DIGNIFYING QUEERNESS

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In recent years, courts that have affirmed the right of lesbian, gay, bisexual, and transgender (LGBT) people to engage in same-sex activity have often invoked the value of dignity. They have done so in spite of the fact that same-sex activity, and many other kinds of sex, have historically been deemed undignified and subject to criminal prohibition. This Article examines a rapidly growing body of comparative jurisprudence to examine how dignity has become an unlikely cornerstone of efforts to decriminalize same-sex conduct. By invoking dignity, courts have persuasively struck down some of the most immediate and egregious restrictions on sexual rights. They have often done so, however, by referencing dignity in an abstract sense, without either specifying how dignity functions in constitutional adjudication or explaining why a particular dignitary injury is constitutionally impermissible. Relying on a generic conception of dignity is risky for sexual rights, as it threatens to withhold protection from acts that are not deemed sufficiently dignified, extend dignity's protection in a partial or conditional way, and give cover to legislative and judicial refusals of more transformative movement goals. By drawing from jurisprudence on the decriminalization of same-sex activity, this Article proposes a more precise typology of dignity that advocates and courts might employ to better operationalize dignity as a constitutional value and to refuse a generic jurisprudence of dignity that undermines sexual rights.

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sodomy (sod-ə-mee) n. (13c) 1. Oral or anal copulation between humans, esp. those of the same sex. . . . Also termed (in all cases archaically) buggery; crime against nature; offense against nature; abominable and detestable crime against nature; unnatural offense; unnatural crime; unspeakable crime . . . .[1]

—BLACK'S LAW DICTIONARY (11th ed. 2019)

The selection of an intimate partner is a private and a personal choice.[2]

—Judge Marissa Robertson, *Orden David v. Attorney General of Antigua and Barbuda* (2022)

INTRODUCTION

Dignity is, in many ways, an unlikely jurisprudential foundation for lesbian, gay, bisexual, and transgender (LGBT) rights.[3] Historically, same-sex activity and gender transgression have not only been subject to criminal sanction but have, in many contexts, carried a stigmatic connotation.[4] As LGBT people grew more visible and formed communities,[5] the disdain that attached to these acts and behaviors

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1 *Sodomy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2 Orden David v. Att'y Gen. of Ant. & Barb. (2022) No. ANUHCV2021/0042, para. 1 (ECSC).

3 This Article uses the acronym "LGBT" to describe those who are most directly affected by the criminalization of same-sex activity, in part because that acronym is commonly used by courts adjudicating these challenges. This Article includes transgender people in that acronym because they are often targeted under criminal prohibitions on same-sex activity based on their sex assigned at birth. It does so with the caveat that the term is not necessarily inclusive of all of the subjectivities that are affected by the criminalization of same-sex activity, and that queer, intersex, and heterosexual individuals, among others, are also affected by these restrictions.

4 *See, e.g.*, MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW xiii (2010); Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26, 28 (2016). Even in an era of Pride and more radical queer politics, shame and indignity often animate a queer sense of self and relation to others. *See* Eve Kosofsky Sedgwick, *Queer Performativity: Henry James's* The Art of the Novel, 1 GLQ: J. LESBIAN & GAY STUD. 1, 4 (1993) ("If queer is a politically potent term, which it is, that's because, far from being capable of being detached from the childhood scene of shame, it cleaves to that scene as a near-inexhaustible source of transformational energy.").

5 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 43 (Robert Hurley trans., 1978) ("As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood . . . . The sodomite had been a temporary aberration; the homosexual was now a species."); *see also* John D'Emilio, *Capitalism and Gay Identity*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 100,

frequently extended to the individuals who practiced them, branding them as outcasts and condemning them to legal regulation and social exclusion.[6]

Yet in both overt and subtle ways, dignity over time has become a consistent theme in foundational judicial rulings that have vindicated the rights of LGBT persons. Dignity has been invoked in nearly every judicial decision to consider the legalization of same-sex activity, as well as those addressing the registration of LGBT rights organizations, recognition of same-sex relationships, and rights of transgender persons. This feature of LGBT jurisprudence has been notable across time and space, with dignity referenced in dozens of major decisions on LGBT rights over a span of four decades and from jurisdictions on every continent.[7] The use of dignity has been particularly prominent in the past decade as the pace of decriminalization has markedly accelerated in countries that inherited colonial laws prohibiting same-sex activity. If dignity once functioned as a central justification to impose criminal prohibitions, it now regularly functions as a powerful justification to eradicate them.

By invoking dignity, courts have justified their invalidation of laws that often retain strong support from a large segment of the population, casting these laws as an impermissible infringement on the humanity of LGBT persons. To that end, these references function to legitimate courts' decriminalization of same-sex activity and recognition of LGBT rights. Often, however, these references to dignity are made at a very general level, without locating dignity in a particular provision of the constitutional text or specifying the dignitary injury that courts consider constitutionally problematic. As supporters of sexual rights have warned, such an approach can be dangerous for sexual rights guarantees and risks constitutionalizing paternalistic, regressive, or partial understandings of dignity.[8] If dignity is to expand sexual rights rather than reinscribe restrictive prohibitions, a more textured and substantive understanding of dignity as a constitutional value is urgently needed.

100–13 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (describing the socioeconomic conditions that gave rise to lesbian and gay communities in the West).

6 Martha Nussbaum offers a thorough treatment of the phenomenon of "projective disgust," noting that "the projection of disgust properties onto subordinate groups is a common way of stigmatizing them as sick and inferior." NUSSBAUM, *supra* note 4, at 20.

7 *See infra* Appendix I; *infra* Appendix II.

8 *See, e.g.*, Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015, 4:16 PM), https://slate.com/human-interest/2015/06/in-the-scotus-same-sex-marriage-case-a-dignity-rationale-could-be-dangerous.html [https://perma.cc/4YXX-VA2G]; Imani Gandy, *Anthony Kennedy's Dignity Jurisprudence Is Great for Same-Sex Marriage, But Not for Abortion Rights*, REWIRE NEWS GRP. (July 7, 2015, 4:21 PM), https://rewirenewsgroup.com/2015/07/07/anthony-kennedys-dignity-jurisprudence-great-gays-lesbians-women [https://perma.cc/Y4BE-6ANB].

This Article examines comparative jurisprudence on the criminalization of same-sex activity to consider the different roles that dignity performs in the adjudication of contested sexual rights claims, and to draw from this jurisprudence to propose a more precise conception of dignity in sexual rights litigation. Part I examines the rise of dignity as a value in international human rights and comparative constitutional law and considers scholarly debates about the utility of dignity in constitutional decision-making. Part II explores the checkered history of dignitary reasoning in the context of queer sexuality, with dignity invoked over time to both criminalize and decriminalize same-sex activity. In Part III, distinguishes different ways that dignity might be functionally codified into constitutional texts and examine whether and how these alternatives have shaped judgments on the criminalization of same-sex activity. Part III then considers how dignity has variously functioned as a standalone right guaranteed by the state, as a constitutive value that informs the meaning of other substantive rights, and as a limiting principle that constrains the operation of state interests as valid justifications for restricting individual rights. In practice, each of these characterizations of dignity has proven capacious enough to provide some basis for courts to incorporate dignity into decriminalization jurisprudence. Part IV examines how courts invoking dignity have empirically understood the dignitary harm of criminalization in practice. Although these courts overwhelmingly speak of dignity in general terms, Part IV isolates three common understandings that they tacitly utilize and propose a framework that disaggregates the indignities inflicted by deprivation, stigmatization, and degradation. Part IV then argues that this framework is useful in specifying dignitary injury where it arises, not only to understand the specific harms of criminalizing same-sex activity, but to understand and identify cognizable dignitary harm more generally. Finally, Part V notes some of the risks and complexities of using dignity as a lodestar of sexual rights adjudication. It focuses in particular on instances where claims have been deemed undignified and therefore unworthy of protection, the possibility that dignity might be extended partially or conditionally to privilege certain types of sexual practices or relationships at the expense of others, and the ways that dignitary reasoning might preclude more transformative holdings that could better advance the fundamental rights of LGBT persons and other sexual minorities. In light of these potential limitations, this Article conclude by urging a more nuanced approach to these challenges that both appreciates the dignitary implications of anti-LGBT legislation and refuses a generic and uncritical conception of dignity that is likely to undermine sexual rights.

I. DIGNITY AND MORALITY AS CONSTITUTIONAL CONCERNS

For more than seventy-five years, dignity has stood as a foundational value in both international and domestic rights adjudication.[9] In the aftermath of World War II and its attendant horrors, the architects of emerging international and regional human rights systems foregrounded human dignity as a value of paramount importance. The preamble of the Universal Declaration of Human Rights (UDHR), adopted in 1948, opens with a declaration that "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."[10] Article 1 reiterates that "[a]ll human beings are born free and equal in dignity and rights."[11] Various regional human rights instruments have also centered dignity as a guiding value. The American Declaration of the Rights and Duties of Man opens with a declaration that "[t]he American peoples have acknowledged the dignity of the individual," and the preamble begins by underscoring that "[a]ll men are born free and equal, in dignity and in rights."[12] The Charter of Fundamental Rights of the European Union states in its preamble that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity."[13] Article 1, titled "Human Dignity," opens the Charter by unequivocally stating that "[h]uman dignity is inviolable" and "must be respected and protected."[14] The African Charter on Human and Peoples' Rights

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9 *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 15–65 (Daniel Kayros trans., 2015) (examining the intellectual history of human dignity and its adoption in international and domestic instruments); ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 11–25 (2012) (discussing dignity's history as a jurisprudential concept, particularly in the post-war era); UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 1st ed. 2013); Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMPAR. L. REV. 331, 332 (2012); Stéphanie Hennette-Vauchez, *A Human* Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 INT'L J. CONST. L. 32, 33–34 (2011); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 15 (2004); Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises, and Dangers*, 62 AM. J. COMPAR. L. 461, 464 (2014) (noting dignity's rise after World War II and suggesting that "[h]uman dignity symbolizes an antithesis, a complete rejection of, and an alternative to the scourges of the war and what it represented").

10 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

11 *Id.* at art. 1.

12 Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948; *see also* American Convention on Human Rights, O.A.S.T.S. No. 36, 114 U.N.T.S. 123, OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1992) (entered into force July 18, 1978).

13 Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) pmbl.

14 *Id.* at art. 1.

reiterates the commitment made in the Charter of the Organization of African Unity that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples."[15] It is no exaggeration to say that dignity is a cornerstone of the international and regional human rights systems that have emerged over the last century.

In addition to international and regional instruments, dignity has become a ubiquitous value in national constitutions.[16] As Erin Daly has noted, "[a]lthough there are differences of opinion about the cause of the cavalcade of constitutional dignity rights after World War II, there is no denying that the phenomenon occurred."[17] A pronounced commitment to dignity has been echoed in many post-war constitutions, with more than 80 percent of constitutions containing references to dignity as of 2012.[18] Dignity appears in different guises, with some constitutions creating a standalone right to dignity, some referencing dignity as a value to guide constitutional interpretation, and some invoking dignity in conjunction with limitations on state action.[19] In each of these different forms, however, references to dignity within constitutional texts have been seized upon by advocates for civil and human rights, including advocates challenging restrictions around sex and sexuality.

In recent years, dignity's role as a constitutional value has been the subject of extensive contestation among jurists and academics alike. At a foundational level, there is debate about what human dignity entails as a philosophical concept, including whether dignity is an innate quality we enjoy by virtue of our humanity or whether it is a quality that can be bestowed upon or stripped away from an individual by the state or other actors.[20] In constitutional adjudication, some champion the codification

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15 Org. of African Unity [OAU] African Charter on Human and Peoples' Rights pmbl. *adopted* June 1, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) (quoting Org. of African Unity [OAU] Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39 (entered into force Sept. 13, 1963)).

16 BARAK, *supra* note 9, at 49–65; DALY, *supra* note 9, at xi ("All forty-nine constitutions adopted since 2003 include at least one reference to dignity."); G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171, 171 (1984); Louis Henkin, *Human Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 220 (Michael J. Meyer & William A. Parent eds., 1992); Shulztiner & Carmi, *supra* note 9, at 461 (noting the sharp rise in dignity clauses following World War II).

17 DALY, *supra* note 9, at 12–13.

18 Shulztiner & Carmi, *supra* note 9, at 461 (noting that only five states referenced dignity in their constitutions prior to 1945, but 162 states did so by 2012).

19 *See infra* Part III.

20 *See generally* GEORGE KATEB, HUMAN DIGNITY (2011) (offering a philosophical defense of human dignity as a concept). The nature of dignity was debated by Justice Kennedy and Justice Thomas in their opinions in *Obergefell v. Hodges*, with Justice Kennedy condemning bans on

of dignity and its recognition of those aspects of life that make us human.[21] Others caution that dignity is a double-edged sword that can function to lionize those whose identities and activities are deemed dignified but can also serve to disqualify the undignified from rights protection.[22] And still others question whether dignity is sufficiently substantial and specific to ground constitutional adjudication, and caution that the indeterminate nature of dignity means that it too often functions as a cover for the normative preferences of judges.[23]

The indeterminacy of dignity as a value is one of many reasons that it has become such a central foundation of international, regional, and domestic legal orders.[24] Many sociolegal traditions revere human dignity and insist on its importance,[25] even if their understandings of what human dignity entails and how it can be best protected vary widely or are even contradictory.[26] Most scholars to analyze human dignity in

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same-sex marriage as injurious to the dignity of same-sex couples and Justice Thomas insisting that humans possess innate dignity that cannot be taken away even by state repression. 576 U.S. 644, 660–61 (2015); *id.* at 735–36 (Thomas, J., dissenting); *see* Connor M. Ewing, *Dignity Disputed*, 11 J.L. & CTS. 370, 382–85 (2023).

21 Others have argued for a recognition of our common humanity that does not rest on protean notions of dignity. *See, e.g.*, Joseph J. Fischel & Claire McKinney, *Capability Without Dignity?*, 19 CONTEMP. POL. THEORY 404 (2020) (examining dignity's pitfalls in the context of abortion and sex).

22 DALY, *supra* note 9, at 38–53; Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CAL. L. REV. CIR. 117, 118–19 (2015); Esteban Restrepo Saldarriaga, *Poisoned Gifts: Old Moralities Under New Clothes?*, *in* BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW 199, 202 (Alice M. Miller & Mindy Jane Roseman eds., 2019).

23 Ewing, *supra* note 20, at 370; Finck, *supra* note 4, at 28 (observing that "[n]o consensus exists about the contours of human dignity as a legal concept"); Man Yee Karen Lee, *Universal Human Dignity: Some Reflections in the Asian Context*, 3 ASIAN J. COMPAR. L. 1, 1 (2008); Conor O'Mahony, *There Is No Such Thing as a Right to Dignity*, 10 INT'L J. CONST. L. 551, 551 (2012) ("Yet in spite of this voluminous and often erudite body of literature, there is little or no consensus as to what the concept of human dignity demands of law makers and adjudicators.").

24 DALY, *supra* note 9, at 102 ("Like other capacious terms, dignity is amorphous enough to mirror whatever the beholder puts up to it; everyone likes dignity because dignity means what each of us wants."); Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257, 257–58 (2006).

25 Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417, 457 (2009) ("But while a very abstract notion of dignity may be common ground, and may serve as an important point of reference in human-rights discourses, politics, and culture, its use tells us very little about the content of that right in a given conflict."); Shulztiner & Carmi, *supra* note 9, at 471–72 ("It tends to be forgotten that human dignity was originally and intentionally used in the UDHR precisely for its open-ended nature and indeterminacy, and because it could appeal to people of various ideological backgrounds, without forcing them to compromise basic principles.").

26 Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 208 (2008); Doron Shultziner, *Human Dignity in Judicial Decisions: Principles of Application and the Rule of Law*, 25 CARDOZO J. INT'L & COMPAR. L. 435, 445 (2017) (noting that dignity "has

comparative law have concluded that, while the concept is ubiquitous, dignity's meaning and import in constitutional law is deeply contextual and grounded in the histories and politics of particular nation-states.[27] Moreover, while dignity has been invoked to decide contentious cases on a number of issues, from due process and criminal punishment to equal citizenship to the aftermath of mass atrocities and transitional justice,[28] it can generate different imperatives in these different contexts. Even on a single issue, it is common to see competing appeals to dignity. In debates about the right to access abortion, for example, some advocates have invoked the dignity of the fetus while others have invoked the dignity of the person deciding the outcome of their pregnancy, wielding dignity for diametrically opposing ends.[29]

Cases involving LGBT rights are no exception. Across the globe, dignity has been a central feature of decisions evaluating the permissibility of bans on same-sex activity.[30] At least twenty-eight of the thirty-four rulings on the legality of same-sex activity compiled and analyzed in this project reference dignity,[31] with approximately twenty of

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been used inconsistently for and against the same issues such as abortions, euthanasia, incitement and freedom of speech, obscenity issues, and social rights and free enterprise").

27 DALY, *supra* note 9, at 5 (describing dignity as "the customized magic weapon conjured to combat whatever demons are in each country's closet"); David Feldman, *Human Dignity as a Legal Value: Part I*, PUB. L. 682, 698 (1999) (cautioning that dignity "is culturally dependent and eminently malleable"); Rao, *supra* note 26, at 211 ("The indeterminacy of human dignity in the abstract may require that difficult questions of competing dignities be resolved by cultural understandings of what dignities should count.").

