wiltshire (note 34), 104–11.

<sup>119</sup> An important exception is Cancik (note 89).

<sup>120</sup> Tertullian was familiar with many of Cicero's philosophical works, but there is no evidence he knew the *De Officiis*; S. MacCormack, "Cicero in Late Antiquity," in C. Steel, ed., *The Cambridge Companion to Cicero* (Cambridge 2013), 255–56.

mainstream Stoic doctrine, and above all, it would appear, in the late Hellenistic (“Middle”) Stoa of Panaetius and his successors Hecaton and Posidonius, all writing in an era when Rome was consolidating its dominion over the Mediterranean.

There is obviously no difficulty with this hypothesis in the case of Cicero, *De Officiis* 1.105–107, and its assertion of a *dignitas* bestowed by Nature on each human in equal measure, since Cicero’s dependency on Panaetius is both express and obvious.

Tertullian, *Ad Scapulam* 2.2, is more problematic, however. He, of course, is an emphatically Christian writer, and therefore, notwithstanding the dearth of the evidentiary record, it is undeniably permissible to celebrate the Christian “roots” or “origin” of freedom of religion as a historical Human Right,<sup>121</sup> this at any rate so long as sight is not lost either of the apparent Stoic watermark on Tertullian’s formulation (this stems from the comparison with Seneca, *Ben.* 3.18.1–2, and the reference there to Hecaton) or of the ensuing centuries in which Christians entirely disregarded the postulated Human Right. As Guy Stroumsa argues, “[A] real conception of religious tolerance did not develop in late antique Christianity,” in large part because of the ultimate ambivalence of theologians like Tertullian.<sup>122</sup> By the end of the Western Roman Empire, long after the Christian ascendancy, inherent human *dignitas* had indeed established an important foothold in theology, but it remained still very much the minority view, largely because of the prevalent doctrine of original sin.<sup>123</sup>

If it is correct that the Cicero and Tertullian passages both derive from more extensive theorizing in the late Hellenistic Stoa, then there is, of course, considerable reason to regret the partial and indirect preservation of the argument these philosophers had developed in their influential works.

The second point is that the very scarcity of references in Roman sources to anything resembling modern Human Rights theory is significant in itself. That scarcity is assuredly no accident. On the whole, it is hard to imagine a world more alien to the concept

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<sup>121</sup> See Wilken (notes 82 and 93); Shah (note 78).

<sup>122</sup> Stroumsa (note 88), 181, relying especially on Tertullian’s *De Idolatria* (196/197 CE).

<sup>123</sup> See R. Kent, “In the Image of God: Human Dignity after the Fall,” in R. Debes, ed., *Dignity: A History* (Oxford 2017), 73–98, and Y. M. Barilan, “From *Imago Dei* in the Jewish Christian Traditions to Human Dignity in Contemporary Jewish Law,” *Kennedy Institute of Ethics Journal*, 19 (2007), 231–59, against Harper (note 37). I am grateful to Caroline Humfress for discussing this issue with me. However, late Classical Christian thinking significantly developed the concept of Human Rights: Lenski (note 114).

of Human Rights than the Roman Empire, with its highly autocratic government and its elaborate legal and social and economic stratification. This does not mean, of course, that the Romans were unfamiliar with *humanitas*, or that they were in any respect incapable of humane behavior across a wide spectrum of situations.<sup>124</sup> But such Roman humanity is virtually always understood as magnanimous benefaction, discretionary in its essence. Exemplary is Cicero, *De Officiis* 1.42–60, discussing the social duty of *beneficentia et liberalitas*. Cicero insists on the importance of considering in advance the potential recipient's *dignitas*, glossed as “his moral character, his attitude toward us, the intimacy of his relation to us, and our common social ties, as well as the services he has hitherto rendered in our interest” (45).<sup>125</sup> Exception is made only in instances of dire necessity, such as, e.g., providing directions to lost travelers or furnishing them with essentials – provided this can be accomplished “without disadvantage to ourselves” (51: *sine detrimento*).<sup>126</sup> Seneca's position in the *De Beneficiis* is broadly similar.<sup>127</sup> Miriam Griffin examines a few passages that do seem to speak of a benefactor's duty to provide assistance to deserving beneficiaries, but concludes that: “these cases . . . even if they approach the idea of ‘rights,’ attach it to the primary Roman meaning of *dignitas* as social standing, not the worth of a human being per se.”<sup>128</sup> Ironically, as Griffin concludes, “I suspect that, for the Romans, the *res publica* [the State], with its *dignitas*, came nearer to having rights than any single human being.”<sup>129</sup>

This conclusion may seem gloomy, but it is not. The wonder is that any resident of the Roman empire ever thought about these issues on a higher moral plane. And thus the question arises: in what sense is it, or is it not, reasonable to regard the Romans as providing the origins of modern Human Rights doctrine?

