

Dignity and Degradation:

Transnational Lessons from the Constitutional Protection of Sex

Libby Adler[†]

I. Introduction

The ideal of human dignity is making increasingly frequent appearances across national jurisdictions and in a wide range of juridical arenas. Recent case law and scholarship suggest the possibility that regard for human dignity implies basic socio-economic rights such as decent housing and running water,¹ or that the infirm are entitled to health care,² or that governments should not execute their most marginalized citizens as punishment for a crime.³ Dignity also has shown up in a handful of cases regarding sex, where the question has been about the extent to which sexual practices such as sodomy or prostitution should be entitled to constitutional protection. A careful reading of the sex cases reveals some risks associated with uncritical reliance on the dignity ideal. This article reviews the concept of dignity historically, examines contemporary sex cases from a few different national jurisdictions for possible historical and transnational continuities, and urges that dignity poses unique legal hazards to reformist efforts to gain constitutional protection for a wide array of sexual practices.

[†] Professor of Law, Northeastern University. I received helpful feedback from Dan Danielsen, Wendy Parmet, Philomila Tsoukala, Dan Williams, Lucy Williams, and members of the Human Rights Interest Group at Northeastern University School of Law, for which I am grateful. Thanks also to Jack Cushman and Kate Pascuzzi for valuable research assistance. Finally, Janet Halley gave generously of her customary and utterly indispensable insight and comradeship, for which she has my unending thanks.

¹ See e.g., Arthur Chaskalson, *Human Dignity as Foundational Value of Our Constitutional Order*, 16 S. AFRICAN JOURNAL ON HUMAN RIGHTS 193, 202 (2000).

² See *id.*

³ See, e.g., Russel Miller, *The Shared Transatlantic Jurisprudence of Dignity*, 4 GERMAN L.J. 925 (2003), and Daniel Williams, _____, ___ HARV. C.R.-C.L. L.REV ___ (2006).

Dignity, for a long time, has stood for at least two broad ideas. The first idea is that all human beings have dignity innately. This idea has a theological incarnation, according to which human beings have dignity because they were created in the image of God, as well as a secular incarnation, according to which human beings have dignity because they have rationality. I will refer to dignity's first meaning—whether its religious or secular origins are implicated—as “universalist” or “egalitarian.”

Dignity's second meaning diverges radically from its first. Rather than being a universal trait, dignity in its second usage derives from social rank. It distinguishes rather than equalizes us. Dignity is what the aristocracy has on the unwashed masses. I will refer to dignity's non-universal, anti-egalitarian meaning as “aristocratic” or “hierarchical.”⁴

This article argues that while aristocratic dignity might appear outdated in modern legal systems with an egalitarian ethos, it is still very much alive, if sometimes difficult to discern. While universalist and aristocratic dignity appear at first blush to stand in stark opposition to one another, the former analytically relies on the latter—that is, an assertion of egalitarian dignity is one side of a coin, the other side of which is necessarily degradation of something excluded and therefore the establishment of a hierarchy. When universalist dignity is invoked, therefore, it is worth investigating the basis for the

⁴ The taxonomy of dignity elaborated in this paper is not the only possible or useful one. For example, Alan Gewirth sets forth two types of dignity which he calls *empirical* and *inherent*, the former being a trait that one might exhibit (“[s]he generally comports herself with dignity,”), while the latter is intrinsic to all human beings. (Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS 12 (Michael J. Meyer & William A Parent eds., 1992). Gewirth's taxonomy is not wholly unrelated to the one used in this paper, but it raises a slightly different set of theoretical questions on which I will not focus, such as whether rights must be deserved, and whether it is theoretically possible to be deprived of one's dignity. See *id.* at 10-11. Moreover, if dignity is conceptualized as empirical, and if *rationality* provides the basis for dignity, (*i.e.*, it is human rationality that entitles human beings to dignity-based rights,) then the question arises whether young children or mentally disabled persons lack entitlement to rights. This paper will not get into this set of questions, but suffice it to say that dignity can be conceptualized in more than one way and that different quandaries result.

assertion of dignity, what—lacking that basis—is excluded, and consequently what hierarchy has been produced or maintained.