28 *See, e.g.*, State v. Makwanyane 1995 (3) SA 391 (CC) at paras. 57–62, 144–46 (S. Afr.) (reasoning from dignity to hold the death penalty unconstitutional); Vriend v. Alberta, [1998] 1 S.C.R. 493, paras. 67–69 (Can.) (reasoning from dignity to determine the scope of equality guarantees); Sandra Milena Rios Oyola, *Uses of the Concept of Human Dignity and the Dignification of Victims in Transitional Justice in Colombia*, 9 EUR. REV. INT'L STUD. 28, 28 (2022) (considering the role of human dignity in transitional justice, particularly in Colombia).

29 *See, e.g.*, Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355, 370–71 (2012); *see also* Fischel & McKinney, *supra* note 21, at 414–17 (noting the ascription of dignity to the fetus as a historical and contemporary feature of campaigns for and against abortion rights).

30 *See infra* Appendix I. Rather than trying to isolate any normative core of the concept of dignity, some scholars have adopted a functionalist approach, examining how dignity has been used in jurisprudence to understand the work that it is doing. *See* Finck, *supra* note 4, at 27; *see also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 186–90 (2011) (adopting a "Wittgensteinian approach" to dignity and identifying five conceptions of dignity that emerge from case law in the United States).

31 *See infra* Appendix I. The six decisions that do not mention dignity are outliers in recent jurisprudence, making the trend in other jurisdictions even more pronounced. One is an early and somewhat perfunctory ruling from Ecuador that casts same-sex attraction as a medical disorder. *See infra* note 74. The other five are decisions from courts in Singapore, where dignitary arguments have failed to gain traction. *See infra* note 150 and accompanying text. Outside these two jurisdictions, every decriminalization decision has mentioned dignity.

those rulings grappling with dignity in a substantive way.[32] The Parts that follow map the use of dignity by courts evaluating LGBT rights claims, as well as the work that dignity does in those decisions and the arguments or conclusions that it seems to enable and foreclose in practice.

II. DIGNITY IN LGBT RIGHTS DECISIONS

Historically, dignity has seemed to offer little to queer sex and relationships, which typically have been understood, if not defined, as undignified under the law. In recent years, however, dignity has been a central feature of legal challenges to laws prohibiting same-sex activity and has featured heavily in other LGBT rights cases. In this Part, I canvass the historical trajectory of dignitary reasoning in decisions on LGBT rights, turning first to those legal frameworks and judicial decisions where dignitary reasoning has been used to uphold restrictions on LGBT rights and then to decisions that have invalidated restrictions on LGBT rights due in part to their dignitary implications.

A. *Queerness as an Affront to Dignity*

Dignity is in many ways an unlikely basis for LGBT rights adjudication, particularly the decriminalization of same-sex activity. Prohibitions on same-sex activity regularly framed same-sex activity as something shameful or beastly, often defining consensual oral or anal sex as an offense akin to bestiality and rape.[33] Under the gloss of either "sodomy" or "buggery,"[34] same-sex activity was understood to be intrinsically shameful and degrading, to the point that even in legal

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32 Some of the decisions that do not meaningfully grapple with dignity only reference dignity in describing plaintiffs' arguments or in referencing case law from other jurisdictions. Notably, however, some do acknowledge concepts like stigma and humiliation even when they do not frame these as cognizable dignitary harms.

33 For historical details on the development of laws against same-sex activity and their circulation in colonial projects, see ALOK GUPTA, HUMAN RIGHTS WATCH, THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM (2008), https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism [https://perma.cc/3RED-74QP]; Michael Kirby, *The Sodomy Offence: England's Least Lovely Criminal Law Export?*, *in* HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH 61, 62–63 (Corinne Lennox & Matthew Waites eds., 2013).

34 Historians have noted that the terms "sodomy" and "buggery" were often used interchangeably. Robert F. Oaks, *"Things Fearful to Name": Sodomy and Buggery in Seventeenth-Century New England*, 12 J. SOC. HIST. 268, 268 (1978). While the early American colonies tended to define homosexuality as sodomy and bestiality as buggery, these definitions were sometimes reversed. *Id.* Many of the laws that currently prohibit "crimes against nature" are used to prosecute not only anal sex but same-sex intimacy more generally. *See* GUPTA, *supra* note 33.

proceedings it was considered "so abominable and vile" that it was deemed "a crime not to be named among Christians."[35]

Historically, same-sex activity was prosecuted as sodomy in the ecclesiastical courts, where it was understood to be an offense against the church rather than an offense against the state.[36] After the English Reformation, new laws were adopted to criminally prosecute sodomy. The Buggery Act of 1533 made same-sex activity a capital offense, and aside from a brief repeal and some minor amendments, it remained a capital offense until the passage of the Offences Against the Person Act in 1861.[37] Under that legislation, both same-sex activity and bestiality were punishable by sentences of anywhere from ten years to life imprisonment.[38]

The description of same-sex activity as an unspeakable crime is not purely hyperbolic—it influenced legislative drafting and led to the adoption of broad and euphemistic terminology. In 1837, Lord Thomas Babington Macaulay included a prohibition on touching with the intent "to gratify unnatural lust" in his draft of the Indian Penal Code, accompanied by commentary stating that the provision "relate[s] to an odious class of offences respecting which it is desirable that as little as possible should be said."[39] As a result, the drafters were "unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject," reasoning that "the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."[40] While the language related to unnatural touching was eventually abandoned, "unnatural offences" were ultimately criminalized in Section 377 of the

35 Caroline Bingham, *Seventeenth-Century Attitudes Toward Deviant Sex*, 1 J. INTERDISC. HIST. 447, 456 (1971) (quoting ANON., THE TRYAL AND CONDEMNATION OF MERVIN, LORD AUDLEY EARL OF CASTLE-HAVEN, AT WESTMINSTER, APRIL THE 5TH 1631 11–12 (1699)).

36 Kirby, *supra* note 33, at 62.

37 *See* Jeffers v. Att'y Gen. (2022) No. SKBHCV2021/0013, para. 6 (St. Kitts & Nevis); *The Buggery Act 1533*, BRITISH LIBR., https://www.bl.uk/collection-items/the-buggery-act-1533 [https://perma.cc/YB9L-WG9X].

38 The relevant provision read: "Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years." Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 61 (Eng.), *repealed by* Criminal Law Act 1967, c. 58, sched. 3, pt. III (U.K.).

39 Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 41 ECON. & POL. WKLY. 4815, 4815 (2006) (quoting REPORT OF THE INDIAN LAW COMMISSION ON THE PENAL CODE 3990–3991 (1837)); *id.* at 4822 n.4.

40 *Id.*

Indian Penal Code and reproduced in penal legislation in Malaysia, Nigeria, Pakistan, Singapore, Zimbabwe, and elsewhere.[41]

Because criminal prohibitions of unnatural offenses were understood to pertain to penetrative, non-procreative oral and anal sex, Henry Labouchere introduced Section 11 of the Criminal Law Amendment Act of 1885, which more generally criminalized "gross indecency" between men.[42]

Throughout the British Empire, variations of these prohibitions on same-sex activity—typically encompassing either sodomy, buggery, or unnatural offenses as well as a more general prohibition of gross indecency—were introduced into legal frameworks in parts of Africa, Asia, and the Caribbean.[43]

Today, sixty-three jurisdictions criminalize consensual same-sex activity in private. Twelve of these jurisdictions categorize or arguably categorize same-sex activity as a capital offense.[44] Many of these laws convey the connotation that same-sex activity is inherently undignified or shameful, prohibiting same-sex activity as "unnatural offenses" or "carnal intercourse against the order of nature."[45] The initial codification of same-sex activity as an affront to dignity was inextricable from moral judgment, which continues to haunt litigation over same-sex activity in the present day.[46] This arises when states frame prohibitions on same-sex

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41 Douglas M. Peers, Book Review, 55 VICTORIAN STUD. 749, 749 (2013).

42 Section 11, colloquially known as the Labouchere Amendment, reads:

> Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year with or without hard labour.

Criminal Law Amendment Act 1885, 48 & 49 Vict. c. 69, § 11 (UK), *repealed and reenacted by* Sexual Offences Act of 1956, 4 & 5 Eliz. 2 c. 69, § 13 (UK); *repealed by* Criminal Law Act 1967, c. 58, sched. 3, pt. III (UK).

43 *See supra* note 33. While nearly half of the states that retain prohibitions on same-sex activity in the present day were colonized by Great Britain, some adopted or strengthened prohibitions after independence, and some did so without any obvious colonial or imperialist influence. *See Map of Jurisdictions that Criminalise LGBT People*, HUM. DIGNITY TR., https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation [https://perma.cc/CC3A-LG9D].

44 *Map of Jurisdictions that Criminalise LGBT People*, *supra* note 43.

45 Corinne Lennox & Matthew Waites, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: From History and Law to Developing Activism and Transnational Dialogues*, *in* HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH 1, 16 (Corinne Lennox & Matthew Waites eds., 2013).

46 Javin Johnson v. Att'y Gen. of St. Vincent (2024) No. SVGHCV2019/0110, paras. 262, 268–72 (ECSC) (declining to find that criminalization violated the claimants' constitutional right to freedom of expression, in part on public morality grounds); Obiri-Korang v. Att'y Gen. (2024) No.

activity as democratic expressions of public sentiment, typically in the context of arguing that courts should defer to legislative judgments about morality and that judges overstep their role by thwarting the moral judgments of the populace.[47] Courts have increasingly rejected these arguments. Many courts considering LGBT rights claims have readily affirmed that legislators may permissibly consider morality and public sentiment when creating law, including criminal law, but have also guarded the judiciary's role in determining whether the resulting laws fall afoul of constitutional guarantees.[48]

Nonetheless, variations of this argument have been successful in some jurisdictions, both historically and in the present day. In some instances, courts have expressly deferred to the moral sentiments of the general public. This is particularly true in older cases, like *Bowers v. Hardwick* in the United States, *Banana v. State* in Zimbabwe, and *Kanane v. State* in Botswana, where courts upheld prohibitions on same-sex activity in part by finding that criminal law could permissibly codify the moral judgment of a majority who did not yet favor recognition of LGBT rights under the law.[49] Justice McNally, writing for the majority in *Banana*, thus suggested in upholding Zimbabwe's sodomy law that:

> I do not believe that the "social norms and values" of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matter[s] of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal. I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal

J1/18/2021, paras. 53–54 (Ghana) (emphasizing that criminal law is shaped by public morality); *id.* paras. 58–67 (Kulendi, J., concurring) (reiterating that the right to privacy can be limited for the protection of health or morals); Akster v. Dir. Pub. Prosecutions [2024] MWHC 25, paras. 438–42 (Malawi) (concluding that the preservation of public morals is a valid reason to limit the right to personal liberty).

47 For additional discussion of the treatment of morality by domestic courts, particularly the distinction some courts have drawn between popular morality and constitutional morality, *see* Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing "Morals" in Human Rights Law*, 59 HARV. INT'L L.J. 197, 223–28 (2018).

48 This emphasis on the role of courts in judicial review generally has been a feature even in decisions that ultimately upheld restrictions on LGBT rights. *See* Tan Eng Hong v. Att'y Gen. (2012) SGCA 45, paras. 61, 99, 143, 168, 170 (Sing.).

49 Banana v. State, (2000) 4 LRC, 621, 645–46 (Zim.); Bowers v. Hardwick, 478 U.S. 186, 186 (1986); Kanane v. State, (2003) (2) BLR 64 (CA) (Bots.).

> interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.[50]

The emphasis on deference to popular morality has continued to arise in some contemporary cases, where LGBT litigants have failed in their challenges based in part on judicial assessments of the moral stakes of LGBT rights.[51] In 2019, for example, the High Court of Kenya based its decision in *EG v. Attorney General* to uphold criminal prohibitions on same-sex activity in part on public opposition to LGBT rights more generally.[52] The petitioners in that case had pointed to the constitutional guarantees of dignity and privacy, arguing that the prohibitions on same-sex activity ran afoul of these explicit guarantees.[53] The panel, however, disagreed. According to the High Court, "while courts may not be dictated to by public opinion, they would still be loath to fly in the face of such opinion," particularly "where the will of the people is expressed in the Constitution." [54] They then reasoned that Article 45(2) of the constitution, crafted as part of a deliberative and participatory constitutional reform process in 2010, recognizes that "[e]very adult has the right to marry a person of the opposite sex," and that this was generally understood to constitutionally prohibit recognition of same-sex marriages.[55] The High Court of Kenya concluded that the "spirit, purpose and intention" of Article 45(2) as an expression of majority sentiment precluded any finding that criminal penalties for engaging in same-sex activity violated petitioners' rights to dignity or privacy.[56]

Elsewhere, courts have more squarely framed the preservation of laws prohibiting same-sex activity as a matter of structural deference to the political branches, particularly the legislative branch, in their role as representatives of the national will. One of the most vivid examples of a court deferring to legislative judgment is the lengthy litigation over Sections 377 and 377A in Singapore. Like many other countries,

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50 *Banana*, (2000) 4 LRC, at 670–71. Botswana's Supreme Court similarly expressed deference to public sentiment in upholding their country's sodomy law. *Kanane*, (2003) (2) BLR 64 ("[W]hile the courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature").

51 In addition to recent litigation in Kenya, discussed *infra* note 52, public opinion expressed through legislation historically has been decisive in appellate decisions on the constitutionality of laws against same-sex activity in both Singapore and India. *See* Koushal v. Naz Found., AIR 2014 SC 563, paras. 32–33 (2013) (India); Lim Meng Suang v. Att'y Gen. [2013] 3 SLR 118, paras. 84–86, 100, 110 (Sing.).

52 EG v. Att'y Gen. (2019) eK.L.R. paras. 402–06 (H.K.C.) (Kenya).

53 *Id.* paras. 59(a), 62.

54 *Id.* paras. 402–03.

55 CONSTITUTION art. 45(2) (2010) (Kenya).

56 *EG*, eK.L.R. paras. 395–97.

Singapore criminalized both "carnal intercourse against the order of nature" under Section 377 and "gross indecency" between men under Section 377A of the Penal Code.[57] Parliament repealed Section 377 in revisions to its Penal Code in 2007,[58] but retained Section 377A in what the government billed as a compromise measure.[59] While Section 377A would remain on the books to signal moral disapproval of same-sex activity, it would not be enforced against men engaging in consensual sexual activity in private.[60]

Beginning in 2010, advocates in Singapore repeatedly mounted legal challenges to Section 377A, generating three decisions from the Court of Appeal in *Tan Eng Hong v. Attorney General* in 2012, *Lim Meng Suang v. Attorney General* in 2014, and *Tan Seng Kee v. Attorney General* in 2022.[61] These challenges were ultimately dismissed, in part because the court reasoned that Parliament was especially well-positioned to resolve the issue and had forged a compromise that reflected the social values of the people of Singapore.[62] The Court of Appeal also took notice of the Attorney General's statement in 2018 that his office generally would not prosecute offenses under Section 377A, deeming the nonenforcement policy a legally significant piece of the "political package" around Section 377A.[63] Ultimately, the majority in *Tan Seng Kee* concluded that "the court should strive to honour and give legal effect to that compromise as far as practicable," and upheld Section 377A with the caveat that the government must announce any change in the nonenforcement policy to avoid infringing on the substantive legitimate expectations of gay and bisexual men who had been told they would not face prosecution for private, consensual sex.[64] Months after the Court of Appeal's decision in *Tan Seng Kee*, the government announced that it would repeal Section 377A as part of a new political compromise that would decriminalize

57 Penal Code 1871, c. 224, § 377 (Sing.); *id.* § 377A.

58 Penal Code (Amendment) Act 2007 (Act No. 51/2007), § 70 (Sing.).

59 *See* Andrew Yu & Stephanie Kwan Nga Lam, *Decriminalising Homosexuality in Singapore: Political Responses from the Perspective of Secularism and Electoral Pragmatism*, 112 ROUND TABLE: COMMONWEALTH J. INT'L AFFAIRS 163, 164–66 (2023) (describing the 2007 debates and the elimination of Section 377).

60 For more on the history of the political compromise and early litigation over Sections 377 and 377A, *see* Lynette J. Chua, *The Power of Legal Processes and Section 377A of the* Penal Code*:* Tan Eng Hong v. Attorney General, 2012 SING. J. LEGAL STUD. 457 (2012).

61 Tan Eng Hong v. Att'y Gen., (2012) SGCA 45, para. 2 (Sing.); Lim Meng Suang v. Att'y Gen., (2014) SGCA 53, paras. 2–3 (Sing.); Tan Seng Kee v. Attorney General, (2022) SGCA 16, para. 1 (Sing.).

62 Tan Eng Hong v. Att'y Gen., (2013) SGHC 199, para. 94 (Sing.); *Lim Meng Suang*, (2014) SGCA 53, paras. 177, 189–90; *Tan Seng Kee*, (2022) SGCA 16, paras. 1–10, 112.

63 *Tan Seng Kee*, (2022) SGCA 16, paras. 66–67.

