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CONTENTS

FELICIA LAL	<i>THE ART OF HUMAN DIGNITY AND THE HUMAN DIGNITY OF ART: EDITORIAL</i>	1
ANTHONY LISTER	<i>PUBLIC SPACES: PUBLIC PEOPLE</i>	5
L-FRESH THE LION	<i>WHY BLEND IN WHEN YOU WERE BORN TO STAND OUT: A STORY OF RAP, RELIGION, AND RIGHTS</i>	11
BRUCE BAER ARNOLD & WENDY BONYTHON	<i>SEEING THROUGH THE IMAGE: ART, DIGNITY, AND RESPONSIBILITY</i>	15
MATTHEW CHRISTIAN	<i>NOTES FROM UNDERGROUND: ARTISTIC RISK AND POTENTIAL IN THE NEW YORK SUBWAY</i>	31
JARROD WHEATLEY	<i>THE WRITING IS ON THE WALL: AN ASSET-BASED APPROACH TO STREET ART</i>	41
JAY SANDERSON & LEANNE WISEMAN	<i>ARE MUSICIANS FULL OF IT? THE METAPHORICAL AND FIGURATIVE POWER OF SUBCONSCIOUS COPYING IN COPYRIGHT INFRINGEMENT CASES</i>	53
CRISP	<i>ONE PERSON'S VANDALISM IS ANOTHER'S MASTERPIECE</i>	67
ADAM JARDINE	<i>WOLVES AMONG US: SOME BRIEF REFLECTIONS ON THE "BONA FIDES" OF GENDERED VIOLENCE IN COMPUTER GAME ART</i>	73
KAREN CRAWLEY	<i>BEYOND THE WAR ON GRAFFITI: THE RIGHT TO VISUAL EXPRESSION IN URBAN SPACES</i>	85

SEEING THROUGH THE IMAGE: ART, DIGNITY, AND RESPONSIBILITY

BRUCE ARNOLD* & WENDY BONYTHON**

Within the artistic world, many have argued that a respect for dignity and human rights stems from debates concerning artistic freedom. However, when considering human rights and dignity, one must step out of conventional discussions and consider the recipients of the art to identify legal and ethical inequities concerning the contexts and subjects artistically expressed. This article argues that art imposes an obligation upon the viewers' engagement where the embodiment of human forms are depicted. It argues for an ethic of responsibility.

CONTENTS

I	INTRODUCTION	16
II	ART AS A COMMODITY?	16
III	THE DIGNITY OF ART	17
IV	THE EXPLOITATION OF BODIES	19
V	US AS VIEWERS	21
VI	CONCLUSION.....	23

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I INTRODUCTION

Respect for dignity, and thus for human rights, requires a responsiveness on the part of people who view images, rather than merely their creators, censors and curators. This article steps beyond conventional debates about artistic freedom and copyright, and considers the obligations – both ethical and legal – on recipients of artistic expression involving the actual human form. It suggests that human rights are fostered by an ethic of responsibility in our engagement with images, that range from Géricault's *Raft of the Medusa* and Warhol's *Car Crash* series, to illustrations in the *Pernkopf Atlas*, Korda's *Che Guevara* and Ut's *Napalm Girl*. In essence, if we are concerned with dignity, we need to recognise that the images we see on t-shirts, campaign posters, textbooks and gallery walls are more than abstractions — they are representations of people. We need to recognise that wariness about reducing personhood to an abstraction is more broadly relevant in human rights theory and legal practice, where plaintiffs and defendants should be respected as people, rather than embodiments of legal principles and procedural conflicts.

II ART AS A COMMODITY?

It is conventional to conceptualise the visual arts in terms of a commodity — dollars crystalised in a frame on a wall — or as a subject of contestation between creativity and repression, something that invokes questions about offence, censorship, copyright, personality rights and freedoms.¹ Philosophers such as Kant have emphasised art's autonomy, a value that — like dignity — is transcendent and independent of use or the market.² It is also conventional to differentiate between art as something that is collectable — valorised by curatorial institutions and fine arts academics and utilitarian representations that appear as illustrations on clothing, bags, bus shelters, anatomy

¹ See generally René Gimpel, 'Art As Commodity, Art as Economic Power' (2000) 14(51) *Third Text* 51; William Goetzmann, 'Accounting for Taste: Art and the Financial Markets Over Three Centuries' (1993) 83(5) *The American Economic Review* 1370; Robert Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Getty Publications, 1998); Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011); Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (University of North Carolina Press, 1991).