In the context of constitutional protection for certain sexual practices on dignity grounds, constitutional courts have dignified some practices, thereby degrading others and producing a sexual hierarchy. This is not inherently bad, but the specific hierarchy should be highlighted and evaluated for its desirability.

A key basis that appears across a handful of national jurisdictions for dignifying constitutionally protected sexual practices is the nature of the relationship in which the sex occurs, producing a hierarchy between sex that occurs in the context of a normatively privileged relationship and sex that occurs outside of that context. This paper highlights the under-acknowledged importance of relationship in constitutional law governing sex and proposes and skeptically evaluates reasons for this preoccupation. It also examines dignity's connection to rationality, and situates that connection historically, devoting particular attention to developments that occurred at the time of the Enlightenment and after World War II, and finds that the interplay among dignity, rationality and sex presents a formidable obstacle to achieving broad constitutional protection for sexual practices. The paper concludes that attaching the dignity of sex to the relational context in which it occurs has injurious consequences for sex generally—not merely for the degraded varieties.

II. Two Strands of Meaning

In one sense, the term *dignity* can be understood to contain a contradiction. As Michael Warner explains:

Dignity has at least two radically different meanings in our culture. One is ancient, closely related to honor, and fundamentally an ethic of rank. It is historically a value of nobility. It requires soap. (Real estate doesn't hurt, either.) The other is modern and democratic. Dignity in the latter sense is not pomp and distinction; it is inherent in the human. You can't, in a way, not have it. At worst, others can simply fail to recognize your dignity.⁵

Warner observes that the two meanings are “radically different,” which is undoubtedly correct. On an axis of egalitarianism-to-hierarchy, however, we might even go so far as to observe their opposition. It is difficult to imagine how such apparently conflicting meanings could coexist in a single word,⁶ but they have done so, as it turns out, for a very long time.

A conference at Hebrew University celebrating the fiftieth anniversary of the Universal Declaration of Human Rights resulted in a helpful volume on the meaning and origins of dignity in human rights thought and practice.⁷ This book brings together legal, philosophical, psychological, historical and theological perspectives on the topic, mainly by enthusiasts. In their forward, the editors mark the pertinence of their efforts by reviewing some of the important legal instruments, including various international declarations as well as Israeli, German and South African basic laws and constitutions, in which dignity is a central precept, and offer to launch a multi-disciplinary dialogue on dignity's meaning.⁸ The first few essays in the collection begin with dignity's roots.

⁵ MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 36 (1999).

⁶ In some of the material that I have come across in my research, the single term *dignity* contains these meanings, but a few authors draw a distinction between *dignity* and *dignity of man* or *human dignity*, and a few siphon off dignity's aristocratic meaning into the term *honor*.

⁷ See David Kertzer & Eckart Klein, *Forward* to *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* vi (David Kertzer & Eckart Klein eds., 2002).

⁸ See *id.* at v-vi (citing ___).

A. Ancient Sources

According to Hubert Cancik,⁹ while there likely was a Greek predecessor,¹⁰ Cicero provides our earliest recorded references to the “dignity of man.”¹¹ In his use of the term *dignitas*, Cancik explains, Cicero usually meant “rank or worth.”¹² Cancik translates Cicero’s definition as follows: “Dignity is someone’s virtuous authority which makes him worthy to be honored with regard and respect.”¹³ Reflecting on the Latin common usage, Cancik elaborates by noting that Cicero’s definition “brings social aspects, like rank and prestige, into the foreground.”¹⁴

But, as the next section of Cancik’s essay shows, Cicero made another claim, also associated with the Latin term *dignitas*. “Human dignity, Cicero claims, resides ‘in human nature,’ and it is Nature herself who...gave reason and freedom of moral decision to all human beings.”¹⁵ Recalling the centrality of both nature and reason to Stoicism,¹⁶ Cancik explains that Cicero and the Stoics understood “natural law, rule of reason, and natural rights, equal for all men, [to be] linked together.”¹⁷

⁹ Hubert Cancik, ‘Dignity of Man’ and ‘Persona’ in *Stoic Anthropology: Some Remarks on Cicero*, *De Officiis* I 105-107, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 19 (David Kretzmer & Eckart Klein eds., 2002).