64 *Id.* para. 110.

same-sex activity while adopting a constitutional prohibition on same-sex marriage to insulate that issue from the kinds of legal challenges that had arisen around Section 377.[65]

The decisions in *EG* and *Tan Seng Kee*, along with the recent judgments upholding laws criminalizing same-sex activity in *Javin Johnson v. Attorney General* in Saint Vincent and the Grenadines, *Hon. Fox Odoi v. Attorney General* in Uganda, *Akster v. Director of Public Prosecutions* in Malawi, and *Obiri-Korang v. Attorney General* in Ghana are outliers in recent jurisprudence.[66] Nevertheless, they represent a reticence among some courts to override popular opposition to LGBT rights in the name of dignity or other constitutional values. This is not entirely surprising. Even in contexts where same-sex activity has been decriminalized, the politics of shame and respectability continue to powerfully shape the regulation of sex and sexuality.[67] Recent efforts to limit teaching about sexual orientation or gender identity, police drag performance and other forms of queer expression, and deny transgender people access to public spaces have all invoked the idea that public articulations of queerness are inappropriate and therefore unworthy of legal protection.[68] While the charged rhetoric of abomination and beastliness has been largely (though not entirely) abandoned by states promulgating or defending these types of laws against constitutional

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65 Elaine Pearson & Graeme Reid, *Singapore to Decriminalize Gay Sex*, HUM. RTS. WATCH (Aug. 22, 2022, 2:21 PM), https://www.hrw.org/news/2022/08/22/singapore-decriminalize-gay-sex [https://perma.cc/5XBV-Y4ZL].

66 Javin Johnson v. Att'y Gen. of St. Vincent (2024) No. SVGHCV2019/0110 paras. 262, 268–72 (ECSC); Obiri-Korang v. Att'y Gen. (2024) No. J1/18/2021 (Ghana); Akster v. Dir. Pub. Prosecutions [2024] MWHC 25 (Malawi); Hon. Fox Odoi v Att'y Gen. [2024] UGCC 10 (Uganda). In 2023, the Supreme Court of Jamaica also rejected a constitutional challenge to laws prohibiting same-sex activity, but did so on technical grounds related to the country's savings law clause rather than a substantive evaluation of the constitutionality of the relevant penal provisions. Tomlinson v. Att'y Gen. [2023] JMFC Full 5 (Jam.).

67 For perspectives on the reclamation of gay shame in the face of a political emphasis on pride and assimilation, see generally GAY SHAME (David M. Halperin & Valerie Traub eds., 2009); Leo Bersani, *Shame on You*, *in* AFTER SEX? ON WRITING SINCE QUEER THEORY 91 (Janet Halley & Andrew Parker eds., 2011).

68 *See, e.g.*, Lauretta Brown, *U.S. Bishops Approve Plan for Guidance to Health Care Institutions on Transgender Issues*, CATH. NEWS AGENCY (June 16, 2023, 4:05 PM), https://www.catholicnewsagency.com/news/254597/us-bishops-approve-plan-for-guidance-to-catholic-healthcare-institutions-on-transgender-issues [https://perma.cc/63YH-3JNP] (describing Catholic guidance on gender-affirming care and its "incompatibility with the Church's teaching on sex and the dignity of the human person"); Jonah McKeown, *Notre Dame Students Defend 'Dignity and Sanctity of Women' Ahead of Campus Drag Show*, CATH. NEWS AGENCY (Oct. 27, 2023, 10:45 AM), https://www.catholicnewsagency.com/news/255834/notre-dame-students-defend-dignity-and-sanctity-of-women-ahead-of-campus-drag-show [https://perma.cc/ZSW5-WX9G] (describing student protests that characterized drag as an affront to the dignity of women).

challenges,[69] the implication of indecency remains a central feature of contemporary legislation and litigation around LGBT issues.

As a constitutional value, certain conceptions of dignity do not necessarily preclude the preservation of anti-LGBT legislation, a point to which I return below. A generic commitment to dignity may elevate the dignities of an imagined public, vocal objectors, or public institutions over the dignity of sexual minorities, with predictably detrimental effects for sexual rights. Nonetheless, in practice, it has been more common in recent years for dignity to function as a rationale for repealing prohibitions on same-sex activity and recognizing LGBT rights, with this dignification of queerness accelerating significantly in the last decade.

B. *The Dignification of Queerness*

Despite a long history of legislative and judicial disparagement of queer conduct and expression, dignity's privileged position in human rights instruments and post-war constitutions has made it a compelling tool for litigants challenging the injustice of restrictive laws. LGBT people have often pointed to dignity when confronting prohibitions on same-sex activity, as well as refusals to register civil society organizations that work for LGBT rights, restrictive understandings of romantic and familial relationships, and constraints on the rights and recognition of transgender people.[70] In response, courts increasingly have taken up dignity in their reasoning, not only upholding LGBT rights but often pointedly dignifying queer sex, expression, and relationships in the process.[71]

The area where dignity's ascendence has been most pronounced is the invalidation of laws against same-sex activity, particularly in parts of the world that were colonized by the British Empire.[72] Where the

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69 *See, e.g.*, Kaylee Douglas, *State Senator Calls 2SLGBTQ+ Oklahomans 'Filth' After Question on Legislation and Nonbinary Student's Death*, KFOR (Feb. 24, 2024, 1:37 PM), https://kfor.com/news/local/state-senator-calls-2slgbtq-oklahomans-filth-after-question-on-legislation-and-nonbinary-students-death [https://perma.cc/4X3S-ZXK6]; Zoë Richards, *Florida GOP Legislator Apologizes After Calling Transgender People 'Mutants' and 'Demons,'* NBC NEWS (Apr. 10, 2023, 11:40 PM), https://www.nbcnews.com/politics/politics-news/florida-legislator-apologizes-calling-transgender-people-mutants-demon-rcna79063 [https://perma.cc/E4DU-HMMM].

70 *See infra* notes 100, 106.

71 As discussed below, however, this dignifying function has limits and circumscribes which forms of queer sex, relationships, and expression are worthy of protection. *See infra* Part V.

72 *See* LYNETTE J. CHUA, MOBILIZING GAY SINGAPORE: RIGHTS AND RESISTANCE IN AN AUTHORITARIAN STATE 134–36 (2014) (examining decriminalization challenges in Singapore); GUPTA, *supra* note 33; ADRIAN JJUUKO, STRATEGIC LITIGATION AND THE STRUGGLE FOR LESBIAN, GAY AND BISEXUAL EQUALITY IN AFRICA 58–63 (2020) (examining decriminalization challenges in South Africa, Botswana, Kenya, Nigeria, and Uganda).

judiciary has invalidated these laws, they have almost always invoked dignity in their decisions.[73] In the late 1990s and early 2000s, this dignification of queerness was first evident in early decisions in South Africa, the United States, and Fiji.[74] More recently, dignity has been invoked in a series of decriminalization decisions, with restrictions being struck down by courts in Belize in 2016,[75] India in 2009 and again in 2018,[76] Trinidad and Tobago in 2018,[77] Botswana in 2019,[78] Saint Kitts and Nevis in 2022,[79] Antigua and Barbuda in 2022,[80] Barbados and Mauritius in 2023,[81] and Dominica and Namibia in 2024.[82] Courts in other countries have also expressed skepticism about criminal prohibitions on same-sex activity on substantive grounds or declined to enforce them, albeit without the precedential force to decriminalize same-sex activity nationally.[83] As discussed below, each of these decisions

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73 Many other countries have repealed sodomy laws through the legislative process, although this has sometimes been in response to regional or international judgments condemning existing laws as a violation of human rights. *See, e.g.*, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) paras. 35–38 (1988); Toonen v. Australia, U.N. GAOR Hum. Rts. Comm., 50th Sess., para. 7.2, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

74 *See* McCoskar v. State (2005) FJHC 500 (Fiji); *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) paras. 36, 106 (S. Afr.); Lawrence v. Texas, 539 U.S. 558, 558 (2003). While Ecuador decriminalized same-sex activity in 1997, that brief decision did not rest on dignity as a foundational value, in part because it cast homosexuality as a medical disorder rather than something that should be subject to penal sanction. *See Case No. 111-97-TC, Constitutional Tribunal of Ecuador (27 November 1997)*, INT'L COMM'N OF JURISTS (Nov. 27, 1997), https://www.icj.org/sogicasebook/case-no-111-97-tc-constitutional-tribunal-of-ecuador-27-november-1997 [https://perma.cc/7KY3-W9JR].

75 Orozco v. Att'y Gen. (2016) 90 WIR 161 (Belize Sup. Ct.), *aff'd* Att'y Gen. v. Orozco, (2019) BZCA 32 of 2016 (Belize C.A.).

76 While the Delhi High Court decriminalized same-sex activity in 2009, see Naz Found. v. Gov't of NCT of Delhi & Others, AIR 2009 Del paras. 131–32 (Del. H.C.), the Indian Supreme Court subsequently reversed that ruling and recriminalized same-sex activity in 2014, see Koushal v. Naz Found., AIR 2014 SC 563 paras. 54–55 (India). The Indian Supreme Court then revisited the issue and finally decriminalized same-sex activity nationwide in 2018, see Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).

77 Jones v. Att'y Gen. (2018) CV2017-00720 paras. 2–4 (Trin. & Tobago High Ct.).

78 Motshidiemang v. Att'y Gen. (2019) MAHGB-000591-16 para. 226 (Bots. High Ct.), *aff'd* Att'y Gen. v. Motshidiemang (2021) CACGB-157-19 paras. 116–18 (Bots. C.A.).

79 Jeffers v. Att'y Gen. (2022) No. SKBHCV2021/0013 (St. Kitts & Nevis).

80 Orden David v. Att'y Gen. of Ant. & Barb. (2022) No. ANUHCV2021/0042 para. 1 (ECSC).

81 Holder-McClean-Ramirez v. Att'y Gen. (2023) No. CV 0044 of 2020 (Barb. High Ct.); Ah Seek v. Mauritius (2023) No. 119259 (Mauritius).

82 B.G. v. Att'y Gen. (2024) No. DOMHCV2019/0149 (Dominica); Dausab v. Minister of Just. (2024) NAHC 331 (Namib.).

83 Lebanon, which primarily uses a civil law system, is one example. *See Lebanon Court Dismisses Case Against Transgender Woman*, HUM. RTS. FIRST (Mar. 12, 2014), https://humanrightsfirst.org/library/lebanon-court-dismisses-case-against-transgender-woman

foregrounded human dignity in their reasoning to various degrees, framing laws against same-sex activity not as an instrument to preserve dignity but as a threat to it.[84]

Even in countries that have retained criminal prohibitions on same-sex activity, dignity has played an important role in cabining the scope and implications of those restrictions. In at least one instance, dignity has featured heavily in legal challenges to the practices used to "prove" same-sex activity for the purposes of criminal prosecution. In *COI and GMN v. Chief Magistrate Ukunda Law Courts*, decided in 2018, Kenya's court of appeal overturned a lower court ruling to hold that imposing anal examinations on those suspected of being LGBT violated their constitutional rights.[85] The claimants alleged that the examination was inhuman and degrading for a variety of reasons, including that they did not consent to the procedure, that it was performed in front of medical and police personnel, and that objects were inserted into their anuses, and therefore contended that it violated the rights to dignity and privacy under Articles 28 and 31 of Kenya's constitution.[86] Kenya's court of appeal agreed, and centered dignity in its evaluation of the claims.[87] As the panel observed, even in a jurisdiction where same-sex activity remains criminalized, "one is, by virtue of being human, worthy of having his or her dignity or worth respected."[88] The court of appeal ultimately held that the examinations were a violation of the right to dignity under Article 28, among other constitutional provisions.[89] While the case revolved around practices used by law enforcement rather than any substantive provisions of criminal law, the judgment recognized a baseline level of dignity to which LGBT people are entitled, even when their sexual conduct remains criminalized.

Dignity has also appeared in decisions vindicating other human rights enjoyed by LGBT individuals in contexts where same-sex activity

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[https://perma.cc/76FS-GBZK]; Graeme Reid, *Lebanon Edges Closer to Decriminalizing Same-Sex Conduct*, HUM. RTS. WATCH (Feb. 2, 2017, 1:40 PM), https://www.hrw.org/news/2017/02/02/lebanon-edges-closer-decriminalizing-same-sex-conduct [https://perma.cc/UU3Y-8VJE]; *Lebanon: Same-Sex Relations Not Illegal*, HUM. RTS. WATCH (July 19, 2018, 12:00 AM), https://www.hrw.org/news/2018/07/19/lebanon-same-sex-relations-not-illegal [https://perma.cc/XSB4-CFJ3].

84 *See infra* Parts III–IV.

85 COI v. Chief Magistrate Ukunda L. Cts. (2018) eK.L.R. No. 56/2016 paras. 2–3, 37 (C.A.K.) (Kenya).

86 *Id.* paras. 5–6.

87 *Id.* para. 22 ("In determining whether the examination in question was lawful and/or reasonable, we have to give regard to the centrality of human dignity in the recognition and protection of fundamental freedoms and rights.").

88 *Id.* para. 26.

89 *Id.* para. 37.

is criminalized. In Uganda, for example, litigants in the early 2000s successfully challenged mistreatment by state officials and private actors in two cases at a time when Section 145 of the Penal Code prohibited same-sex activity as an "unnatural offense" with a possible punishment of life imprisonment.[90] In both of these cases, the courts relied on dignity and the prohibition of inhuman and degrading treatment under Uganda's constitution as a central justification in ruling for LGBT litigants.[91] In the first, an LGBT human rights activist's home was raided,[92] his property was seized, and a houseguest who was present at the home was detained, ridiculed, forced to strip, fondled, referred to as a "creature," and denied access to a bathroom until she urinated on herself.[93] The High Court of Uganda agreed with the applicants that this treatment "is humiliating, and degrading and contravened Article 24 of the Constitution which militates against torture, cruel, inhuman and degrading treatment," and awarded the houseguest significant compensation for the "humiliation, injury and trauma" she suffered at the hands of the state.[94] In the second, three LGBT activists sued a tabloid that posted photos of LGBT individuals accompanied by warnings that they were recruiting children and urging that they be hung.[95] The applicants argued that this jeopardized their right to dignity and protection from inhuman treatment, their right to life, their right to liberty and freedom of movement, and their right to privacy.[96] The court agreed that the tabloid publisher had contravened their right to dignity, among other rights. It found that the suggestion that the applicants were pedophiles and should be killed functioned to separate them "from the other members of the community who are regarded as worthy, in equal measure, of human dignity and who ought to be treated as worthy of dignity and respect" and observed that "[i]f a person is only worthy of death, and arbitrarily, then that person's human dignity is placed at the

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90 Xavier B. Lutchmie Persad, Note, *Homosexuality and Death: A Legal Analysis of Uganda's Proposed Anti-Homosexuality Bill*, 6 FLA. A&M U.L. REV. 135, 138–40 (2010) (discussing proscriptions of same-sex activity before and after the passage of the Anti-Homosexuality Bill of 2009).

91 CONSTITUTION art. 24 (2017) (Uganda) (under the heading of "respect for human dignity and protection from inhuman treatment," guaranteeing that "[n]o person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment").

92 While the opinion uses she/her pronouns to refer to both applicants, this Article uses he/him pronouns here to reflect that the first applicant, Victor Mukasa, is a transgender man.

93 Mukasa v. Att'y Gen. (2008) No. 247/06, at 2–4 (High Ct.) (Uganda).

94 *Id.* at 18–20.

95 Xan Rice, *Ugandan Paper Ordered to Stop Printing List of Gay People*, THE GUARDIAN (Nov. 1, 2010), https://www.theguardian.com/world/2010/nov/01/uganda-paper-gay-list [https://perma.cc/T9XJ-D6TG].

96 Kasha Jacqueline v. Rolling Stone Ltd. (2010) No. 163/10 4–5 (High Ct.) (Uganda).

lowest ebb."[97] The fact that same-sex activity is a criminal offense in Uganda was noted in both opinions, but judges in both cases maintained that the existence of that offense does not diminish the dignity and protection from inhuman and degrading treatment that LGBT people enjoy.[98]

Dignity's reach in the criminal law context has also extended to laws criminalizing gender expression. Relatively few states have laws that overtly criminalize transgender identity and expression[99]—although laws on loitering, solicitation, and other petty offenses are often marshalled for that purpose in practice—and Guyana's law to that effect was struck down by the Caribbean Court of Justice in *McEwan v. Attorney General* in 2018.[100] In the first paragraph of the decision, the court underscored the dignitary stakes of the case and stressed that "[n]o one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order."[101] The petitioners did not primarily frame their case as a violation of the right to dignity, and instead alleged that the law violated the freedom from discrimination, right to equality before the law, and freedom of expression.[102] Nonetheless, the court centered dignity in its interpretation of these guarantees.[103] Although gender identity is not enumerated as a protected classification in Guyana's constitutional text, the court emphasized that "[t]he constitutional promise of equality prohibits the State from prescribing legislative distinctions or other measures that treat a group of persons as second-class citizens or in any way that otherwise offends their dignity as human beings."[104] In doing so, it reached the conclusion that the applicants' rights had been violated by enforcement of the law.[105]

These debates about criminal prohibitions of same-sex activity and gender expression have had wider repercussions for dignitary reasoning around LGBT rights. LGBT litigants have had relatively consistent success of late, for example, in cases challenging state refusals to register

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97 *Id.* at 8–9.

98 *Mukasa*, No. 247/06, at 18; *Kasha Jacqueline*, No. 163/10, at 9.

99 According to the Human Dignity Trust, transgender people are vulnerable to criminal punishment for expressing their gender identity in fourteen countries under laws that criminalize cross-dressing, impersonation, or disguise, with many other countries policing gender expression under laws against same-sex activity or public order offenses. *See Map of Jurisdictions that Criminalise LGBT People*, *supra* note 43.