² See Casey Haskins, 'Kant and the Autonomy of Art' (1989) 47(1) *The Journal of Aesthetics and Art Criticism* 43; Joseph Margolis, *What, After All, Is a Work of Art?: Lectures in the Philosophy of Art* (Pennsylvania State Press, 2010); Pierre Bourdieu, *The Rules of Art* (Susan Emanuel trans, Stanford University Press, 1996) [trans of: *Les Règles de l'art* (first published 1992)].

textbooks, in the mass media or on social media sites such as Facebook, Tumblr and Pinterest.³

In contrast, this article contends that the visual arts — high and low, fine or decorative — involve representation and need not be balkanised on the basis of price tag, epoch, authorship, medium or genre. Considering reception of that representation, in what prominent Professor William Mitchell characterised as the pictorial turn, potentially tells us something about dignity.⁴ It also offers a grasp on potentially intractable tensions in freedom of expression, involving balances between the human rights of the creator, the viewer, the creator's subjects and people or institutions who consider that they have a duty to shape what is viewed and how it is viewed.⁵

III THE DIGNITY OF ART

Dignity — recognition as a person, irrespective of age, gender, sexual affinity, religious affiliation, nationality, education or wealth — is a foundation of human rights and thus of justice in a liberal democratic state that is informed by values of fairness,⁶ and flourishing.⁷ It is a matter of personhood, something that is innate to all humans and always to be respected, rather than dependent on deportment.⁸ It involves recognition

³ Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed) *Illuminations* (Harry Zohn trans, Schocken, 1969) 214 [trans of: 'Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit' (first published 1936)]; Arthur Danto, *What Art Is* (Yale University Press, 2013).

⁴ William Mitchell, *What Do Pictures Want?: The Lives and Loves of Images* (University of Chicago Press, 2005); See especially W. J. T. Mitchell, *Picture Theory: Essays on Verbal and Visual Representation* (University of Chicago Press, 1995); see also Agnes Heller, 'Autonomy of Art or the Dignity of the Artwork' (2008) 9(2) *Critical Horizons* 139.

⁵ For points of entry to the Australian and international literature regarding such tensions, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007); Martha Nussbaum, 'Exactly and Responsibly: A Defense of Ethical Criticism' (1998) 22(2) *Philosophy and Literature* 343; Katharine Gelber, 'Distracting the Masses: Art, Local Government and Freedom of Political Speech in Australia' (2006) 10 *Law Text Culture* 195; Kate MacNeill, 'When Subject Becomes Object: Nakedness, Art and the Public Sphere' (2010) 135 *Media International Australia Incorporating Culture & Policy* 82; Michael Dunstan, 'Australia's National Classification System for Publications, Films and Computer Games: Its Operation and Potential Susceptibility to Political Influence in Classification Decisions' (2009) 37(1) *Federal Law Review* 133.

⁶ John Rawls, 'The Sense of Justice' in Samuel Freeman (ed) *John Rawls: Collected Papers* (Harvard University Press, 1999) 115.

⁷ See Alan Gewirth, *Self-Fulfillment* (Princeton University Press, 1998); Alan Gewirth, *The Community of Rights* (University of Chicago Press, 1996); and Martha Nussbaum, *Cultivating Humanity* (Harvard University Press, 1998).

⁸ George Kateb, *Human Dignity* (Belknap Press, 2011); Andrew Brennan and Y S Lo, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds) *Perspectives on Human*

that people are individuals, rather than manifestations of a particular attribute, such as ethnicity. This results in an abhorrence of treating people as a means to an end.⁹

That recognition may be expressed through statute and case law — enforceable rules that valorise some identities, signal that abuses of rights are impermissible and invoke duties. Recognition may, however, be manifested through small acts of kindness and respect that are not determined by statutes.¹⁰ It involves an ethic of personal responsibility that is discernable in classical philosophy, and in contemporary rights theory.¹¹