¹⁰ The likely predecessor on whom Cicero often relied was Panaetius of Rhodes. *See id.* at 22.

¹¹ *See id.* See also Izhak Englund, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 *CARDOZO L. REV.* 1903 (2000) crediting Cicero with the earliest use of the term dignity to refer to “[m]an’s special, inherent quality as a rational being”).

¹² See Cancik, *supra* note ___ at 20.

¹³ *Id.* at 23.

¹⁴ *Id.*

¹⁵ *Id.* at 24.

¹⁶ *See id.*

¹⁷ *Id.* at 25.

Cancik's reading is easily supported by the text of Cicero's political work *De Officiis*.¹⁸

[E]ach of us is endowed by nature with two characters: the first is common to all, in that we share that reason and dignity which is the mark of our superiority over the animal kingdom, and from which is derived all that is good and fitting as well as the capacity for discovering our duty; the second is particular to each individual... in characters there are...many... differences.¹⁹

As Thomas Mitchell explains, *dignitas* in this second context “denoted the esteem and standing enjoyed by an individual because of the merit that was perceived to exist in him.”²⁰ It mitigated Cicero's egalitarianism by recognizing gradations in individual capacity.²¹ This should not, however, be read as purely meritocratic. Mitchell clarifies Cicero's position by pointing to the importance of birth: “[*D*]ignitas did not seem to [Cicero] to be compatible with the world of the poor and the humbly employed.... [It] belonged for him in the loftier ambience of those whose wealth liberated them from the necessity of... hiring their services.”²² As Mitchell concludes, Cicero's concept of *dignitas* contained both merit and heredity, “derived from *genus* as well as from personal worth.”²³

¹⁸ CICERO, ON MORAL OBLIGATION: A NEW TRANSLATION OF CICERO'S DE OFFICIIS (John Higginbotham trans., 1967).

¹⁹ *Id.* at 76.

²⁰ THOMAS N. MITCHELL, CICERO: THE SENIOR STATESMEN 47 (1991).

²¹ *See id.*

²² *Id.* at 48-49.

²³ *Id.* at 50.

It is this dual-stranded etymological history that evidently accounts for the contradiction that appears right out of the gate in Cancik's essay in the Kretzmer-Klein volume:

The original Latin term *dignitas hominis* denotes worthiness, the outer aspect of a person's social role which evokes respect, and embodies the charisma and the esteem presiding in office, rank or personality. It is concrete dignity inherent in the rational persona, given by Nature and to all human beings.²⁴

"Well, which is it," one might fairly inquire after reading Cancik's opening paragraph, "something that accompanies social rank or something that comes with being a human being?" The answer is that as far back as Cicero, dignity seems to have contained both meanings, and that Cancik's first paragraph reflects evidence of this duality.²⁵

Another author in the Kretzmer-Klein volume, Joern Eckert, observes this same phenomenon relying on Cicero and the Stoics, as well as some additional ancient sources.²⁶ "In ancient history, the concept of human dignity had two different meanings,"²⁷ Eckert writes. "On the one hand, it referred to the social rank of a person, and on the other hand, to the distinction between human beings and other creatures."²⁸ Eckert points to Cicero's "critici[sm of] democracy for not respecting the necessary differentiations of dignity according to rank,"²⁹ but then as well to an early Greek idea

²⁴ Cancik *supra* note __ at 19.