The title of this article speaks not of “Roman roots” or “origins,”

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<sup>124</sup> See Bauman (note 34), who canvasses numerous examples of Roman *humanitas* but glosses over the problem of Human Rights as a simple matter of vocabulary (5–6). Bauman does not consider any of the main sources cited in this article.

<sup>125</sup> Cic. *Off.* 1.45: *mores eius . . . et animus erga nos et communitas ac societas vitae et ad nostras utilitates officia ante collate*. Cicero adds that ideally these qualities should coincide; if not, at least the plurality of them. See Griffin (note 31), 60–62, on *Off.* 1.45–50.

<sup>126</sup> See also *Off.* 3.30–31.

<sup>127</sup> Griffin (note 31), 62–64.

<sup>128</sup> Id., 64.

<sup>129</sup> Id., 65, commenting on Cicero's speech *Pro Murena* 1 (*quantam rei publicae dignitas postulat*, “as much as the *dignitas* of the Republic demands”).

but of “Roman precursors.” In the modern scholarship on Human Dignity and Human Rights, there has been almost an obsession with identifying their origin, no doubt, at least in part, because of a desire to bolster a contested idea by bestowing upon it an authoritative ancient pedigree. Researchers have proposed a startlingly wide range of origins. One view, of course, is that modern Human Rights emerged with the United Nations’ *Universal Declaration* of 1948, establishing – notwithstanding its substantial debt to earlier ethical, religious, and legal traditions – a decisive break from the past.

But many scholars have argued for specific earlier origins: in ancient Mesopotamian lawgiving; Pharaonic Egypt; the grant of religious tolerance by the Achaemenid Persian emperor Cyrus the Great in 539 BCE (the Cyrus cylinder); the *poleis* of Classical Greece; the *Twelve Tables* of Rome (449 BCE); the ethical thinking of Plato and Aristotle;<sup>130</sup> the Edicts of the Mauryan Emperor Ashoka (268–232 BCE); Hellenistic Stoic philosophy and Cicero; the Roman *ius gentium* and the Roman jurists; Tertullian’s *Apologeticum* and *Ad Scapulam*; late Classical Christian theology; the early Islamic Caliphate; medieval Rabbinic and scholastic understanding of man created in the “image of God” (*imago dei*); early modern Christian scholastic critiques (especially by Francisco Suarez) of absolutist claims by European sovereigns;<sup>131</sup> Renais-

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<sup>130</sup> See J. Lössi, “The Pre-Christian Concept of Human Dignity in Greek and Roman Antiquity,” in J. Loughlin, ed., *Human Dignity in the Judaeo-Christian Tradition: Catholic, Anglican and Orthodox Perspectives* (Camden, UK 2019), 37–56; R. H. Sternberg, *The Ancient Greek Roots of Human Rights* (Austin 2021).

<sup>131</sup> See, e.g., R. Tuck, *Natural Rights Theories: Their Origin and Development* (Oxford 1979); T. Angier, et al., eds., *The Cambridge Handbook of Natural Law and Human Rights* (Cambridge 2023). This theology is closely associated with the Judaeo-Christian *Imago Dei* tradition stemming from *Genesis* 1:26 and *Wisdom* 2:23; see Baker (note 13), and B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Grand Rapids 1997), along with V. Mäkinen, “Medieval Natural Rights Discourse,” in P. Slotte and M. Halmes-Tuomisaari, eds., *Revisiting the Origins of Human Rights* (Cambridge 2015), 64–81. On the relationship between this tradition and the *Universal Declaration*, see above all Jacques Maritain, *Christianity and Democracy: The Rights of Man and the Natural Law* (San Francisco 1986). In general, John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford 2011; orig. publ. 1980), remains essential. On the other hand, there is considerable discontinuity between the traditional Christian doctrine of Natural Rights and the modern secular conception. J. Nickel, *Making Sense of Human Rights*, 2nd ed. (Hoboken, NJ 2007), 7–9, 12–14, notes that the modern