The ethic is one of human rights. It requires awareness on the part of the observer – an engagement by the *viewer* of visual arts rather than merely the creator, distributor, curator or regulator of images. In essence, respect for dignity is not something that is necessarily left to those actors who provide dissemination or curation of images. It is not readily addressed in terms of law regarding obscenity, offensiveness and intellectual property,¹² or in terms of law fostering political communication,¹³ and the broader exchange of ideas that may affront some members of a pluralist liberal democratic society.¹⁴

If we are concerned with what makes us human and with fostering the flourishing of all people, as observers we thus need to look beyond the canvas and pigment, the pixels in a

Dignity (Springer, 2010) 43; Martha Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (The President's Council on Bioethics, 2008) 351, 357.

⁹ Immanuel Kant, 'Groundwork of the Metaphysics of Morals', in Mary Gregor (ed) *Practical Philosophy* (Mary Gregor trans, Cambridge University Press (The Cambridge Edition of the Works of Immanuel Kant), 1999) 43, 79 [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); see also *Disability Discrimination Act 1992* (Cth); *Privacy Act 1988* (Cth); *Racial Discrimination Act 1975* (Cth).

¹¹ Martha Nussbaum, "'Finely Aware and Richly Responsible": Moral Attention and the Moral Task of Literature' (1985) 82(10) *The Journal of Philosophy* 516.

¹² See, eg *Copyright Act 1968* (Cth); *Summary Offences Act* (NT) s53(1); *Classification of Theatrical Performances Act 1978* (SA) s12; *Criminal Code Act 1899* (Qld) s 228.

¹³ Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; See also Bede Harris, 'Pell v. Council of Trustees of the National Gallery of Victoria: Should Blasphemy Be a Crime?: The "Piss Christ" Case and Freedom of Expression' (1998) 22(1) *Melbourne University Law Review* 217.

¹⁴ Larry Alexander, *Is there a Right of Freedom of Expression?* (Cambridge University Press, 2005) 140; and Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) *Oxford Journal of Legal Studies* 303; But see Guy Carmi, 'Dignity - The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification' (2007) 9(4) *University of Pennsylvania Journal of Constitutional Law* 958; Cass Sunstein, 'Pornography and the First Amendment' (1986) 4 *Duke Law Journal* 589.

digital display, the scholarship in a catalogue raisonné, or the million dollar figures in an auction report.

IV THE EXPLOITATION OF BODIES

Consider Andy Warhol's *Car Crash* series of screenprints, appropriations from tabloid photographs of fatal car accidents. If you are an investor, the prints are both a useful hedge against inflation and a demonstration of the purchaser's membership of a cultural elite, someone whose tastes in art are more edgy than those with a Warhol *Flowers* or *Liz Taylor* print on the wall.¹⁵ An observer who looks beyond Warhol's fluorescent colours might recognise, however, that each image features the mangled bodies of real persons — individuals who had connections to parents, colleagues, friends,¹⁶ and were not wholly fictive, such as Rembrandt's *Ganymede* being hauled aloft by a paedophilic Zeus, or Botticelli's *Birth of Venus*.¹⁷

It is an art of exploitation, based on disregard for those in each crash and their survivors. It sits along contemporary gawker images by professional and citizen journalists that exploit the spectacle of accidents and natural disasters for the purposes of infotainment (and mass media revenue) and that are weakly condemned by regulators, such as the Australian Communications & Media Authority for breaching community standards that are attributable to human rights.¹⁸ Warhol for example produced a similar series of prints featuring the electric chair.¹⁹ Perversely, while we might condemn tabloid publishers and broadcasters or more effectively exercise our responsibility by denying them our patronage, images in curatorial institutions and upmarket art books rarely attract the same averted gaze.

¹⁵ *Green Car Crash* sold for US\$72 million in 2007. *Silver Car Crash* sold for US\$105 million in 2013; BBC News, 'Andy Warhol Auction Record Shattered' *BBC News* (online), 14 November 2013 <<http://www.bbc.com/news/entertainment-arts-24937683>>.

¹⁶ Gilbert Meilaender, *Neither Beast Nor God: The Dignity of the Human Person* (Encounter Books, 2009) 5.