100 McEwan v. Att'y Gen. (2018) CCJ 30 (AJ) (Guy.).

101 *Id.* para. 1.

102 *Id.* para. 28.

103 *Id.* paras. 64–65, 68–69 (discussing the link between dignity and equality).

104 *Id.* para. 66.

105 *Id.* para. 147.

LGBT nongovernmental organizations (NGOs). While this is nominally distinct from the criminalization of same-sex activity, the denial of registration typically arises in contexts where statutory prohibitions on same-sex activity have been invoked to justify the prohibition of LGBT NGOs. Courts in Botswana and Kenya have relatively recently rejected interference with the registration of LGBT rights NGOs, and both invoked dignity in their judgments.[106] In Botswana, this victory laid the groundwork for a subsequent challenge to criminal provisions against same-sex activity,[107] while in Kenya, the courts have maintained that LGBT people have a constitutional right to organize and advocate even as criminal prohibitions against same-sex activity remain in place.[108]

Finally, in some jurisdictions, dignity has not only been extended to same-sex activity, but has compelled or informed state recognition of same-sex relationships.[109] The most well-known examples are the Constitutional Court of South Africa's ruling in *Minister of Home Affairs v. Fourie* and the United States Supreme Court's ruling in *Obergefell v. Hodges*, where the courts repeatedly invoked dignity in their recognition of a constitutional right to marry for same-sex couples.[110] But other courts have done so as well, most notably in decisions recognizing the rights of same-sex couples who married in other jurisdictions. For example, in 2023, courts in Namibia and Nepal ordered their governments to recognize foreign same-sex marriages for immigration purposes, and both relied on the right to dignity to do so.[111]

Although dignity has been a central thread in the transformation of same-sex activity from a criminal vice to a constitutional right, jurisdictions that have codified dignity into their constitutions have done so in very different ways. As this Article notes below, much of the legal scholarship on dignity as a constitutional right has focused on the particular ways that dignity has been codified into constitutional texts, and how that might affect constitutional jurisprudence. The following Part considers how dignity has formally factored into judicial evaluations

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106 Rammoge v. Att'y Gen. (2014) MAHGB-000175-13 (Bots. High Ct.), *aff'd* Att'y Gen. v. Rammoge (2016) CACGB-128-24 (Bots. C.A.); Gitari v. Non-Governmental Orgs. Coordination Bd. (*Gitari I*) (2015) eK.L.R. No. 440/2013 (H.C.K.) (Kenya), *aff'd* Non-Governmental Orgs. Coordination Bd. v. Gitari (*Gitari II*) (2019) eK.L.R. No. 145/2015 (C.A.K.) (Kenya), *aff'd* Non-Governmental Orgs. Coordination Bd. v. Gitari (*Gitari III*) (2023) eK.L.R. No. 19/2019 (S.C.K) (Kenya).

107 *See* Motshidiemang v. Att'y Gen. (2019) MAHGB-000591-16 (Bots. High Ct.).

108 *See* EG v. Att'y Gen. (2019) eK.L.R. No. 150/2016 (H.C.K.) (Kenya).

109 Finck, *supra* note 4.

110 *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.); Obergefell v. Hodges, 576 U.S. 644 (2015).

111 Pokhrel v. Ministry of Home Affairs (2023) 079-WO-0198 (Nepal); Digashu v. Gov't of the Republic of Namibia (2023) SA 7/2022 (Namib.).

of LGBT rights—and how much that codification has mattered in practice—before turning to the specific arguments about the dignitary stakes of sexual regulation that judges are practically making in the process of dignifying these rights claims.

III. DIGNITY AS A CONSTITUTIONAL VALUE

While dignity has become a prominent and foundational concept in both international and domestic legal orders, its form and content have varied widely. As other scholars have noted, dignity has been alternately centered as a value animating human rights instruments and national constitutions and as a justiciable right, sometimes performing both functions in the same text.[112] While some argue that dignity should primarily function as an interpretive value and is conceptually challenging as a standalone right,[113] several jurisdictions do recognize and operationalize a right to dignity in their jurisprudence.[114] This Part examines three ways that dignity has arisen in constitutional litigation over criminal prohibitions on same-sex activity,[115] focusing in turn on dignity as a standalone right, dignity as a constitutive value that shapes other substantive guarantees,[116] and dignity as a limiting principle that cabins the state's interest in restricting individual rights.[117]

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112 For discussions of dignity's function as either a value or right, see DALY, *supra* note 9, at 25 ("Dignity, like constitutions generally, reflects both rights and values; in any given constitution, dignity may be one or the other or both, or it may be impossible to discern which the drafters envisioned."); O'Mahony, *supra* note 23, at 559 (distinguishing dignity's role as "a foundational principle which is a source of, and justification for, human rights norms" from its role as "a human right in itself—i.e., a right to dignity, or to be treated with dignity, or to lead a dignified life"); Gosego Rockfall Lekgowe, *A New Dawn for Gay Rights in Botswana: A Commentary on the Decision of the High Court and Court of Appeal in the* Motshidiemang *Cases*, 67 J. AFR. L. 477, 480–81 (2023) (noting that dignity can function both as a value and as a right, and in Botswana's constitutional jurisprudence it is best understood as a value).

113 *See* O'Mahony, *supra* note 23, at 559–65; Shulztiner & Carmi, *supra* note 9, at 481.

114 BARAK, *supra* note 9, at 225–307 (examining dignity's role in the jurisprudence of Germany, South Africa, and Israel).

115 *Id.* at 103–13.

116 Shulztiner & Carmi, *supra* note 9, at 473–76 (discussing the 97 of 162 sovereign countries that referenced dignity in the preambles or fundamental principles of their constitutions as of 2012); *id.* at 476 (discussing the 141 of 162 sovereign countries that referenced dignity in constitutional articles as of 2012).

117 Using dignity as a limitation on state interests is distinct from an additional use of dignity as a limitation on rights or source of duties, as discussed below. *See id.* at 483–89; Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 801 (1986); Shultziner, *supra* note 26, at 466–79.

A. *Dignity as a Standalone Right*

Of the jurisdictions that have vindicated LGBT rights claims in recent years, some expressly recognize dignity as a standalone right. The constitutions of Belize, Kenya, Namibia, Nepal, and South Africa, for example, recognize a right to dignity in their texts.[118] These judiciaries have had to evaluate whether bans on same-sex activity and other restrictions of LGBT rights comport with an express constitutional guarantee of dignity. The standalone right to dignity has been enormously influential in Nepal and South Africa,[119] as I discuss below, and has consistently shaped jurisprudence relating to LGBT rights issues in these countries. After the Supreme Court of Namibia held that refusing to recognize a foreign same-sex marriage violated the constitutional right to dignity, the high court of Namibia similarly reasoned from the standalone right to dignity to decriminalize same-sex activity.[120] While it remains to be seen whether Kenya's appellate courts will look to the right to dignity in the decriminalization context specifically,[121] those courts have previously relied on dignitary reasoning in a decision vindicating the right to register LGBT NGOs.[122]

South Africa's dignity jurisprudence is arguably the most robust and thorough of the domestic judiciaries that have considered the dignity of LGBT applicants. It also stretches back the farthest, with dignity providing a central justification for legal recognition of LGBT rights from

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118 CONST. OF BELIZE Sept. 21, 1981 (rev. 2011), § 3; CONSTITUTION art. 28 (2010) (Kenya) ("Every person has inherent dignity and the right to have that dignity respected and protected."); CONST. OF NEPAL 2016, art. 16 ("Each person shall have the right to live with dignity."); NAMIB. CONST. 2014, art. 8 ("The dignity of all persons shall be inviolable."); S. AFR. CONST., 2012 § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected.").

119 *See, e.g.*, LAURIE ACKERMANN, HUMAN DIGNITY: LODESTAR FOR EQUALITY IN SOUTH AFRICA (2012); THE DIGNITY JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA, VOLS. I & II (Drucilla Cornell et al. eds., 2013); Lakshmi v. Nepal, Order Writ No. WO-0757 of year 2063 B.S. (2006 A.D.) (Sup. Ct.), *translated in* LANDMARK DECISION OF SUPREME COURT OF NEPAL ON ABORTION RIGHTS 1, 17–18, 20, 23 (Ctr. for Reprod. Rts. & F. for Women, L. & Dev. trans.), https://reproductiverights.org/wp-content/uploads/2021/07/Laxmi-dhitta1-endnote.pdf [https://perma.cc/6UNB-N7GS] (invoking the right to dignity to find a fundamental right to access abortion).

120 Digashu v. Gov't of the Republic of Namibia (2023) SA 7/2022 (Namib.); Dausab v. Minister of Just. (2024) NAHC 331 (Namib.).

121 Friedel Dausab, the plaintiff in Namibia's decriminalization case, specifically argued that the criminalization of same-sex activity violated his right to dignity as well as equality and freedom of association. *See* Lisa Ossenbrink, *Could Namibia Decriminalise Same-Sex Relations?*, OPENLY, Nov. 21, 2023, https://www.openlynews.com/i/?id=89247a98-bec0-48df-b79d-4dd1e7a1ef56 [https://perma.cc/4RDG-LVDH].

122 Non-Governmental Orgs. Coordination Bd. v. Gitari (2023) eK.L.R. No. 19/2019 (S.C.K) (Kenya).

1998 to the present. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, South Africa's post-apartheid constitutional court considered the legality of Section 20A of the Sexual Offences Act, a criminal law prohibiting same-sex activity.[123] In addition to its equality analysis, the court went further to find that the common law crime of sodomy also infringed the right to dignity under Section 10 of the constitution. In a lengthy discussion of the value of dignity, Justice Ackermann underscored that "the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society." [124] Drawing from the unique historical experience of South Africa, Justice Ackermann explained:

> Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.[125]

Justice Sachs, concurring, placed dignity in an even more central position in the constitutional framework. He argued that "the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity."[126] In so doing, he emphasized that the majority had gone beyond a formal equality analysis to be sensitive to the ways in which anti-gay prejudice specifically harms the dignity of gay, lesbian, and bisexual people. In the context of the post-apartheid turn to democracy, Justice Sachs also suggested that the court's favorable constitutional judgment itself bestowed dignity, suggesting that "[f]rom today a section of the community can feel the equal concern and regard of the Constitution and enjoy lives less threatened, less lonely and more dignified."[127] In Justice Sachs' view, state recognition not only vindicated the dignity of LGBT people, but heightened it.

The standalone right to dignity in South Africa served to validate expressions of same-sex intimacy in private, but also paved the way for litigants to obtain positive public recognition from the state. In a string of cases dealing with immigration rights, employment benefits, parental rights, and the right to marry, the Constitutional Court consistently

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123 *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) (S. Afr.); Sexual Offences Act 23 of 1957 § 20A (S. Afr.).

124 *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) para. 28 (S. Afr.).

125 *Id.*

126 *Id.* para. 120 (Sachs, J., concurring).

127 *Id.* para. 130 (Sachs, J., concurring).

emphasized that the standalone right to dignity provides support for LGBT rights alongside and in addition to an equality framework.[128] In this line of cases, the right to dignity was invoked to underscore the stigmatic harm that accompanies the refusal of state recognition, violating equality and nondiscrimination guarantees but also inflicting a unique dignitary injury that is cognizable under the law.

While Nepal's jurisprudence of dignity is newer and less comprehensive, dignity also operates as a standalone constitutional right, and has thus far appeared in two landmark decisions recognizing and protecting a sweeping range of LGBT rights. In *Sunil Pant v. Nepal*, a 2007 decision that affirmed constitutional equality for LGBT people, the Supreme Court of Nepal underscored that Article 12 of the interim constitution "provides that every person shall have the right to live with dignity," and that LGBT people "should be entitled to live in the society enjoying all the freedoms with dignity" including "the right to have one's own identity."[129] More recently, in *Pokharel v. Ministry of Home Affairs*, the Supreme Court of Nepal reiterated that approach by invoking Article 16's right to dignity, Article 17's right to freedom, and Article 18's right to equality under the 2015 constitution, and concluding that these align to protect recognition of foreign same-sex marriages under domestic law.[130]

Dignity's codification as a standalone right in a constitutional text, however, is not a prerequisite for finding a right to dignity. In some instances, dignity has been invoked by courts as a right even when it does not expressly appear in the constitution. The Constitution of Botswana, for example, does not mention the word "dignity,"[131] yet dignity was foundational to decisions affirming both the right to engage in same-sex activity and the right to form and register LGBT associations.[132] In *Motshidiemang v. Attorney General*, which struck down Botswana's ban on same-sex activity, Botswana's High Court and court of appeal invoked dignity as both a value and a right in itself.[133] The judiciary did so as well in cases involving the registration of an LGBT rights organization and legal gender recognition, suggesting a consistent commitment to dignity

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128 *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs* 2000 (2) SA 1 (CC) (S. Afr.); *Satchwell v. President of the Republic of S. Afr.* 2002 (6) SA 1 (CC) (S. Afr.); *Du Toit v. Minister of Welfare & Population Dev.* 2003 (2) SA 198 (CC) (S. Afr.); *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.).

129 Sunil Pant v. Nepal (2007) No. 917 of 2064 BS (Sup. Ct.), *translated in* 2 NJA L.J. 262, 284 (trans. Yadav Pokharel 2008) (Nepal).

130 Pokhrel v. Ministry of Home Affairs (2023) Order 079-WO-0198, para. 15 (Nepal).

131 CONST. OF BOTS. 1966 (rev. 2016).

132 *See* Lekgowe, *supra* note 112, at 480–81.

133 *Id.* at 479.

in national jurisprudence in Botswana beyond the narrow context of decriminalization.[134]

Conversely, some jurisdictions that do recognize a standalone right to dignity have stopped short of extending that right in decriminalization cases. Both Ghana and Malawi expressly recognize a right to dignity in their constitutions and, as in Kenya, courts in those countries have rebuffed constitutional challenges and retained prohibitions on same-sex activity.[135] Although litigants and amici in Malawi made a variety of arguments detailing how prohibitions on same-sex activity violated the right to dignity, the High Court summarily concluded that because the litigants had not successfully established their discrimination claim, they also had not established a violation of their right to dignity.[136] The Supreme Court of Ghana only addressed privacy, nondiscrimination, and personal liberty claims, and did not meaningfully consider whether the dignity of LGBT individuals was threatened by the retention of the country's prohibitions on same-sex activity.[137]

Thus, while dignity's overt presence as a standalone right provides a powerful tool for advocates, it has not been singularly decisive. The explicit inclusion of a right to dignity can allow dignitary claims to stand separately from other substantive rights to privacy or nondiscrimination, but courts have also centered dignity in the absence of express constitutional recognition of a standalone right, and have declined to extend a right to dignity where such a right exists. As discussed in the next Section, states without such a standalone right have drawn on other constitutional references to dignity to infuse the value into their decision-making in important ways.

B. *Dignity as a Constitutive Value*

While dignity can function as a standalone right, a more common approach is for constitutions to attend to dignity as a constitutive value in the application of other constitutional rights, either as an overarching principle in constitutional interpretation or in the context of specific substantive provisions. The Constitution of Fiji, for example, specifies that anyone interpreting or applying the provisions of the constitutional

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134 Tashwill Esterhuizen, *Decriminalisation of Consensual Same-Sex Sexual Acts and the Botswana Constitution:* Letsweletse Motshidiemang v The Attorney General (LEGABIBO as *amicus curiae*), 19 AFR. HUM. RTS. L.J. 843, 852 (2019).

135 CONST. OF GHANA 1992 (rev. 1996), art. 15 ("The dignity of all persons shall be inviolable."); CONST. OF MALAWI 1994 (rev. 2017), ch. 4, § 19 ("The dignity of all persons shall be inviolable.").

136 Akster v. Dir. Pub. Prosecutions [2024] MWHC 25 para. 443–49 (Malawi).

137 Obiri-Korang v. Att'y Gen. (2024) No. J1/18/2021 para. 52 (Ghana SC).

text must do so in a manner that is consistent with the values of a democratic society, including human dignity.[138] Other constitutions, like the Constitution of Uganda, reference human dignity in their articulation of particular rights, such as the rights of women and persons with disabilities.[139]

The recognition of dignity as a constitutive value in either a preamble or specific provisions and the codification of dignity as a standalone right are not mutually exclusive. While Belize, Kenya, Malawi, Namibia, and South Africa's constitutions recognize a standalone right to dignity, for example, they also specify that dignity is a constitutional value.[140] In some places, they further link dignity to other substantive rights guaranteed by the constitution.[141] Courts have taken that link seriously in evaluating rights claims. In *COI*, for example, Kenya's court of appeal specifically underscored that the right to privacy is bound up with dignity and that those rights together prevent the state from compelling a medical examination.[142]

Whether the commitment to dignity is merely set out in aspirational terms or is framed as a value that must be considered in judicial decision-making varies by jurisdiction. In some constitutions, it appears only or primarily in preambular language, and is framed as a value of the nation but not necessarily as a lodestar of constitutional interpretation. The only mention of dignity in the Constitution of Saint Kitts and Nevis, for example, is in the preamble, which states that "the People of Saint Christopher and Nevis declare that the nation is established on the belief

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138 CONST. OF FIJI Sept. 7, 2013, ch. 1, § 3, cl. 1.