²⁵ Cancik's essay proceeds to trace dignity's travels from pre-Christian Rome through parts of Europe and the United States. His timeline concludes with the work of Kant, who, Cancik maintains, owes a debt to Cicero and the Stoics. *See id.* at 33-34, 36-37.

²⁶ Joern Eckert, *Legal Roots of Human Dignity in German Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 41, 43-47 (David Kretzmer & Eckart Klein eds., 2002).

²⁷ *Id.* at 43.

²⁸ *Id.*

²⁹ *Id.*

that “the essential equality of all men was based on ‘decency and law,’ the gifts of Zeus... bestowed upon all men... differ[entiating men] from the animals,”³⁰ a differentiation noted in the Cicero excerpt above, as well.

One need not, therefore, choose between dignity’s two meanings. While the hierarchical (or aristocratic) and egalitarian (or universalist) meanings of dignity appear at first to exist in a contradictory or alternative relationship, the two meanings can be performed simultaneously. If rationality is what dignifies human beings according to the egalitarian meaning, it also places human beings in the upper stratum of a hierarchy between human beings and other species.

The Kretzmer-Klein volume portrays the religious foundations of dignity similarly. In Christianity, the creation of man in God’s image, the apparent dominion of man over other creatures, and the incarnation of Christ all cut in favor of a universalist meaning,³¹ though St. Thomas Aquinas “considered dignity differentiated according to rank as a principle of God.”³² And two other essays in the volume together demonstrate a virtually identical structure within Judaism. The first posits that human dignity comes from a “democratiz[ed]” reading of the Book of Genesis according to which “every

³⁰ *Id.*

³¹ *Id.* at 43-44.

³² *Id.* at 44. See also Engard, *supra* note __ at 1908 on the Christian conception, especially as found in the work of Aquinas and Luther, both of which include egalitarian and hierarchical dimensions. See also John Witte, Jr., *Between Sanctity and Depravity: Human Dignity in Protestant Perspective*, in ROBERT P KRAYNAK AND GLENN TINDER EDS. IN DEFENSE OF HUMAN DIGNITY, ESSAYS FOR OUR TIMES 119-138 (2004) for a reading of Luther that distinguishes between the hierarchical dignity of the priesthood and the egalitarian dignity of the Christian. Jack’s note on Christianity here? Clare’s idea that church wants everyone to start off wrong, sex is undignified, celibacy is dignified, marriage is a sacrament?

human being... is created... in [God's] image."³³ The second, though, concludes from the relevant literature that dignity (*kavod*)

vacillates between the abstract... and the more concrete higher status and respect that are due to the upper hierarchical entities within any social structure. Thus, intrinsic in the Rabbinical system of thought is a concept of dignity that contradicts any... absolute principle of human dignity. Human dignity in rabbinical perspective derives... from the higher divine dignity, and as such is also subordinated.³⁴

Kavod, this second writer explains, like its English counter-part, "stands for both dignity in its most abstract and lofty meaning as well as the most degenerated hierarchical concept of status and demand for subordination."³⁵ Note, however, that even the egalitarian version within Judaism relies on elevating human beings above those creatures which were *not* created in God's image.

The ancient sources, therefore, support the idea of a longstanding contradiction contained in the term *dignity*—that is, either all human beings have it *or* only those of high social rank have it. It is also the case, however, that even the egalitarian version of dignity among human beings was enabled by a hierarchy that denied dignity to other animals.

B. Conceptual Changes Around the Time of the Enlightenment

³³ Yair Lorberbaum, *Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth, and Ritual*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 55, 55-56 (David Kretzmer & Eckart Klein eds., 2002).

³⁴ Chana Safrai, *Human Dignity in a Rabbinical Perspective*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 99, 99 (David Kretzmer & Eckart Klein eds., 2002).

³⁵ *Id.* at 100. See also Englard, *supra* note __ at 1908 ("in Judaism, human dignity is the result of our being created in the image of God") but also see Englard's alternative translation of *kavod* to mean *honor*, which connotes self-aggrandizement and was "viewed suspiciously by the sages." *Id.* at 1904.