¹⁷ Margarita Russell, 'The Iconography of Rembrandt's "Rape of Ganymede"' (1977) 9(1) *Simiolus: Netherlands Quarterly for the History of Art* 5; Leonard Barkan, *Transuming Passion: Ganymede and the Erotics of Humanism* (Stanford University Press, 1991); Charles Mack, 'Botticelli's Venus: Antique Allusions and Medicean Propaganda' (2002) 28(2) *Explorations in Renaissance Culture* 207.

¹⁸ See eg *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s11; *Broadcasting Services Act 1992* (Cth) Sch 5; *Privacy Act 1988* (Cth) s7B.

¹⁹ Bennett Capers, 'On Andy Warhol's "Electric Chair"' (2006) 94(1) *California Law Review* 243; Michael Golec, 'Media Aesthetics, Sense Perception, and Andy Warhol's Blue Electric Chair' (2009) 4(1) *The Senses and Society* 23.

Likewise, Alberto Korda's *Guerrillero Heroico*, that is, the photograph of Che Guevara that has been relentlessly reproduced on posters, bags and t-shirts,²⁰ functions as a low-cost signifier of the bearer's hipness, potentially as an indicator of a leftist affinity in which association with the like-minded is a substitute for activism founded on a recognition of personal responsibility. As an embodiment of what Thomas Frank dubbed 'cool', it is at odds with consideration of human rights abuses by regimes of the Left and Right in Latin America, including killings by Guevara, and the social conditions that fuelled those abuses.²¹

Fewer consumers have used Nick Ut's 1962 photograph *Napalm Girl* as decoration.²² We might wonder, however, whether some people have come to regard Kim Phuc, depicted naked and screaming as she ran from bombing in the Vietnam War, as emblematic rather than a real person — a symbol of bad policies (and worse technologies) rather than someone who had a previous and subsequent life, or someone who was a person rather than an icon. Is Ut's image different to that of Eddie Adams' 1968 photograph *General Nguyen Ngoc Loan Executing a Viet Cong Prisoner in Saigon*, which is just as iconic, just as unsettling and as scholars such as Andrew Friedman have argued, somewhat more complicated than a homicide.²³

Phuc's dignity is recognised through attribution. That is, we know her name. This is more than can be said for the humans whose remains appear in Eduard Pernkopf's *Topographische Anatomie des Menschen* (Anatomical Atlas). It is a comprehensive authoritative reference of work that is a medical and artistic masterpiece. It is also a successor of landmark works such as Vesalius' 1543 *De Humani Corporis Fabrica Libri Septem*, and profoundly troubling and emblematic of tensions within the law.²⁴ Editions of Pernkopf, until recently, featured Nazi symbols – a reminder that distinguished

²⁰ Michael Casey, *Che's Afterlife: The Legacy of an Image* (Vintage, 2009); See generally Thomas Frank, *The Conquest of Cool: Business Culture, Counterculture, and the Rise of Hip Consumerism* (University of Chicago Press, 1997).

²¹ Winifred Tate, *Counting the Dead: The Culture and Politics of Human Rights Activism in Colombia* (University of California Press, 2007); Thomas Wright, *State Terrorism in Latin America: Chile, Argentina, and International Human Rights* (Rowman & Littlefield Publishers, 2006); Mayra Gómez, *Human rights in Cuba, El Salvador and Nicaragua: A Sociological Perspective on Human Rights Abuse* (Routledge, 2003).

²² Denise Chong, *The Girl in the Picture: The Story of Kim Phuc, the Photograph, and the Vietnam War* (Penguin, 2001); Nancy Miller, 'The Girl in the Photograph: The Vietnam War and the Making of National Memory' (2004) 24(2) *JAC* 261.

²³ Andrew Friedman, *Covert Capital: Landscapes of Denial and the Making of U.S. Empire in the Suburbs of Northern Virginia* (University of California Press, 2013) 196.