139 CONST. OF UGANDA 1995 (rev. 2017), arts. 33, 35.

140 CONST. OF BELIZE Sept. 21, 1981 (rev. 2011), pmbl. (stating that the nation is built in part on "the dignity of the human person"); CONSTITUTION art. 10 (2010) (Kenya) (recognizing "human dignity" as a national value and saying this value binds public officials in the discharge of their duties); *see also id.* at art. 19 (indicating that a core aim of the Bill of Rights is "to preserve the dignity of individuals and communities"); CONST. OF MALAWI 1994 (rev. 2017), ch. 3, § 12(1) (recognizing as a constitutional principle that "the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights"); CONST. OF NAMIB. 1990 (rev. 2014), pmbl. (declaring that recognition of human dignity is "indispensable for freedom, justice, and peace" and declaring a national "desire to promote amongst all of us the dignity of the individual"); S. AFR. CONST., 1996, ch. 1, § 1 (recognizing "human dignity" as a foundational value of the state); *see also id.* at ch. 1, § 39 (specifying that anyone interpreting the Bill of Rights "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom").

141 CONSTITUTION art. 20(4)(a) (2010) (Kenya) (specifying that courts interpreting the Bill of Rights should promote dignity, among other values).

142 COI v. Chief Magistrate Ukunda L. Cts. (2018) eK.L.R. No. 56/2016, para. 27 (C.A.K.) (Kenya) ("The right to privacy, particularly not to have one's privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Those rights, in our view, extend to a person not being compelled to undergo a medical examination.").

in Almighty God and the inherent dignity of each individual."[143] The preambles of the constitutions of Antigua and Barbuda, Barbados, Dominica, Saint Vincent and the Grenadines, and Trinidad and Tobago similarly reference dignity as a value upon which those nations are founded, but dignity does not appear elsewhere in the constitutional text.[144] Yet despite these slight foundations, courts in each jurisdiction have considered dignity as a way of understanding the particular injustice of criminalizing same-sex activity.

Dignity can also function as a constitutive value to understand the scope of rights to life, liberty, or equality even when it does not appear in the text of particular rights guarantees. The preamble of India's constitution pledges to secure "fraternity assuring the dignity of the individual and the unity and integrity of the nation," [145] but the constitution only references dignity elsewhere in guaranteeing the dignity of women and children.[146] Nonetheless, both the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* and the Supreme Court of India in *Navtej Singh Johar v. Union of India* heavily grounded their rulings decriminalizing same-sex activity in the right to dignity, with the opinions in the latter case referencing dignity more than 200 times.[147] Rather than functioning as a free-floating value, India's judiciary has primarily located a right to dignity within the enumerated right to life and personal liberty in Article 21.[148] Similarly, the United States Constitution does not contain any express reference to dignity, yet Justice Kennedy's majority opinions striking down restrictions on same-sex activity in *Lawrence v. Texas*, invalidating federal restrictions on same-sex

143 CONST. OF ST. KITTS & NEVIS Sept. 19, 1983, pmbl.

144 ANT. & BARB. CONST. ORD. OF 1981, pmbl. (stating that the nation is founded in part on "the dignity and worth of the human person"); CONST. OF BARB. 1966, pmbl. (saying the nation is founded in part on "the dignity of the human person"); CONST. OF DOMINICA 1978 (rev. 2014), pmbl. (stating that the nation is founded in part on "the dignity of the human person"); CONST. OF ST. VINCENT 1979, pmbl. (saying the nation is founded in part on "the freedom and dignity of man" and that "the maintenance of human dignity" requires the protection of certain rights); CONST. OF TRIN. & TOBAGO 1976, pmbl. (saying the nation is founded in part on "the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator"). The preamble of Guyana's constitution recognizes that its young people "aspire to live in a safe society which respects their dignity," but this is the only mention in the text. CONST. OF GUY. 1980, pmbl.

145 India Const. pmbl., amended by The Constitution (One Hundred and First Amendment) Act, 2016.

146 India Const. art. 39 (committing the state to giving children opportunities to develop "in conditions of freedom and dignity"); *id.* at art. 51A (recognizing the duty of every citizen "to renounce practices derogatory to the dignity of women").

147 Naz Found. v. Gov't of NCT of Delhi & Others, AIR 2009 Del paras. 131–32 (Del. H.C.); Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India); *see also* Gupta, *supra* note 39.

148 India Const. art. 21.

relationships in *United States v. Windsor*, and identifying a constitutional right to marry for same-sex couples in *Obergefell v. Hodges* all conspicuously center dignity as a fundamental value animating due process and equal protection guarantees.[149]

These examples suggest that dignity is a sufficiently familiar value that judges are often able to infuse constitutional jurisprudence with dignitary considerations. Yet the absence of explicit references to dignity in the constitutional text can in some instances deprive litigants of a strong foundation for dignitary arguments when judges seem to be less amenable to its use. Singapore's constitution does not mention dignity, for example, and litigants there have not gained traction when they have attempted to make dignitary arguments.[150] For courts that are disinclined to use dignity to decide LGBT rights cases, then, the absence of any explicit textual hook may relieve them of the obligation of evaluating any dignitary stakes of litigants' claims.

C. *Dignity as a Limiting Principle*

A final possible use of dignity in jurisprudence on same-sex activity is as a limiting principle, and particularly as a constraint on the state's ability to pursue a state interest that overrides the exercise of individual rights.[151] Article 24 of Kenya's constitution, for example, specifies that protected rights can only be limited where such a limitation "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[152] In this register, dignity does not function as a right or give meaning to other substantive rights, but instead

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149 Lawrence v. Texas, 539 U.S. 558, 575 (2003); United States v. Windsor, 570 U.S. 744, 775 (2013); Obergefell v. Hodges, 576 U.S. 644, 670–72 (2015). In *Lawrence*, Justice Kennedy invoked a passage from the Supreme Court's abortion jurisprudence to center dignity in understanding liberty guarantees: "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

150 CONST. OF SING. 1965 (rev. 2016). One of the petitioners in *Tan Seng Kee* specifically argued that the decision in *Lim Meng Suang*, which had upheld restrictions on same-sex activity, should be reconsidered because the parties "did not put forward arguments on the bedrock concept of human dignity, which would affect the constitutionality of s 377A." Ong Ming Johnson v. Att'y Gen. (2020) SGHC 63, para. 9 (Sing.). The court did not engage this argument when considering whether to follow *Lim Meng Suang*, nor is dignity expressly addressed anywhere in the judgment on appeal. *See* Tan Seng Kee v. Att'y Gen. (2022) SGCA 16 (Sing.).

151 The decriminalization cases have involved constitutional provisions in which dignity constrains state interests, requiring that state action be respectful of human dignity, but other scholars have pointed out that dignity can also operate in some instances as a constraint on individual rights. *See* Howard & Donnelly, *supra* note 117; Shultziner, *supra* note 26, at 466–79.

152 CONSTITUTION art. 24(1) (2010) (Kenya).

qualifies and narrows the scope of state interests that governments can permissibly invoke to justify the limitation of certain rights.

While dignity's function as a limiting principle may seem less important than dignity's role as a source of individual rights, it has regularly shaped outcomes in disputes about the permissibility of regulations on sex and sexuality. The High Court of Fiji concluded in *McCoskar*, for example, that because the criminalization of consensual same-sex activity was "a severe restriction on a citizen's right to build relationships with dignity and free of State intervention," it exceeded any legitimate state interest in morality and could not be justified as a necessary restriction on constitutional rights.[153] Indeed, in nearly all of the LGBT rights challenges described above, a central defense by the state has been that LGBT rights may be permissibly limited in order to advance certain state interests recognized in constitutional law, such as public order or public morality. To prevent the state from abusing these justifications to run roughshod over individual rights, many constitutional texts require that any limitation on rights be consistent with certain values, including human dignity.[154]

Questions about the scope of limitation clauses and the nature of the state's interest in morality and order have been ubiquitous in decades of philosophical and legal challenges to laws prohibiting same-sex activity.[155] Where laws criminalizing same-sex activity have been upheld, courts have typically taken pains to explain why that outcome is consistent with human dignity, most often by emphasizing the importance of countervailing public policy aims that they believe outweigh any cognizable dignitary harm.[156] Where the laws have been struck down, courts have often expressly deemed them incompatible with a democracy based on human dignity, lending democratic legitimacy to what might appear to be a countermajoritarian move.

IV. THE DIGNIFICATION OF LGBT RIGHTS

As the above discussion suggests, the formal codification of dignity as a constitutional value or right is not always determinative of whether

153 McCoskar v. State (2005) FJHC 500, at 13 (Fiji).

154 ACKERMANN, *supra* note 119, at 267; BARAK, *supra* note 9, at 112–13.

155 H.L.A. HART, LAW, LIBERTY, AND MORALITY (1962); Alli Jernow, *The Harm Principle Meets Morality Offenses: Human Rights, Criminal Law, and the Regulation of Sex and Gender*, *in* BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW 54 (Alice M. Miller & Mindy Jane Roseman eds., 2019).

156 *See, e.g.*, EG v. Att'y Gen. (2019) eK.L.R., No. 150/2016 paras. 400–05 (H.C.K) (Kenya) (underscoring relevance of a heterosexual understanding of marriage in the constitutional text).

or how dignity will be used by the judiciary.[157] In the context of decriminalizing same-sex activity, dignity has tended to offer a stronger basis for LGBT rights claims when it exists as a codified constitutional right or when the constitutional text expressly infuses dignity into other guarantees. But whether dignity has functioned as a standalone right, a constitutive value, or a limiting principle constraining the assertion of state interests, it has functionally served to transform same-sex activity from an unspeakable moral offense to a form of intimacy deserving of constitutional protection. In each of these registers, it has done so by foregrounding the lived experiences of LGBT persons over and above a generic idea of sexual morality in the criminal law.

What dignity actually means in these decisions, however, is often tacit and not elaborated upon at any length. While many courts recognize that criminalization impairs dignity, they generally do not directly specify why and how the criminalization of same-sex activity generates a dignitary injury that is impermissible as a matter of constitutional law. This is an underappreciated feature of dignity's role in LGBT rights decisions, as commentary on these rulings tends to treat human dignity as an important but abstract value rather than a concept that is wielded by courts in particular and recurring ways. As many scholars have noted, a generic version of dignity produces considerable conceptual challenges, as dignity in the abstract is a difficult concept to define and adjudicate.[158] Whether and how courts can recast the criminalization of same-sex activity as an affront to dignity depends in large part on how they understand and define the dignitary harm being inflicted by the continued existence of these laws.

As this Part illustrates, there are multiple ways that one could conceptualize the criminalization of same-sex activity as an affront to dignity. While courts typically have not overtly specified what they understand dignity to mean or require in these cases, closer examination illuminates three distinct understandings of dignity that they tacitly draw upon: deprivation, stigmatization, and dehumanization. As argued below, these three meanings in the decriminalization context provide a useful framework to instrumentalize a right to dignity and resolve some of the tensions inherent in a more generic understanding of dignity in constitutional law.

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157 This supports Doron Shultziner's finding in his empirical work on dignity more generally that "the placement of dignity in different functional parts of the constitution is not the only, or perhaps not even the main, determining factor in judges' invocation of the concept." Shultziner, *supra* note 26, at 464.

158 Rao, *supra* note 26, at 208; Shultziner, *supra* note 26, at 445.

A. *Deprivation as Indignity*

Arguably, the sharpest reversal of the classification of same-sex activity as inherently undignified is the positive valorization of same-sex activity as an intrinsically human expression of love and intimacy. Under this reading, laws criminalizing same-sex activity are an affront to dignity because they deny a class of people the capacity to forge intimate relationships that courts regard as a central feature of human experience.[159] While other sexual restrictions enacted by lawmakers may prevent individuals from engaging in particular *kinds* of sex, the prohibition on oral and anal sex—and sometimes same-sex intimacy writ large—are understood to functionally prohibit LGBT individuals from enjoying a level of sexual intimacy that their heterosexual, cisgender counterparts are able to enjoy. If they do seek that level of sexual intimacy, they do so under threat of criminal punishment. In this understanding of deprivation as indignity, that denial of the full human experience undermines the dignity of LGBT persons.

In recent years, many courts have seemed to embrace this understanding in dignifying same-sex activity as a matter of constitutional right.[160] In the *Jones* litigation, the high court of Trinidad and Tobago underscored that "Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is statutorily unlawful, whether or not enforced."[161] Similarly, in the *Motshidiemang* litigation in Botswana, one of the petitioner's central arguments was that the criminal bans in place "prohibited him from expressing the greatest emotion of love through the act of enjoying sexual relations with a consenting male to whom he is sexually attracted."[162] The High Court of Botswana readily agreed, finding that the prohibitions "den[ied] the applicant the right to sexual expression in the only way available to him," and thus concluded that criminalization "violate[d] his inherent dignity and self-worth."[163] The Supreme Court of Mauritius in *Ah Seek v. Mauritius* similarly decried the fact that "the act of sodomy

159 Martha Nussbaum has made this point separately in a way that complements her capabilities approach. NUSSBAUM, *supra* note 4, at 39 ("Even if sex is in many ways unlike religion, it is like it in being intimately personal, connected to a sense of life's ultimate significance, and utterly nontrivial. . . . We understand that it goes to the heart of people's self-definition, their search for identity and self-expression.").

160 McCoskar v. State (2005) FJHC 500, at 13 (Fiji) (recognizing "a citizen's right to build relationships with dignity and free of State intervention").

161 Jones v. Att'y Gen. (2018) CV2017-00720 para. 91 (Trin. & Tobago High Ct.).

162 Lekgowe, *supra* note 112, at 479.

163 Motshidiemang v. Att'y Gen. (2019) MAHGB-000591-16, para. 189 (Bots. High Ct.).

which is an expression of love between two men is an offence," and that the state had criminalized "the only natural way for [the petitioner] and other homosexual men to have sexual intercourse."[164]

In these and other opinions, dignity becomes a vehicle to extend recognition of the romantic and intimate dimensions of sex to same-sex activity and bring it within the ambit of constitutional protection. Under such an approach, acts of non-procreative sex engaged in by LGBT people are not disordered or unnatural. Instead, they are classed as a kind of intimacy that is universalized to human experience and protected from state interference as a matter of law.[165] In bestowing dignity on non-procreative sex, courts have recognized it as sex, subject to the relevant protections that heterosexual sex as a central part of intimate relationships receives under constitutional law.

This understanding of dignity resonates with notions of liberty, as the dignitary injury arises from the deprivation of a freedom that is understood to be foundational to a full human existence.[166] But, importantly, it differs from liberty arguments that litigants have traditionally invoked in challenges to criminal laws against same-sex activity. When it is available as a cognizable claim under domestic, regional, or international law, litigants have most often relied on privacy as the fundamental liberty jeopardized by the criminalization of same-sex activity.[167] These privacy-based arguments frequently valorize the sanctity of the private sphere as a normative imperative in and of itself and restrict protection to that domain. They also often sound in the harm principle, using harm to others as a metric for whether and when sexual activity in the privacy of one's home can be permissibly regulated by the state.[168]

Unlike other liberty-based arguments, this understanding of dignity tacitly advanced in recent decriminalization decisions foregrounds the deprivation of romantic and intimate connection as an injury in itself. Rather than finding that people have the right to engage in private

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164 Ah Seek v. Mauritius (2023) No. 119259, at 3, 26 (Mauritius).

165 For queer critiques of this normalizing move, see *infra* Part V.

166 O'Mahony, *supra* note 23, at 565–74 (discussing the ways in which autonomy can be understood as an aspect of dignity).

167 *See, e.g.*, Toonen v. Australia, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488 /1992 (Mar. 31, 1994); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) paras. 41–49 (1981); Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) para. 46 (1988); Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

168 *See* Joanna N. Erdman, *Harm Production: An Argument for Decriminalization*, *in* BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW 248 (Alice M. Miller & Mindy Jane Roseman eds., 2019) (analyzing how advocates have shifted from the argument that sexual and reproductive activities do not produce harm to arguments that emphasize the ways that criminalizing those activities does produce harm).

behavior, however immoral, so long as it does not hurt others, courts in these instances conclude that criminal prohibitions deprive them of something that is innately human and intrinsically valuable.[169] By providing a vehicle to appreciate this unique deprivation, dignity does not merely underscore existing liberty guarantees, but expands them; it "at once acknowledges the partiality of liberty's legal codification while providing a mechanism for progressively identifying liberties that warrant constitutional protection."[170] Although many litigants have simultaneously raised other liberty arguments in decriminalization litigation—and have often succeeded on those grounds—casting criminalization as a deprivation of essential aspects of humanity that diminishes human dignity adds a distinct dimension to their claims.

B. *Stigmatization as Indignity*

A second way that courts have reasoned from dignity is by recognizing that the criminalization of same-sex activity stigmatizes LGBT individuals, and thereby fosters and encourages mistreatment by others in society. Whether or not laws against same-sex activity are enforced, their preservation marks gay and bisexual men, and typically others who engage in same-sex activity or gender transgression, as "unapprehended felons."[171] This has stigmatizing consequences in countless areas of one's life, limiting opportunities for employment, education, and housing as well as fueling family rejection, exposure to violence, and other extralegal types of harm.[172]

In this register, dignity seems to sound in equality, foregrounding the discriminatory treatment that criminalization inflicts on LGBT people by virtue of their sexual orientation or gender identity.[173] But here

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169 Daly argues that dignity is a better justification for the right to abortion than privacy or even liberty, and courts in Hungary, Colombia, Peru, Germany, and elsewhere have ruled on reproductive freedom as a form of self-determination in this vein. DALY, *supra* note 9, at 40–42.