Moving ahead to modernity, Eckert³⁶ cites the natural law thinker Samuel von Pufendorf (1632-1694) as representative of the increasing emphasis on the gift of reason as the basis for human dignity, pointing out that Pufendorf was “translated into all the national European languages” and that his work apparently “influenced the author’s [sic] of the Virginia Bill of Rights in 1776.”³⁷ Around this time, a shift in conceptual priority away from rank and toward universal access to reason can be seen, Eckert argues, in the Protestant Reformation, the French Revolution and a general “loss of legitimacy for the traditional orders based on dignity according to hierarchical [sic] ranks.”³⁸ Eckert also credits the major British Enlightenment figures with conceptual development in the direction of natural rights, equality and – with John Locke – a place for these concepts in governance.³⁹ On the Continent, Kant is a major figure, as well, drawing on the ideals of the French Revolution but “emphasiz[ing] moral autonomy,”⁴⁰ and so is Savigny, for “his doctrine of legal personality and subjective right.”⁴¹

Under the influences of Natural Law and Enlightenment, the idea of innate rights of all human beings gained acceptance in Germany. At that time,

³⁶ See also Englard, *supra* note __ at 1917-19, for a strikingly similar account of developments during and after the Enlightenment, emphasizing the contributions of Pufendorf, Locke and Kant. Englard sees the Enlightenment ideas as building on “the Renaissance reaction against the pessimistic medieval vision of humanity.” *Id.* at 1910. Petrarch was a key link in the chain, extolling the virtues of man over animal and “engender[ing] a whole literary genre dedicated to the dignity of man.” *Id.* at 1910-12.

³⁷ Eckert, *supra* note __ at 44. Add cite to Meyer?

³⁸ *Id.* at 44-45.

³⁹ See *id.* at 45-46. Locke’s conception of dignity was roomy enough to allow for slavery. CITE.

⁴⁰ *Id.* at 46. See also EDWARD J. BERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 42-45 (2002). “In the dignitarian jurisprudence of the [German] Constitutional Court, the Court has mainly followed Kant’s theory of moral autonomy.” *Id.* at 43. There is a rich literature on Kantian dignity which I will not review here. One interesting point, however, which Englard raises is that for Kant, “dignity was not a right to be protected, but a moral achievement—man obeying the self-imposed laws of reason.... The shift to a notion of dignity as a fundamental human right could [therefore] be achieved only by renouncing the actuality of moral freedom in persons, and replacing it with its general and equal potentiality in human beings.” Englard, *supra* note __ at 1921.

⁴¹ Eckert, *supra* note __ at 50.

the traditional idea that man is a person because God is a person and man is created in his image became secularized.⁴²

The Enlightenment and its devotion to reason was therefore crucial to the evolution of the secular universalist version of dignity, having landed on the fertile soil of pre-existing acceptance of universal dignity, albeit based on creationism. As the ideas of the Enlightenment spread, the aristocratic version of dignity was less and less in evidence. In an essay pointedly entitled *Dignity as a (Modern) Virtue*, Michael J. Meyer proposes that modernity itself can be characterized as

the general tendency to reject... the ideology of aristocracy. Otherwise put, modern thought generally tends to reject (natural or hereditary) moral and political hierarchies as normative ideals. This aspect of modern thought is, for example, displayed in Kant's moral philosophy as opposed to, say, Aristotle or Burke.⁴³

So, during the Enlightenment, the universality of the capacity for reason as a basis for dignity displaced the pre-Enlightenment commitment to rank and hierarchy. Dignity seemed to evolve into an egalitarian, universalizing, Enlightenment concept. This “recognition of... universal and equal human dignity” came to have “political and legal effect”⁴⁴ in German law⁴⁵ and eventually in the form “of universal human rights.”⁴⁶

⁴² *Id.* at 49.