²⁴ Charles O'Malley, *Andreas Vesalius of Brussels, 1514-1564* (University of California Press, 1964).

clinicians, philosophers and lawyers disregarded their duty to humanity by actively embracing a system of belief that denied human rights. More disquietingly, Pernkopf and his illustrators appear to have used concentration camp inmates as their subjects, with controversy over the past two decades, including suggestions that some of the people who appear in the Atlas were killed to order.²⁵

We do not know the names of all of the people who were dissected and illustrated by Pernkopf's team. They are inadequately memorialised as victims of a regime in which humans — contrary to Kant's ethic of respect — were regarded as a means to an end and others not recognised as actual people.²⁶ Can we comfortably use such fruit from a poisonous tree? Is the Atlas something akin to Warhol's casualty images? Is it sufficiently abstract that it should not be regarded by the viewer with distaste and that is wholly outside frames of reference, such as personality rights?²⁷

V US AS VIEWERS

One response is that in reading the Pernkopf Atlas, we should take a moment to contemplate the source of the illustrations and indeed wonder about how other people came to be on the slab and thence in the illustrations in independent anatomical works. There are no easy answers and privacy scholars are, for example, in disagreement about the identification of people whose photographs appear in more recent anatomical or diagnostic texts.²⁸ Is anonymity antithetical to dignity? Should we, as an indicator of

²⁵ Pieter Carstens, 'Revisiting the Infamous Pernkopf Anatomy Atlas: Historical Lessons for Medical Law and Ethics' (2012) 18(2) *Fundamina: A Journal of Legal History* 23; Richard Panush, 'Nazi Origins of an Anatomy Text: The Pernkopf Atlas' (1996) 276(20) *JAMA* 1633; Chris Hubbard, 'Eduard Pernkopf's Atlas of Topographical and Applied Human Anatomy: The Continuing Ethical Controversy' (2001) 265(5) *The Anatomical Record* 207; William Seidelman, 'The Legacy of Academic Medicine and Human Exploitation in the Third Reich' (2000) 43(3) *Perspectives in Biology and Medicine* 325.

²⁶ Sabine Hildebrandt, 'Research on Bodies of the Executed in German Anatomy: An Accepted Method that Changed During the Third Reich. Study of Anatomical Journals from 1924 to 1951' (2013) 26(3) *Clinical Anatomy* 304; See also Sabine Hildebrandt, 'The Women on Stieve's List: Victims of National Socialism Whose Bodies Were Used for Anatomical Research' (2013) 26(1) *Clinical Anatomy* 3.

²⁷ Hannes Rösler, 'Dignitarian Posthumous Personality Rights: An Analysis of US and German Constitutional and Tort Law' (2008) 26(1) *Berkeley Journal of International Law* 153; Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge University Press, 2006); Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge University Press, 2008).

²⁸ Bruce Baer Arnold, 'Death and Indignity' (2011) 7(10) *Privacy Law Bulletin* 134; Samuel Terilli and Sigman Spichal, 'Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions' (2005) 10(3) *Communication Law and Policy* 313; Clay Calvert, 'The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture' (2006) 26 *Loyola Los Angeles Entertainment Law Review* 133.

respect, be acknowledging the names and other identifying details of those people, or rely on anonymity as a means of minimising distress to their survivors?

What happens if people have volunteered their bodies for plastination in an exhibition by anatomical entrepreneur Gunther von Hagens?²⁹ Are visitors to what one critic described as a contemporary freak show complicit in a disregard of dignity, particularly given controversy over the entrepreneur's sourcing of bodies from China? What of the *Visible Person Project*, in which a US death row prisoner was digitised post-mortem after being carefully sliced into 1 871 one-millimetre sections with the resultant files being released on the internet?³⁰ We know the name of the prisoner (Joseph Paul Jernigan), so he is not anonymous, but there are ethical questions about the validity of his consent and about the appropriateness of using a prisoner as the basis for a data file or indeed for any research.³¹

Géricault's 1819 *Raft of the Medusa*³² pictures a group of desperate, desolate people adrift on the high seas after administrative failure, cowardice, murder and cannibalism. His contemporary Jules Michelet described the work as:

France herself, our whole society is on that raft ... a portrait so cruelly true that the original refused to recognise herself. People drew back before this terrible picture; they passed it quickly; they tried not to see it, not to understand it. 'This picture is too sad, there are too many dead people; could he not have made a gayer shipwreck?'³³

²⁹ Lawrence Burns, 'Gunther von Hagens' Body Worlds: Selling Beautiful Education' (2007) 7(4) *The American Journal of Bioethics* 12; T. Christine Jespersen, Alicita Rodríguez and Joseph Starr (eds) *The Anatomy of Body Worlds: Critical Essays on the Plastinated Cadavers of Gunther von Hagens* (McFarland, 2008); Yechiel Michael Barilan, 'Bodyworlds and the Ethics of Using Human Remains: A Preliminary Discussion' (2006) 20(5) *Bioethics* 233.