170 Ewing, *supra* note 20, at 384.

171 Edwin Cameron, *'Unapprehended Felons': Gays and Lesbians and the Law in South Africa*, *in* DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA 89, 89–91 (Mark Gevisser & Edwin Cameron eds., 1995).

172 *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001) (examining the regulatory effects of laws prohibiting same-sex activity beyond their formal legal enforcement).

173 O'Mahony, *supra* note 23, at 554–55 (noting that dignity is often read into equality guarantees and providing examples from Ireland, the United Kingdom, and France); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT'L J. CONST. L. 267 (2008); *see also* Laurence H. Tribe, Response, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015) (discussing the notion of "equal dignity"); Note, *Equal Dignity—*

too, attention to stigma as a dignitary injury is distinct from other equality-based arguments that have been foundational to decriminalization challenges. The equality-based arguments against criminalization of same-sex activity are primarily concerned with differential treatment by the state, and only secondarily concerned with the stigma that treatment engenders more widely. While equality arguments often acknowledge stigma, they frequently turn on more mechanical considerations—for example, whether sexual orientation or gender identity are specifically named as protected classes in the constitutional text, whether discrimination based on sexual orientation or gender identity can be subsumed under the wider category of sex discrimination, or whether "intelligible differentia" and a "rational nexus with the object sought to be achieved" permit the state to treat LGBT people differently from others in administering relevant laws.[174] Some courts have declined to find a violation of the right to equality where prohibitions on non-procreative sex also apply to heterosexual activity, even if LGBT people are disproportionately constrained and policed by those prohibitions in practice.[175] In analyzing these issues, courts often need not, and do not, look at the stigmatizing function of the law, but at the nature of differential treatment by the state and whether the kind of discrimination at issue is one that the constitution technically recognizes and forbids.

Foregrounding dignity, by contrast, underscores concerns about equality but elides many of the technical considerations inherent to nondiscrimination analysis. It focuses attention first and foremost on the ways in which prohibitions on same-sex activity shame, stigmatize, and disadvantage those who engage in those acts, as well as those who are presumed to engage in those acts, might want to engage in those acts, or are associated in the public imagination with those acts. Thus, in *Motshidiemang*, the High Court of Botswana found that criminalization meaningfully "perpetuates stigma and shame against homosexuals and renders them recluse[s] and outcasts," and thus "disproportionately

Heeding Its Call, 132 HARV. L. REV. 1323 (2019) (considering the past and future of "equal dignity" after Justice Kennedy's departure from the U.S. Supreme Court).

174 Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 paras. 233–37 (India) (examining the questions of intelligible differentia and rational nexus); *see also* Ah Seek v. Mauritius (2023) No. 119259, at 16–17 (Mauritius) (considering whether the constitution prohibits sexual orientation discrimination as such and whether it prohibits sexual orientation discrimination as a form of sex discrimination); Supriyo Chakraborty v. Union of India (2023) WP(C) No. 1011 of 2022, decided on Oct. 17, 2023 (SC), paras. 71–86 (India) (opinion of Bhat, J.) (applying these principles and concluding that the Special Marriage Act's exclusion of same-sex couples does not amount to discrimination under Article 14 of the Indian constitution).

175 Akster v. Dir. Pub. Prosecutions [2024] MWHC 25 para. 425-32 (Malawi).

impacts . . . the lives and dignity of LGBT persons."[176] Here, the indignity is not primarily that those who wish to engage in oral or anal sex are unable to do so and are thereby deprived of a core human experience, but that those who are presumed to engage in same-sex activity are subjected to persistent disapprobation and devaluation as a result of legal prohibitions.

Indeed, many courts that have invoked dignity in striking down criminal prohibitions on same-sex activity have been particularly attuned to the distinctive consequences of the stigma associated with criminalization, above and beyond a formal equality analysis. In *Lawrence*, for example, Justice Kennedy emphasized the wider harm that prohibiting same-sex activity inflicts, underscoring that stigma "is not trivial" when LGBT people's sex is "a criminal offense with all that imports for the dignity of the persons charged," whether or not those prohibitions are widely enforced in practice.[177] Other courts have gone even further in articulating precisely how stigma inflicts demonstrable harm. After recounting abuse that the claimant had suffered, for example, Trinidad and Tobago's high court warned in *Jones* that "criminal sanctions have the potential to be used oppressively by differently minded citizens as a foundation for hate as condoned by the State."[178] Many courts that have struck down laws on same-sex activity have also appreciated how this stigmatic harm negatively influences public health outcomes, at times citing amicus briefs by experts and NGOs detailing how criminal prohibitions deter HIV testing and disclosure and access to sexual health services more generally.[179] Some courts that have struck down criminal laws against same-sex activity have taken further notice of the fact that, because of legal sanctions against them, LGBT individuals may be reluctant to turn to law enforcement for help insofar as they fear arrest or revictimization, leaving them especially vulnerable to discrimination, harassment, and violence.[180]

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176 Motshidiemang v. Att'y Gen. (2019) MAHGB-000591-16 para. 189 (Bots. High Ct.).

177 Lawrence v. Texas, 539 U.S. 558, 575 (2003).

178 Jones v. Att'y Gen. (2018) CV2017-00720 para. 94 (Trin. & Tobago High Ct.); *id.* paras. 150–54 ("The fact that the State proscribes against it quite obviously validates society's feelings against anyone who does call himself a homosexual to the extent that society may possibly feel justified in denouncing the practice forcefully or physically."); *see also* B.G. v. Att'y Gen. (2024) No. DOMHCV2019/0149 para. 55 (Dominica) (concluding that "failure by the State to take steps to protect LGBT Dominicans from such attacks and indeed encouraging such attacks through the continued criminalization of LGBT people" amounts to degrading treatment).

179 *See, e.g.*, Jeffers v. Att'y Gen. (2022) No. SKBHCV2021/0013 para. 17 (St. Kitts & Nevis); Esterhuizen, *supra* note 134, at 850, 855.

180 *See, e.g.*, Orden David v. Att'y Gen. of Ant. & Barb. (2022) No. ANUHCV2021/0042 paras. 16–17 (ECSC).

In this appreciation of the stigmatizing function of criminalization—and its very real effects—courts striking down bans on same-sex activity underscore the expressive function of law, and the role that the state's criminal prohibitions play in giving tacit approval to discrimination more broadly.[181] This recognition of law's stigmatizing function has the potential to extend more widely to state failures to address discrimination on the basis of sexual orientation or gender identity. That potential may be limited, however, insofar as courts discount the stigmatizing effects of other laws that regulate sex and sexuality, or decline to attribute those stigmatizing effects to the state.[182] A telling example is the Supreme Court of India, which forcefully condemned the state's law against "unnatural offenses" as a violation of the right to dignity,[183] underscoring the pervasive stigma the law engendered, but said just five years later that the state's failure to create a framework for same-sex couples to marry did not implicate dignitary considerations to the same degree.[184] A version of dignity that is attentive to stigma can thus empower the judiciary to strike down laws that they consider particularly stigmatizing, like those that threaten criminal punishment for behaviors associated with a marginalized group, but can also empower the judiciary to uphold laws when they perceive the stigmatic harm to be de minimis or tolerable. As I discuss below, courts that have struck down bans on same-sex activity in part on dignitary grounds have in fact varied in their willingness to acknowledge and condemn other forms of exclusion based on sexual orientation or gender identity, illustrating the importance of specifying what kinds of dignitary harm are cognizable when resolving constitutional claims.

C. *Degradation as Indignity*

A third and final understanding of dignity that has appeared in recent decriminalization decisions is a recognition that one's dignity is impaired when one is degraded or dehumanized. This understanding of dignity is less closely linked with liberty or equality and is more squarely concerned with one's ability to be treated as a full human being with the

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181 Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998).

182 *But see* DALY, *supra* note 9, at 127 (suggesting that dignity also offers a tool to compel the state to proactively protect and fulfill dignitary objectives rather than just respecting it by avoiding discrimination by the state itself).

183 Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India).

184 Supriyo Chakraborty v. Union of India (2023) WP(C) No. 1011 of 2022, decided on Oct. 17, 2023 (SC) (India).

respect and moral standing that commands. In this view, dignity is impaired when individuals are mistreated in particular and recognizable ways—for example, being dehumanized, objectified, infantilized, or humiliated—whether or not they are also deprived of particular aspects of the human experience or stigmatized in the eyes of others.[185]

In the decriminalization context, this concern is often reflected in allegations that the criminalization of same-sex activity violates a right to be free from cruel, inhuman, or degrading treatment or punishment, which many litigants have raised either alongside or as a vehicle for dignitary claims.[186] Punishment at the hands of the state is arguably always dehumanizing to some degree; carceral punishment, for example, limits incarcerated people's rights to liberty and security of the person, privacy, freedom of expression, and freedom of movement, among other rights, but also typically involves regulating association and contact with the outside world, prescribing permissible dress and expression, and imposing routine and compliance at the expense of individual decision-making.[187] Above and beyond limitations of rights that are incidental to criminal punishment, however, litigants have argued that criminalizing consensual same-sex intimacy in private, particularly with harsh penalties, itself amounts to inhuman and degrading treatment at the hands of the state.

In addition to the degradation inherent in punishing consensual intimacy, litigants in recent cases have raised a more specific concern that their dignity is impaired when criminal prohibitions tacitly or explicitly associate them with other kinds of objectionable and shameful acts. In some of the decisions invoking dignity, litigants and judges have recognized the degradation that occurs when same-sex activity is located alongside other offenses in the criminal law. In the *Orozco* litigation in

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185 Paulus Kaufmann et al., *Human Dignity Violated: A Negative Approach—Introduction*, *in* HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED 3 (Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser & Elaine Webster eds., 2011) (recognizing "some general forms of dignity violations such as humiliation, degradation or dehumanization"); *see also* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993 111 (Stephen Shute ed., 1993) (identifying particular kinds of degradation that jeopardize human rights).

186 *See, e.g.*, Akster v. Dir. Pub. Prosecutions [2024] MWHC 25 para. 50 (Malawi); B.G. v. Att'y Gen. (2024) No. DOMHCV2019/0149 para. 54 (Dominica); Javin Johnson v. Att'y Gen. of St. Vincent (2024) No. SVGHCV2019/0110 paras. 31 (ECSC). This argument not only arises in the context of the state fueling or tacitly accepting mistreatment, but in instances where agents of the state themselves use criminalization to facilitate the "extortion, corruption, rape, and threatened [] arrest" of those who engage in same-sex activity. Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL RTS. J. 1429, 1460 (2006).

187 Ryan Thoreson, *"Discriminalization": Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law*, 110 CALIF. L. REV. 431, 435–38 (2022) (detailing human rights restrictions associated with carceral punishment).

Belize, for example, the claimant argued in his affidavit that "constitutional rights to dignity, equality, freedom of expression and privacy are violated by criminalising the free expression of my sexuality and, worse, having my sexuality linked with sexual practices involving animals," gesturing to the country's prohibition of bestiality and same-sex activity in the same provision of the penal code.[188] Indeed, the criminalization of same-sex activity typically exists as part of a wider range of offenses against the person or against morality. For example, the high court of Fiji noted in *McCoskar v. State* that the prohibition on same-sex activity was codified as an offense against morality, alongside "rape, defilement, indecent assault, prostitution, brothel keeping, abortion, [and] incest."[189] The codification of same-sex activity as a criminal offense not only marks LGBT people as criminals, but further degrades LGBT people by conflating them with rapists, pedophiles, or various forms of perversity.[190]

In response to these concerns, courts have in some instances acknowledged that this likening of same-sex activity to pedophilia, bestiality, or rape under the law inflicts a unique kind of harm. It is not only that criminalization deprives LGBT people of the capacity to engage in sexual intimacy or stigmatizes LGBT people as presumptive criminals, but that it casts same-sex activity as a particular kind of legal and moral offense that is especially monstrous and shameful in the public imagination. While this uniquely demeaning association of same-sex activity with pedophilia, bestiality, and rape has not been decisive for courts evaluating the constitutionality of criminalization, some courts have acknowledged it as an injury to the dignity of those who engage in same-sex activity.

This concept of dignity, too, may have import beyond the decriminalization context. A robust version of this understanding of dignity might extend not only to extreme forms of degradation or dehumanization operating through the criminal law, but to more prosaic or everyday forms of state regulation as well. It is arguably also

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188 Orozco v. Att'y Gen. (2016) 90 WIR 161 (Belize Sup. Ct.), *aff'd* Att'y Gen. v. Orozco, (2019) BZCA 32 of 2016 (Belize C.A.), para. 28; *see also id.* para. 65 (noting this stigmatic injury in the context of pedophilia and rape); Javin Johnson v. Att'y Gen. of St. Vincent (2024) No. SVGHCV2019/0110 para. 38 (ECSC) (recalling a litigant's testimony that "[i]n his mind, in the eyes of the law homosexuals had the same status as murders and thieves").

189 McCoskar v. State (2005) FJHC 500, at 4 (Fiji).

190 Gupta, *supra* note 39, at 4815 (observing that, in India, "the lack of a consent-based distinction in the offence has made homosexual sex synonymous to rape and equated homosexuality with sexual perversity"); *see also id.* at 4817–18.

dehumanizing to be unable to discuss your identity in public,[191] to be refused medical care or other services because of your identity,[192] to be forced to carry identification or use public spaces that misrecognize your gender,[193] to be refused benefits and recognition for your committed partnership,[194] or to be unrecognized as a parent of your child or a child of your parent.[195] Many cases involving these types of issues have been evaluated under liberty or equality guarantees, though the harm in question is often first and foremost a form of degradation—not merely that one is constrained in one's behavior or treated differently from others, but that the state diminishes one's sense of self, relationships, and humanity through the imposition of humiliation and shame. Courts that invoke dignity in decriminalization cases might also consider when and how these other forms of indignity become intolerable under constitutional law. Here, dignity offers a different vocabulary for understanding the harm of longstanding denials of LGBT rights, but one that courts have thus far been slow to take up outside of the context of the criminal law.

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The varied uses of dignity—and the increasing success with which LGBT litigants have wielded dignity in constitutional challenges—signal that dignity will continue to play a role in challenges to restrictions on LGBT rights. But courts have tacitly understood dignity to mean a variety

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191 *See, e.g.*, Anna Chernova & Sana Noor Haq, *"Our Mere Existence Is Illegal." As Moscow Toughens Anti-Gay Law, LGBTQ Russians Fear for the Future*, CNN (Dec. 11, 2022, 12:05 AM), https://www.cnn.com/2022/12/11/europe/russia-lgbtq-anti-gay-propaganda-law-intl-cmd/index.html [https://perma.cc/WYZ3-NAEF]; Jennifer Rankin, *Hungary Passes Law Banning LGBT Content in Schools or Kids' TV*, THE GUARDIAN (June 15, 2021, 11:06 AM), https://www.theguardian.com/world/2021/jun/15/hungary-passes-law-banning-lbgt-content-in-schools [https://perma.cc/5YPG-55W6].

192 *"You Don't Want Second Best": Anti-LGBT Discrimination in US Health Care*, HUM. RTS. WATCH (July 23, 2018), https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care [https://perma.cc/8E99-BGDP]; Carl G. Streed Jr., Ellen P. McCarthy & Jennifer S. Haas, *Association Between Gender Minority Status and Self-Reported Physical and Mental Health in the United States*, 177 JAMA INTERNAL MED. 1210, 1211 (2017).

193 Myeshia Price-Feeney, Amy E. Green & Samuel H. Dorison, *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. ADOLESCENT HEALTH 1142 (2020).

194 Obergefell v. Hodges, 576 U.S. 644, 670–71 (2015) ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society . . . .[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.").

195 *Id.* at 646 ("Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser . . . .The marriage laws at issue thus harm and humiliate the children of same-sex couples.").

of things, and specifying the indignities that amount to constitutionally cognizable harm is essential if dignity is to be meaningfully and consistently vindicated as a matter of law. Even in the single context of criminal laws prohibiting same-sex activity, dignity functions as a vehicle to contest laws that deprive people of core features of the human experience, reject the imposition of stigma by the state, and address degrading and dehumanizing treatment. These diverse understandings tie dignity to liberty and equality but also recognize dignity's unique imperatives, and thereby provide a colorable framework for dignitary claims.

Specifying and elaborating upon these particular uses of dignity rather than invoking a generalized notion of dignity is crucial. The failure to consider different kinds of dignitary injury can prove fatal to LGBT rights claims. In Malawi, for example, the high court assumed dignitary harm could only arise as a result of discriminatory treatment, without considering deprivation or degradation as forms of indignity, and thus rejected litigants' dignitary claims.[196] In India, the judiciary's attention to the most degrading forms of indignity in the decriminalization context has not consistently led to consideration of the ways in which other LGBT rights violations might deprive or stigmatize LGBT individuals.[197] As discussed below, without identifying what a court understands the relevant dignitary violation of criminalization to be, or how decriminalization does or does not remedy that violation, dignity can also descend into impossible generalities, potentially at the expense of future sexual rights guarantees.