⁴³ Michael J. Meyer, *Dignity as a (Modern) Virtue*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 195, 202 (David Kretzmer & Eckart Klein eds., 2002).

⁴⁴ Eckert *supra* note __. at 45.

⁴⁵ *Id.* at 51-52.

⁴⁶ *Id.* at 45.

C. The Aftermath of Fascism in Europe

Skipping ahead to the second half of the twentieth century, Eckert concludes with the apparently obvious:

The idea of human dignity was decisively strengthened by developments after the Second World War. After the terrible crimes and contempt towards mankind by the Nazis, there was a sudden surge for stronger protection of human dignity.⁴⁷

As evidence, Eckert points to key provisions in the Universal Declaration of Human Rights, the Charter of the United Nations and post-war German constitutional texts.⁴⁸

Other authors in the Kretzmer-Klein volume, such as Yehoshua Arieli, underscore Eckert's final point:

[T]he invocation of dignity and rights of man has to be seen as a counter-thesis and counter-ideology of the Free World to the ideologies of the Axis Powers and in particular to National Socialism.⁴⁹

Arieli's essay echoes many of the points already made above. He sees dignity and its embrace in the Universal Declaration of Human Rights as "the direct offspring of the great ideas of the 18th century Enlightenment, of the American and French revolutions, of the movement toward democracy and of liberalism,"⁵⁰ and also as directly responsive to

⁴⁷ *Id.* at 52.

⁴⁸ *See id.* at 52-53.

⁴⁹ Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 1, 3 (David Kretzmer & Eckart Klein eds., 2002).

⁵⁰ *Id.* at 5.

the Holocaust.⁵¹ His understanding of dignity is universalist and secular (*i.e.*, grounded in access to reason rather than in man's having been created in the image of God).⁵²

D. Revisiting the Key Points in the Conventional Narrative

The first purpose of my review of these accounts exemplified by the Kretzmer-Klein volume is that the concept of dignity can be traced back quite a long ways along two etymological strands, one universalist and egalitarian, sometimes theological and sometimes secular, and the other oriented toward hierarchy and distinction based on social status. While the two meanings were in some sense conflicting (did all people or just aristocrats have dignity?), the egalitarian version relied on a hierarchy between human beings and other species.

Next, I wanted to use this summary to demonstrate two conventions, each related to the importance of a particular historical juncture: First, I wanted to show the extent to which the Enlightenment and related historical events (American and French revolutions and the Protestant Reformation) have been credited not only with secularizing the universalist version of dignity by stressing access to reason over creationism, but also with *delegitimizing and edging out the aristocratic version of the concept*. As one writer sees it:

Human dignity is man's position in the world, his uniqueness in the cosmos, and no longer his position in a social-functional relationship vis-à-vis his peers.... The shift to the cosmic aspect is a shift from the functional or

⁵¹ See *id.* at 1.

⁵² See *id.* at 8, 16.

performing character of dignity to the given and inherent status of man. It is *pari passu* a shift from certain particular individuals to the universal texture of human existence.⁵³

So the first convention—found in Kretzmer-Klein and beyond—is that during the Enlightenment there was a shift in the meaning of dignity from hierarchical to universal.⁵⁴

Second, I wanted to air the commonly held view that the Nazis' total abandonment of the universalist principle demanded a resurgence of universal dignity and that the Universal Declaration of Human Rights and a number of European and other national constitutions and basic laws asserted preeminence of the concept in the post-war years precisely because of the Nazis' disregard for it.⁵⁵

⁵³ Englard, *supra* note __ at 1905 (citing NATHAN ROTENSTREICH, *MAN AND HIS DIGNITY* 12-13 (1983)).

⁵⁴ As Englard points out, however, "it should be noted that the original meaning of dignity as a function of the individual's social rank continued to be widely used alongside this relatively newer sense of humanity's intrinsic value." *Id.* at 1906 (citing Michael J. Meyer, *Kant's Conception of Dignity and Modern Political Thought*, 8 *HISTORY OF EUROPEAN IDEAS* 319, 330 n. 10 (1987)). This is a point I hope to make elaborately as the article proceeds.