³⁰ José Van Dijck, 'Digital Cadavers: The visible human project as anatomical theatre' (2000) 31(2) *Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences* 271; Catherine Waldby, 'Revenants: The Visible Human Project and the Digital Uncanny' (1997) 3(1) *Body and Society* 1.

³¹ Sabine Hildebrandt, 'Capital Punishment and Anatomy: History and Ethics of an Ongoing Association' (2008) 21(1) *Clinical Anatomy* 5; Catherine Waldby, *The Visible Human Project: Informatic Bodies and Posthuman Medicine* (Psychology Press, 2000); Grant Kester, 'Aesthetics After the End of Art: An Interview With Susan Buck-Morss' (1997) 56(1) *Art Journal* 38; Meredith Wadman, 'Ethics Worries of Execution Twist to Internet's 'Visible Man'' (1996) 382(6593) *Nature* 657.

³² Christopher Murray, 'Raft of the Medusa' Christopher Murray (ed) *Encyclopedia of the Romantic Era 1760-1850* (Routledge, 2004) 923; Jonathan Miles, *Medusa: The Shipwreck, The Scandal, The Masterpiece* (Pimlico, 2014); Albert Alhadeff, *The Raft of the Medusa: Géricault, Art, and Race* (Prestel, 2002).

³³ For the text of one version of Michelet's 1848 lecture, see Francis Klingender, 'Géricault as Seen in 1848' (1942) 81(475) *The Burlington Magazine* 254, 255.

From a human rights perspective we can see the *Raft* as a striking (albeit through the passage of time now illegible) condemnation of institutional and personal failure. The ethic of individual responsibility espoused by Nussbaum and Rawls cannot force people to look at art or derive a particular meaning from images. Much of the literature about the *Raft* accordingly centres on academic debate about genre, artistic traditions and aesthetic values.

In contemplating the *Raft*, *Car Crash*, *Guerillero* and other works, we might acknowledge that human rights law has its limits. Responsibility sits alongside, rather than being wholly determined, by law. It requires an engagement with questions about free expression. The real challenge for observers encountering images is to be responsive, to be sufficiently self-aware and imaginative, in order to look beyond the surface and be empathetic to people who are depicted in those images or whose beliefs motivated those images. A respect for dignity would, for example, encompass an awareness, however limited, of what it might be like to be in danger on an 1819 raft or a 2015 refugee vessel off the coast of North Australia. More startlingly, it would encompass a sense of why people make what we regard as ethically repugnant decisions.

VI CONCLUSION

This responsiveness is a duty of anyone in a liberal democratic state. It is of importance for anyone who teaches, writes about or practices law. The previous paragraphs have cautioned about the abstraction evident in many images, the disregard by Warhol for example, of the dignity of people whose deaths were convenient and profitable topics for artistic expression. From a law reform and human rights perspective, it is important to recognise that the abstraction evident in much engagement with the visual arts is also apparent in legal teaching. That teaching is concerned with abstractions, principles, exemplars and modes of ‘thinking like a lawyer’. Distance from the subjects of law insulates students and practitioners from realities that they find painful and confronting. We might ask whether a closer engagement with questions about dignity — an awareness of flesh and blood, pain and happiness, will result in a more humane legal

system, alongside an acknowledgement of art's power as both an affirmation of dignity and exhortation against abuse?³⁴

³⁴ See, eg, Goya's 1810-1820 *Los Desastres de la Guerra* (an echo of Callot's 1633 *Les Grandes Misères de la guerre*), where it can be viewed as a value-free illustration, as a comforting demonstration that 'we' are different or as an encouragement – like sites such as Auschwitz and Hiroshima – to prevent future atrocity, beginning with empathy for the people whose suffering was depicted by those artists.

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