Specifying the content of dignity is particularly important insofar as dignitary arguments are likely to be taken up in other contexts as the pace of legal challenges accelerates. In many jurisdictions, robust constitutional guarantees of dignity seem particularly inconsistent with the state's ongoing criminalization of same-sex activity, leaving ample room for richer and more substantive dignitary reasoning. These jurisdictions include Guyana and Kenya, where recent judicial opinions have centered human dignity in striking down certain restrictions on LGBT rights but where laws against same-sex activity remain on the books.[198] Other jurisdictions, however, also have explicit constitutional protections for dignity and still retain prohibitions on same-sex activity,

196 *See supra* note 136.

197 *See supra* note 184.

198 McEwan v. Att'y Gen., [2018] CCJ 30 (AJ) (Guy.); Digashu v. Gov't of the Republic of Namibia (2023) SA 7/2022 (Namib.).

among them Indonesia, Tanzania, and Zimbabwe.[199] Rather than dismissing decriminalization as a trend among liberal democracies—something the Supreme Court of Zimbabwe did in *Banana* nearly twenty-five years ago—many courts are now reasoning with the growing body of jurisprudence discussing dignity and decriminalization that is developing among post-colonial nation-states in Africa, Asia, and the Caribbean with similar legal and constitutional traditions.[200] For dignity to have resonance both transnationally and across different sexual rights domains, it is important for courts that embrace dignitary reasoning to elaborate when and how certain forms of dignitary injury might fall afoul of constitutional guarantees.

Dignity has offered a valuable resource for litigants seeking to expand LGBT rights, both conceptually and geographically, but without specifying the nature of dignitary harm, it also has significant pitfalls. The following and final Part describes some of the foundational limitations of human dignity as it has been understood by courts thus far, before explaining how a more consistent and constructive use of dignity in queer jurisprudence might ameliorate many of these tensions.

V. EQUAL AND UNEQUAL DIGNITIES

Asking courts to pronounce upon the dignity or indignity of queer sex, expression, and relationships is a risky endeavor. While it has proven fruitful in many contexts, courts in some jurisdictions have opted to reinscribe prohibitions on same-sex activity as unnatural and unlawful, framing those prohibitions as a reasoned moral judgment of the nation to which they must defer.[201] Even when they win, litigants who appeal to dignity run the risk of certain queer acts or behaviors being deemed

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199 CONST. OF INDON. 1945 (reinst. 1959, rev. 2002), art. 28G ("Every person shall have the right to protection of his/herself, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right."); CONST. OF TANZ. 1977 (rev. 2005), art. 12 ("Every person is entitled to recognition and respect for his dignity."); *id.* at art. 9 (declaring that the state must work to ensure "that human dignity and other human rights are respected and cherished" and "that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights"); CONST. OF ZIM. 2013, art. 51 ("Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected."); *id.* at art. 3(1)(e) (declaring that the state is founded in part on "recognition of the inherent dignity and worth of each human being"); *id.* at art. 46(1) (requiring that courts and tribunals interpreting individual rights guarantees "must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality, and freedom").

200 Banana v. State (2000) 4 LRC, 621, 670–71 (Zim.).

201 *E.g.*, Tan Eng Hong v. Att'y Gen. (2012) SGCA 45 (Sing.); Lim Meng Suang v. Att'y Gen. (2014) SGCA 53 (Sing.); EG v. Attorney General (2019) eKLR. (H.C.K.) (Kenya).

undignified, either in whole or in part, in ways that undermine or jeopardize other movement goals. This Part examines how the growing reliance on dignity might potentially narrow the horizon of possibility for sexual rights and carry risks for LGBT litigants, focusing on three dangers: the persistent risk of LGBT people being deemed undignified or less dignified than others, the extension of a partial or conditional dignity, and the possibility that dignity might displace more transformative approaches to sexual rights.

First and perhaps most obviously, the long historical legacy of the "abominable and detestable crime against nature" has led some judges to conclude that same-sex activity and relationships are in fact not dignified and are therefore less worthy of protection than heterosexual sex and relationships. This argument is echoed in many of the positions taken by religious entities as interested parties or amici curiae in lawsuits around LGBT rights. In the *Orozco* litigation in Belize, for example, Bishop Dorrick Wright of the Diocese of Belize City of the Roman Catholic Church stated in his affidavit that "[b]ecause man possesses inherent dignity, the Church calls upon individuals to reject sin, which does not befit that dignity, but rather degrades."[202] In the *Gitari* litigation in Kenya, counsel for the state made a similar argument, asserting that "[i]n reference to the right to human dignity . . . the acts described in section 162 of the Penal Code and which are described as unnatural, are in themselves regardless of consent degrading."[203] Ultimately, two of the five judges on the court of appeal panel in *Gitari* intimated that they too saw same-sex activity as more akin to a criminal offense than a form of protected intimacy.[204] While casting same-sex activity as undignified did not ultimately carry the day in either *Orozco* and *Gitari*, it is not difficult to imagine these arguments prevailing or shaping opposition to LGBT rights in other contexts.[205] Indeed, this paternalistic approach to dignity, in which the state deems certain acts or behaviors to be insufficiently

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202 Orozco v. Att'y Gen. (2016) 90 WIR 161 (Belize Sup. Ct.), *aff'd* Att'y Gen. v. Orozco, (2019) BZCA 32 of 2016 (Belize C.A.), paras. 79–80.

203 Non-Governmental Orgs. Coordination Bd. v. Gitari (2019) eK.L.R. No. 145/2015, at 24 (C.A.K.) (Kenya) (Nambuye, J., dissenting).

204 *Id.*

205 Dignity also features heavily in the Manhattan Declaration, a document issued by prominent academics and movement leaders primarily based in the United States calling on Christians to oppose abortion, assisted suicide, and same-sex marriage, and to promote religious liberty. *See Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), https://www.manhattandeclaration.org [https://perma.cc/952S-4R9Q].

dignified and prohibits them, has been a central challenge in the constitutional adjudication of dignity claims.[206]

Centering dignity as a constitutional value may also have unintended consequences for other sexual rights demands beyond the decriminalization context. Foregrounding dignity as a guiding value potentially compromises other sexual rights that may yet be seen as undignified, non-normative, or queer. Recognizing the dignity of same-sex activity has not necessarily established a broader right to sexual autonomy under the law, nor has it necessarily led to the invalidation of laws prohibiting consensual adultery, public sex, sex work, sadomasochistic sex, or the possession of sex toys for personal use.[207] Indeed, dignity has been used in some courts to deny a constitutional right to engage in these practices.[208] The limits of dignity are evident in jurisdictions that have reiterated a right to engage in same-sex activity but pointedly refused to extend that right to other sexual practices, casting them outside the realm of conduct that constitutional dignity is prepared to recognize.[209]

In addition to casting sexual rights as undignified, opponents of sexual rights have also insisted that *their* views on sex and sexuality must be afforded dignity and respect. States that have severely restricted LGBT rights have often framed these rights as an affront to the dignity or morality of the public. When the Russian Federation restricted LGBT

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206 Steven Malby, *Human Dignity and Human Reproductive Cloning*, 6 HEALTH & HUM. RTS. 102, 110 (2002) (noting an approach where "the state may introduce regulations to restrict people's freedom to make choices that, in the state's view, interfere with the dignity of an individual, a social group, or the human race as a whole"); Giorgio Resta, *Human Dignity*, 66 MCGILL L.J. 85, 88 (2020) ("Situations may arise in which the exercise of personal freedom may clash with the 'objective' value of human dignity.").

207 For an example from the European case law where the recognition of a privacy right that encompassed consensual same-sex activity did not extend to consensual sadomasochistic sex in private, see Laskey, Jaggard & Brown v. United Kingdom, 24 Eur. H.R. Rep. 39 (1997). But see ADT v. United Kingdom, 31 Eur. H.R. Rep. 803 (2001), which held that the recognition of such a right did extend to consensual group sex in private. In the United States, *Lawrence*'s carefully circumscribed right to private sexual conduct between consenting adults has not given rise to a broader recognition of sexual autonomy or pleasure. Richard Glover, *Can't Buy a Thrill: Substantive Due Process, Equal Protection, and Criminalizing Sex Toys*, 100 J. CRIM. L. & CRIMINOLOGY 555, 573–74 (2010); Phillip Rawls, *High Court Lets Alabama Sex-Toy Ban Stand*, SEATTLE TIMES (Oct. 1, 2007, 6:01 PM), https://www.seattletimes.com/nation-world/high-court-lets-alabama-sex-toy-ban-stand [https://perma.cc/VE3D-7Q7R]; Warren Richey, *Supreme Court Declines Polygamy Case*, CHRISTIAN SCI. MONITOR (Feb. 27, 2007), https://www.csmonitor.com/2007/0227/p25s01-usju.html [https://perma.cc/8LXF-M8ZE].

208 *See, e.g.*, Ronald Louw, *The Constitutional Court Upholds the Criminalisation of Sex Work*, 57 AGENDA 104 (2003); Restrepo Saldarriaga, *supra* note 22, at 202.

209 *See, e.g.*, Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1, 3, 25, 27 (2008) (noting that sex tends to be deemed dignified if it comports with a normative understanding of intimacy); Fischel & McKinney, *supra* note 21, at 407 (exploring the difficulties of using dignity as a basis for sexual rights).

parades and demonstrations, for example, it defended its decision to the European Court of Human Rights by arguing that permitting the parades would offend the religious beliefs of the majority of the population and would amount to a "terrible debasement of their human dignity."[210] In the government's eyes, "the democratic state must protect society from destructive influence on its moral fundamentals, and protect the human dignity of all citizens, including believers."[211] While the European Court of Human Rights rejected that argument, it is one that continues to be echoed in domestic courts. Where conditions are not ripe for the decriminalization of same-sex activity or other sexual rights goals, arguing for dignity to play a decisive role may backfire, with courts instead privileging the asserted dignity of majoritarian moral or religious views.

Even courts that are sympathetic to the dignity of LGBT persons may encounter conceptual difficulties when multiple parties assert dignitary claims that seem to be irreconcilable. In addition to cases where the state deems certain behavior undignified or purports to defend the dignity of the general public, some cases call on the state to mediate between competing dignitary claims advanced by private parties. A "clash of dignities" has been evident, for example, in cases dealing with access to abortion, where litigants and social movements simultaneously insist upon the dignity of the pregnant person and dignity of the fetus, or anti-discrimination law, where courts have attempted to balance the dignity of protected groups with the dignity of religious or conscientious objectors.[212] Such clashes do not necessarily deny the dignity of LGBT people, but challenge courts to determine whether and when that dignity must give way to other dignitary claims. Dignity may therefore generate less predictable results outside the context of criminalization, particularly

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210 Alekseyev v. Russia, Apps. Nos. 4916/07, 25924/08 & 14599/09, Eur. Ct. H.R., para. 59 (2010).

211 *Id.* para. 60. Although its determination was overturned by the courts, the NGO Coordination Board in Kenya offered a similar justification for its rejection of an LGBT organization, arguing that "whereas gays and lesbians are entitled to their inherent dignity as human beings, this should never be construed to mean that they have a cause to convert the world to a cul-de-sac lifestyle that negates the fundamentals of human survival." Gitari v. Non-Governmental Orgs. Coordination Bd. (2015) eK.L.R. No. 440/2013, para. 18 (H.C.K.) (Kenya).

212 *See, e.g.*, Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 639–40 (2018) (suggesting that "these disputes" over exemptions to anti-discrimination laws "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market"); 303 Creative v. Elenis, 600 U.S. 570, 607 (2023) (Sotomayor, J., dissenting) (objecting to expressive exemptions to nondiscrimination laws by pointing out that "a public accommodations law ensures *equal dignity* in the common market" and calling this "the law's 'fundamental object': 'to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"'" (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)))).

where nondiscrimination protections or relationship recognition call for some degree of compliance from private actors whose beliefs may also be understood and protected through a dignitary lens.

Whether dignity is denied to LGBT people, subordinated to the dignity of majority sentiment, or discounted in favor of the dignitary claims of others, the amorphousness of dignity as a constitutional value makes it a potentially unstable foundation for LGBT rights claims. While dignity has proven to be a powerful normative foundation in decriminalization cases, it is not clear that it will retain that value in cases where dignity is invoked by opponents without greater precision in articulating what dignity does and does not protect.

A second and separate concern is that courts may affirm the dignity of LGBT people in partial or conditional ways, valorizing only particular aspects of queer life that most closely resemble normative practices sanctioned by the state. Courts that have championed human dignity in LGBT rights cases have tended to do so when presented with movement demands that seem most recognizably universal and unobjectionable, rather than those that seem resolutely specific, non-normative, or queer.[213] Dignity may therefore function in practice not to vindicate any and all legitimate demands for LGBT rights, but particular kinds of LGBT rights for particular kinds of LGBT people. This potential circumscribing function of dignity for sexual rights is reason for caution as litigants decide whether to emphasize dignity beyond the context of decriminalizing same-sex activity, and whether to craft new dignitary arguments in future litigation or for different ends.

At times, this partial recognition involves the simultaneous extension of dignity on some fronts and not others. Dignity has not precluded courts and lawmakers from engaging in line-drawing exercises that deem some violations of LGBT rights to be an impermissible affront but regard others as acceptable. The political repeal of Section 377A in Singapore is a telling example. When Prime Minister Lee Hsien Loong announced that his government would repeal Section 377A, he simultaneously announced that the government would be introducing constitutional amendments that would codify marriage as a heterosexual institution, proactively heading off any future legal challenges for same-sex couples seeking equal recognition of their relationships.[214] Through this simultaneous extension and withholding of rights, the government purported to affirm the dignity of those the Prime Minister had called

213 *See infra* note 214.

214 Pearson & Reid, *supra* note 65.

"part of our society" and "our kith and kin" while also resigning that dignity to the realm of private intimacy.[215]

In other instances, dignity has been premised on assimilation to existing normative structures and has run the risk of elevating certain kinds of normative sexual and relational practices at the expense of others. This exclusionary potential is particularly evident in decisions that identify a constitutional right to marry, which often emphasize the dignity of state-sanctioned marriage and the couples who enter into those unions. In his dissent in *Obergefell v. Hodges*, Justice Thomas objected in a footnote that

> [t]he majority also suggests that marriage confers "nobility" on individuals . . . People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.[216]

Scholars who have written on gender, sexuality, and family have similarly expressed concern about the valorization of marriage at the expense of those who cannot or do not wish to marry, and the concomitant devaluation of other innovative forms of partnership recognition other than marriage.[217]

This is not to say that these qualified victories do not have any wider value to champions of a broader conception of sexual rights. The benefits of judicial affirmations of dignity often redound to those whose sex and relationships diverge from the normative models described in judicial opinions. The *Lawrence* majority's recognition that same-sex activity "can be but one element in a personal bond that is more enduring" did not make the right to engage in same-sex activity contingent on that more enduring personal bond,[218] and in practice the decision protects casual sex in private from prosecution as well as sex in the context of a

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215 *Full Parliamentary Speech by PM Lee Hsien Loong in 2007 on Section 377A*, STRAITS TIMES (Sept. 7, 2008, 2:51 PM), https://www.straitstimes.com/politics/full-parliamentary-speech-by-pm-lee-hsien-loong-in-2007-on-section-377a [https://perma.cc/VW4G-DK8V].

216 Obergefell v. Hodges, 576 U.S. 644, 735 n.8 (2015) (Thomas, J., dissenting). For more on the conceptual dispute about dignity in *Obergefell*, see Ewing, *supra* note 20, at 375–80.

217 *See, e.g.*, Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 31 (2015); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209–10 (2016); STEPHEN M. ENGEL & TIMOTHY S. LYLE, DISRUPTING DIGNITY: RETHINKING POWER AND PROGRESS IN LGBTQ LIVES 223, 227 (2021).

218 Lawrence v. Texas, 539 U.S. 558, 567 (2003).

committed relationship.[219] Similarly, while the *Obergefell* majority indicated that "[m]arriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm,"[220] that decision also functionally extends the right to marry to same-sex couples who, like many heterosexual couples, marry for convenience or for practical reasons relating to benefits, childrearing, inheritance, or taxation.[221] While dignity therefore can and does often function to protect a range of behavior, advocates should be mindful of the possibility that dignitary reasoning might function to valorize certain kinds of sex and relationships that are most akin to normative practices, while leaving behind options that are seen as less significant or dignified in the eyes of the law.[222]

Third and finally, there is some danger that dignity may displace liberty or equality guarantees that potentially offer a more stable and uncompromising foundation for civil and human rights. By grounding the logic of a ruling in a particularly egregious affront to dignity, courts may tacitly limit their holding to factual circumstances that are uniquely harsh or objectionable rather than making more durable pronouncements about the fundamental rights that LGBT people enjoy, or the impermissibility of discrimination based on sexual orientation or gender identity.

In the decriminalization context, this concern has arisen in opinions that decry especially intolerable indignities but decline to find that discrimination based on sexual orientation more generally is impermissible. In the United States, for example, Justice Kennedy's opinions in *Lawrence* and *Obergefell* placed a heavy emphasis on the indignities of laws prohibiting same-sex activity and exclusion from the institution of marriage, respectively, and found that the right to engage in consensual same-sex conduct in private and the right to marry were both liberties protected under the Fourteenth Amendment's Due Process

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219 As Dale Carpenter has noted, it is not clear that the named plaintiffs in *Lawrence* were in a committed relationship, or even that they engaged in sexual activity at all. The officers who responded to a report of a person brandishing a gun offered different and arguably incompatible testimony on what they saw the plaintiffs doing when they arrived, and both Lawrence and Garner intimated that they were not having sex. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 61–74 (2012).