sance humanists such as Gianozzo Manetti and Giovanni Pico della Mirandola; Dominicans concerned about the indigenous population of the New World; Enlightenment philosophers, especially Thomas Hobbes, Baruch Spinoza, John Locke, Giambattista Vico, Denis Diderot, and Jean-Jacques Rousseau; Natural Lawyers such as Hugo Grotius and Samuel Pufendorf; popular novels of the eighteenth century; the *Declaration of Independence* in America (1776), along with its predecessors and the subsequent Bill of Rights to the U.S. Constitution (1791), and then the French *Declaration of the Rights of Man and of the Citizen* (1789–1793); Immanuel Kant's *Grundlegung zur Metaphysik der Sitten* (1785) with its argument for human *Würde*, translated as Dignity; the theories of nineteenth century philosophers such as Friedrich Hegel and John Stuart Mill; the American abolitionists and, later, anti-colonialists such as Mahatma Gandhi; the Geneva Conventions from 1864 onward; Pope Leo XIII's encyclicals *Aeterni Patris* (1879) and *Rerum Novarum* (1891); several national constitutions from the early and mid-twentieth century that expressly incorporate the concept of dignity; the minority rights treaties adopted after World War I; the International Labour Organization established by the League of Nations (1919); and so on into the post-World War II developments through the United Nations declarations and in ensuing regional instruments such as the *European Convention on Human Rights* (1950).<sup>132</sup>

No doubt, somewhere in this clangor of rival claims, truth lurks. But such a list, though of limited usefulness, does at least serve to suggest that Human Rights have been around for a very long time, albeit in widely varying guises, some primitive and some refined, some inchoate and some highly systematic; and that Hu-

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conception emphasizes the need for positive State action to achieve equality, promotes the importance of family and community rather than being narrowly individualistic, and is more emphatically universalistic (or “internationalist”) in its orientation.

<sup>132</sup> See the survey of arguments, with sources, in *Wikipedia* s.v. “History of Human Rights” (online), to which I have made additions. Also R. Debes, “A History of Human Dignity,” *Forum for Philosophy* (Feb. 5, 2018) (online); McCrudden (note 2), 433–36; and the essays in P. Slotte and M. Halme-Tuomisaari, eds. (note 34). For what it's worth, my money is still on the standard historical account privileging Locke and Kant; see A. Fagan, “Human Rights,” in the *Internet Encyclopedia of Philosophy* (undated) (online); E. Curran, *Rethinking Rights: Historical Development and Philosophical Justification* (Lanham 2022). A few scholars, e.g., S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA 2012), have argued for an even later, post-1948 emergence of an effective concept of Human Rights, in the 1960s or 1970s; against, see C. McCrudden, “Human Rights Histories,” *Oxford Journal of Legal Studies*, 35 (2015), 179–212.

man Dignity as an organizing principle, although probably of more recent vintage, is also quite venerable.<sup>133</sup> However, the deeper point is that such ideas, in their ebb and flow across the centuries, have been fashioned and refashioned, manipulated and re-manipulated, remembered and forgotten and remembered again, according to, on the one hand, their perceived efficacy within their respective legal, social, and economic environments; and, on the other, the fervor and the ingenuity of their proponents and of their adversaries. In this respect, amongst the various Great Ideas, there is nothing at all unusual about Human Rights and Human Dignity, except that, in the contemporary world of unremitting atrocities, overweening governments, and callous private enterprises, they have acquired an urgency that has led to their formal proclamation.<sup>134</sup>

It seems to me that searching for the “roots” or “origin” of Human Rights is largely a forlorn quest. Rather, it may be more helpful to devise a different metaphor: historical Human Rights as an archipelago of thoughts and acts that are, perhaps, sometimes separated from one another by centuries of neglect or misinterpretation, with both triumphs and reversals, but gradually absorbed as innovations within various “moral communities,”<sup>135</sup> until all of these sundry islands, under the pressure of events and notwithstanding the occasional cost of considerable simplifications, finally coalesce into the modern Prevailing View: the confident assertions of the *Universal Declaration* and its posterity.

Within this metaphor, the Stoic or the Roman or the early Christian contributions can be more easily understood and appreciated for what they seem in fact to be: significant theoretical steps forward, even if taken tentatively and with little immediate consequence.

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<sup>133</sup> A. Masferrer, *The Making of Dignity and Human Rights in the Western Tradition: A Retrospective Analysis* (New York 2023), gains some traction by considering the development of Human Dignity and Human Rights retrospectively, from the modern conceptions to their past.

<sup>134</sup> Compare, for instance, R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Redwood City, CA 2002), and *Sediments of Time: On Possible Histories* (Redwood City, CA 2018). H. Joas, *The Sacredness of the Person: A New Genealogy of Human Rights* (Georgetown 2013), presents, from a sociological standpoint, a complex but interesting historically staged development of Human Rights through the gradual “sacralization” of the human person.

<sup>135</sup> See recently Richardson (note 109) on the acceptance of new moral ideas within a “moral community.”