220 *Obergefell*, 576 U.S. at 656–57.

221 As Courtney Joslin has argued, the line of gay rights cases in the United States up to and including *Obergefell* also offers important protections to those who do not marry. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 426 (2017).

222 *See* Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), https://www.nytimes.com/2011/06/24/opinion/24franke.html [https://web.archive.org/web/20240711084435/https://www.nytimes.com/2011/06/24/opinion/24franke.html] (noting the delegitimization of alternatives to marriage in the wake of marriage victories in the United States).

Clause. In both decisions, the majority indicated that the laws at issue also offended the Fourteenth Amendment's Equal Protection Clause, but declined the opportunity to articulate what level of scrutiny should be given to apparent discrimination on the basis of sexual orientation.[223] In later cases involving discrimination on the basis of both sexual orientation and gender identity, lower courts have disagreed on the level of scrutiny that should be applied, and that has proven to be consequential for the outcomes of those cases.[224]

In addition to displacing a liberty or equality analysis, some have warned that using dignity as the primary lodestar for constitutional rights may set the floor for mistreatment too low. As Susanne Baer has warned, "very abstract notions of dignity may then even inform the interpretation of equality and liberty, turning them into devices that protect only against those injustices severe enough to meet a dignity threshold far removed from the daily experiences of many people."[225] Thus dignity may be invoked in the context of torture or other cruel, inhuman, or degrading treatment or punishment, but may not be considered colorable in challenges to more routine or everyday forms of humiliation and dehumanization.[226] This is evident in the Supreme Court of India's recent jurisprudence; the court's ruling in *Johar* that struck down the state's prohibition on same-sex activity made extensive and laudatory references to human dignity, but the court's ruling in *Supriyo Chakraborty v. Union of India* determined that the state's failure to provide same-sex couples an avenue to marry was not similarly egregious and fell short of implicating the same concerns.[227]

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These concerns about relying on dignity as a vehicle for LGBT rights are cause for reflection and caution. Because dignity remains a capacious term that is subject to interpretation, it is relatively easy for judiciaries that are hostile to LGBT rights to twist dignity into a justification for

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223 *Lawrence*, 539 U.S. at 574–75; *Obergefell*, 576 U.S. at 672–76.

224 *Compare* L.W. v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023) (finding that a ban on gender-affirming care is not sex discrimination and that discrimination based on transgender status is subject to rational basis review), *with* Brandt ex rel. Brandt v. Rutledge, 47 F.4th 661, 670 (8th Cir. 2022) (finding that a ban on gender-affirming care is sex discrimination and is subject to heightened scrutiny), *and* Kadel v. Folwell, 100 F.4th 122, 155-56 (4th Cir. 2024) (finding that exclusions from state healthcare plans for gender-affirming care constitute both sex discrimination and gender identity discrimination and are subject to heightened scrutiny).

225 Baer, *supra* note 25, at 447.

226 *Id.* at 459.

227 *Compare* Navtej Singh Johar v. Union of India, AIR 2018 SC 4321(India), *with* Supriyo Chakraborty v. Union of India (2023) WP(C) No. 1011 of 2022, decided on Oct. 17, 2023 (SC) (India).

preserving or reinscribing restrictions on rights, extending those rights in a partial or conditional manner, or avoiding more durable and expansive pronouncements on liberty or equality grounds. This is perhaps especially true in litigation around gender, sexuality, and reproduction, where there is a long history of transgressive acts being understood as undignified.

If dignity is to be used as a justification for decriminalization and other LGBT rights litigation, it is thus essential that litigants and courts take pains to specify what dignity, whether as a value or as a right in itself, does and does not entail. Articulating dignitary harm with greater precision and rigor may not alleviate all of its dangers, but can significantly mitigate its misuse while preserving its unique importance in the protection and advancement of civil and human rights.[228] As suggested above, specifying why and how a particular legal restriction offends dignity—as a deprivation of core human experiences, as a source of social stigmatization, or as a basis for degradation and dehumanization—can have meaningful consequences for judicial application of dignitary reasoning. Each of these versions of dignity not only provides a unique justification for judicial action, but can mitigate the pitfalls of dignitary reasoning in the abstract by providing understandings of dignitary injury that can be operationalized consistently in adjudication.

Where dignity might be invoked to deny sexual rights or to assert competing dignities, specifying the kind of indignity that merits judicial attention can be consequential. Recognizing deprivation as a form of indignity, for instance, can be a crucial tool in placing some types of regulation beyond the authority of the state or balancing assertions of competing dignities. The abstract dignity of heterosexual sex or the gender binary arguably pales in the face of a concrete dignitary interest in having intimate relationships without fear of prosecution or having a fundamental aspect of one's personhood recognized and respected by the state. The religious sensibilities of the general public, and the sense that they disapprove of a particular sexual activity or gender expression and prefer not to be exposed to it, provide a similarly weak justification relative to the dignitary interests of LGBT individuals who may be

228 O'Mahony, *supra* note 23, at 552; *see also* Catherine Dupré, *Constructing the Meaning of Human Dignity: Four Questions*, *in* UNDERSTANDING HUMAN DIGNITY 113, 120 (Christopher McCrudden ed., 2013) (encouraging greater specificity and precision when invoking dignity); Shultziner, *supra* note 26, at 439 (proposing "four formal principles concerning how human dignity should be applied in judicial decisions: 1. be based on written law; 2. defined; 3. used consistently; and 4. used only for the advancement of human rights").

deprived of participation in public and private life as a result.[229] Concerns about state paternalism, too, are alleviated significantly by this version of dignity. While the state may conceivably conclude that certain professions or activities are incompatible with dignity, this understanding limits its ability to prohibit exercises of autonomy that fundamentally implicate what it means to be human.

The temptation to subordinate sexual rights to public sentiment or competing dignities can also be aided by a more nuanced understanding of stigmatization and degradation as forms of indignity. A better appreciation of stigma as a form of indignity, for example, can help explain why the tacit branding of some individuals as criminals inflicts a dignitary injury that is fundamentally different in kind than the indignity of seeing a parade or library display that one finds offensive. In many cases, it is unhelpful for courts to reason about competing dignities in the abstract—for example, the dignity of religious belief versus the dignity of equal treatment—without greater specificity. A more nuanced attentiveness to stigma and degradation may allow courts to better evaluate when dignity is impaired in particular instances of religious exemptions and refusals, considering whether service providers have been treated with respect but also insisting that the state does not render members of marginalized groups second-class citizens or expose them to public humiliation or degrading misrecognition of their identities and relationships. Identifying whether a dignitary claim is cognizable but also gauging the intensity of the dignitary interests at play can allow courts to more rigorously weigh competing dignities, and to evaluate how stigmatization or degradation might be mitigated or eliminated as a practical matter.

Concerns about the partial or conditional extension of dignity may also be mitigated in unexpected ways by a more precise and substantive understanding of dignity. A greater appreciation of stigma, for example, has promise in elevating demands by transgender individuals who are humiliated by the state's refusal to respect their gender identity, or same-sex couples who feel that the state's refusal to recognize their marital relationship stigmatizes their union and their family. But recognizing stigmatization as a form of indignity that is distinct from discrimination

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229 The notion of core human experiences also serves to distinguish some claims of sexual autonomy from others. While scholarship on dignity often speaks in a general register about the dignity of individual choice, criminal prohibitions on same-sex activity are arguably a particular affront to dignity because they may deter or prevent some people from the experience of engaging in sex at all. Restrictions on group sex or polygamy or sex work may also limit sexual autonomy and thereby deprive individuals of some degree of dignity of choice, but do not deprive individuals of sexual experiences or relationships altogether. The criminalization of other sexual activities and relationships may nonetheless violate other rights, such as privacy and liberty, even where litigants do not want to, or cannot, advance dignitary claims.

also offers litigants an opportunity to go beyond an equality framework that is narrowly circumscribed by a set of protected classes, expanding possibilities beyond mere assimilation to existing normative structures. Such a version of dignity can also support the claims of those who are stigmatized by the state's enforcement of a rigid gender binary, or those who question the linkage of substantive rights and benefits with marriage and concomitant devaluation of other relationships of mutual care and support.

Finally, the possibility of transformative approaches being stifled by a minimalist concern with dignity is offset considerably when dignity is recognized in each of its distinctive guises. The specified concepts of indignity as deprivation, stigmatization, and dehumanization taken together can offer a robust scaffolding for civil and human rights that an abstract or amorphous concept of dignity might elide. Each of these facets of dignity is also subject to further elaboration by social movements. It is not difficult to imagine a concern with deprivation expanding beyond sexual intimacy, for example, to encompass a wider range of core features of human experience, in keeping with Martha Nussbaum's articulation of a list of capabilities for human flourishing.[230] As the broad historical arc of regulation of same-sex activity illustrates, too, our notions of what is impermissibly stigmatizing and degrading evolve over time.

In many instances, litigants might strategically opt not to center dignity but to deliberately insist upon particular liberty and equality guarantees for LGBT people and others. When used to affirm and bolster notions of liberty and equality, dignity's concern with a floor for permissible treatment can complement rather than cannibalize other fundamental human rights.[231] Dignity is likely to be most useful to litigants when harmful laws neither violate a cognizable liberty interest nor discriminate on the basis of a protected characteristic, but nonetheless function to inflict serious deprivation or brand groups as outcasts or subhuman.[232] It is likely to be most dangerous when states and courts invoke dignity in a paternalistic register or use it to reinforce existing disparities. Litigants should thus work to define dignity first and foremost as something that is inextricably linked both to autonomy and

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230 Nussbaum's list includes life, bodily health, bodily integrity, and affiliation, for example, among other capabilities. Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23–24 (2007).

231 Suzanne Baer has persuasively argued that dignity must be understood as part of a triangle with liberty and equality, and that deploying it in a vacuum "should be resisted, since this is exactly the danger that dignity carries: it opens, if used in isolation, a space for metaphysics and moralistic particularities in law." Baer, *supra* note 25, at 430.

232 Shultziner, *supra* note 26, at 463 ("[J]udges employ the concept [of dignity] in hard cases where the standard legal tools do not bring relief to those who seek the court's help or when longstanding legal rules result in a legal yet unjust reality in face of changing social values.").

to equal moral worth with others, working with rather than against other fundamental rights.[233]

The conceptual difficulties inherent in constitutionalizing dignity are not insignificant, but many of them arise from the seemingly impossible level of abstraction with which courts have typically invoked dignity. In recent decriminalization litigation, however, litigants and courts have tacitly reasoned from kinds of indignity that might refine dignity's utility as a constitutional foundation. In these rulings, courts have drawn on notions of dignity that center on the ability to engage in those things that make us human, to be recognized and respected as equals, and to be treated humanely—substantive aspects of dignity that, disaggregated from their factual context, have significant potential in constitutional litigation more broadly. To the extent that dignity has become ubiquitous and will likely continue being used and centered in constitutional litigation, nurturing this framework and encouraging courts to use the concept with greater care and precision is essential to mitigate against its misuse.

CONCLUSION

The frequency with which dignity is invoked in decriminalization jurisprudence can be partially attributed to the conspicuous rise of dignity generally, as that value has been increasingly enshrined in constitutions across the globe. But the efflorescence of dignity in constitutional texts does not fully explain its use in LGBT rights jurisprudence. While a codified right to dignity is a useful tool for advocates, the formal recognition of dignity in a constitutional text is not a prerequisite for these challenges, and courts with varying commitments to dignity have productively drawn on dignitary rhetoric and reasoning in adjudicating the criminalization of same-sex activity.

Beyond its ubiquity, then, dignity is also the product of social mores that have evolved in such a way that punishing consensual same-sex conduct in private is no longer considered compatible with fundamental civil and human rights guarantees. Where same-sex activity was once understood to be inherently undignified, courts have increasingly recognized that dignity inheres in queer intimacy as well. Dignity has thus been wielded "to build an irrefutable foundation for what the court is

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233 This insistence on dignity's harmonization with other rights is essential to avoid a paternalistic privileging of "narratives of dignity that understand dignity as acquired status, a good way to lead one's life, a dignified existence, and honourable way of being in the world," with the state or majority left to dictate those terms. Baer, *supra* note 25, at 457–58.

doing" as it repudiates past practice, even when dignity is one of multiple rights and values at stake.[234]

In these decisions, dignity does meaningful work. It functions as a rhetorical explanation to justify the reversal of longstanding criminal prohibitions, providing judges with a conceptual vehicle to acknowledge social changes and embrace evolving understandings of the moral worth of LGBT persons. But dignity can also specify *why* criminalization poses an unacceptable threat to rights. A more substantive understanding of dignity recognizes that bans on same-sex activity constrain important aspects of human experience, give symbolic license to stigmatization on the basis of sexual orientation and gender identity, and degrade LGBT people and others who engage in same-sex activity. Although courts have not consciously used this typology, in jurisdictions around the world, dignitary reasoning has powerfully illustrated these real and varied harms that laws prohibiting same-sex activity inflict.

This textured jurisprudence of dignity has the potential to fill an important void that has often been left open by liberty and equality guarantees. Courts that have evaluated bans on same-sex activity have at times declined to find violations of the right to privacy, reasoning that their constitutional text narrowly interprets that right in a way that does not extend to intimate relationships subject to the requirements of the criminal law. Similarly, several of the courts that have evaluated bans on same-sex activity have declined to find that bans on same-sex activity are discriminatory—whether because their constitutional text does not prohibit discrimination based on sexual orientation or gender identity, or because they do not regard these laws as a form of sex discrimination, or because they believe any discriminatory effect to be justified.[235] Either alone or in conjunction with rights to liberty and equality, dignitary reasoning can provide a normative basis for courts to determine that bans on same-sex activity do not only circumscribe particular sexual acts but

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234 DALY, *supra* note 9, at 12–13; *see also* Finck, *supra* note 4, at 45. Finck looks primarily at relationship recognition cases; in the cases evaluating bans on same-sex activity, dignity similarly has not been the sole jurisprudential foundation but has in some instances been claimed as a justiciable right by plaintiffs and accepted by courts. *Id.*

235 In response to the argument that these provisions are discriminatory because they only prohibit same-sex conduct among men, some jurisdictions have responded by criminalizing same-sex conduct between women as well. *See* HUMAN DIGNITY TRUST, BREAKING THE SILENCE: CRIMINALISATION OF LESBIANS AND BISEXUAL WOMEN AND ITS IMPACTS 4 (2016) ("At least ten countries that previously only criminalised male same-sex conduct have recently expanded their criminal codes to encompass sexual conduct between women."); *id.* at 11 ("Ironically, such amendments are often made on the inaccurate premise of ensuring non-discrimination in the State's treatment of male and female homosexuals.").

impermissibly intrude on a realm of personal autonomy or seriously threaten the equal membership of LGBT people in the polity.[236]

While growing recognition of dignity is thus laudable, it can be a double-edged sword. Particularly when dignity is invoked as an abstract or rhetorical concept, dignitary reasoning can function as a tool to classify some conduct and litigants as undignified, to needlessly valorize certain practices at the expense of others, or to award litigants a limited set of rights while holding more ambitious demands at bay. Litigants in LGBT rights cases must be aware of these dangers and advance a conception of dignity that takes them into account. Dignity has been most powerful and influential in recent decisions striking down bans on same-sex activity when it provides some degree of specificity as to the injury in question, indicating how and why the ongoing existence of these bans threatens the full enjoyment of human experience, impermissibly brands certain people as inferior, or functions to degrade and dehumanize.

As the pace of judgments overturning bans on same-sex activity accelerates, the centrality of dignity offers new opportunities for LGBT advocates to reclaim full membership in the polity and address pervasive patterns of social discrimination—not only in the realm of criminalization, but in cases regarding advocacy and free expression, relationship recognition, transgender rights, and other contemporary concerns. The choices that litigants and courts make in framing dignitary arguments and giving them specificity are likely to matter greatly in crystallizing the kinds of dignity that take hold in different jurisdictions for future litigants to draw upon. A richer and more nuanced understanding of dignitary harm is a critical step toward that end.

236 *See* Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3 (2015).

APPENDIX I: DECRIMINALIZATION RULINGS (1997–2024)

- Case No. 111-97 TC, Constitutional Court of Ecuador (1997).
- National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa (1998).
- Banana v. State, Supreme Court of Zimbabwe (2000).
- Kanane v. State, Court of Appeal of Botswana (2003).
- Lawrence v. Texas, Supreme Court of the United States (2003).
- McCoskar v. State, High Court of Fiji (2005).
- Sunil Pant v. Nepal, Supreme Court of Nepal (2007).
- Naz Foundation v. Government of NCT of Delhi, High Court of Delhi, India (2009).
- Tan Eng Hong v. Attorney General, High Court of Singapore (2011).
- Tan Eng Hong v. Attorney General, Court of Appeal of Singapore (2012).
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APPENDIX II: OTHER NOTABLE LGBT RIGHTS RULINGS INVOKING DIGNITY

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- COI and GMN v. Chief Magistrate Ukunda Law Courts, Court of Appeal of Kenya, (2018).
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- Digashu v. Government of Namibia, Supreme Court of Namibia (2022).
- Supriyo Chakraborty v. Union of India, Supreme Court of India (2023).
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