⁵⁵ Of course this idea can be found in sources well beyond the Kretzmer-Klein volume. See Berle, *supra* note __ at 41 ("Human dignity is a central value of the [German] Basic Law. This determination reflects the conscious intention to elevate modern Germany beyond the inhumanity of Nazism, signaling a new constitutional order."). See also Englard, *supra* note __ at 1920-21 ("Ferdinand Lasalle... relat[ed] dignity] to the material conditions of the working classes. He demanded that these conditions be improved in order to achieve for them a 'dignified' human existence... It was... in this sense that the notion of dignity was first introduced into the Weimar Constitution of 1919.... [But] it was the Kantian notion of dignity's absolute and intrinsic character that promoted its inclusion into modern constitutions and human rights conventions in the wake of Nazi Germany's crimes during World War II.").

Even the dignity guarantee in Montana's state constitution has been traced to events in Europe that took place decades earlier. Montana, which adopted its provision in 1972, was apparently influenced by a similar provision in the Puerto Rican constitution of 1951, which in turn "was part of a wave of post World War II constitution making" and drew on "language and ideas from... international human rights documents." Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse* 65 *MONT L. REV.* 15, 23-25 (2004).

Cf. ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2004). Central to Kagan's thesis regarding the conflicting tendencies of Europe and the United States with regard to the use of unilateral force is that Europe is ideologically and psychologically inclined toward the constraints of international law, diplomacy and persuasion and that European nations have largely declined to devote the resources necessary to make themselves powerful in the military sense *because of* the European experience during World War II. Kagan's book is not about constitutional law or the legal concept of dignity, but his view is consistent with the "second convention," especially his

This second convention has been taken up by James Q. Whitman, who offers a more complex account.⁵⁶ Whitman argues that rather than understanding post-war European dignity as an abrupt resurgence following a period of hibernation, the concept can be traced back *through* the Nazi era and owes some of its post-war characteristics to developments that occurred during that time.⁵⁷ He observes:

The new Europe is founded on a forthright rejection of the fascist past.

This is a commonplace.... Perhaps most of all it is a commonplace that we repeat when we discuss the European embrace of the values of ‘dignity,’ and... ‘human dignity.’.... In the literature on all these areas of law we find forthright rejection of the legacy of the fascist era, and especially of the horrors of Nazism.⁵⁸

But, Whitman contends, the history is “messier”⁵⁹ than this narrative suggests. Whitman locates important pieces of dignity’s history in “Nazi law aimed to vindicate claims of ‘honour,’”⁶⁰ and sets forth a richer narrative according to which “old norms of ‘honour,’ norms that applied only to aristocrats and a few other high-status categories of persons in

attribution of the European preference for international liberal legalism to the legacy of the fascist era. *See, e.g., id.* at 55.

⁵⁶ See generally James Q. Whitman, *On Nazi ‘Honour’ and the New European ‘Dignity,’* in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243 (Christian Joerges & Navraj Singh Ghaleigh eds. 2003).

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 245. It is worth pointing out, however, that while Whitman argues that the history of European dignity is not always pretty, he has suggested elsewhere that he is still something of a fan of the concept. *See, e.g.,* Gabrielle S. Friedman and James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 243 (2003) (expressing a preference for an emphasis on dignity in harassment law). See also James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty* 113 YALE L.J. 1151 (2004) (in which he appears at least to disapprove of traces of parochialism in American thinking about privacy, which does not take dignity concerns as seriously as European privacy law does).

the seventeenth and eighteenth centuries, have gradually been extended to the entire population.”⁶¹

For example, Whitman examines the contemporary German law of “insult,” including the cause of action available to Germans who have been insulted individually, (e.g., by an obscene gesture), as well as “collective insult,” protecting minorities from insulting or degrading treatment,” (i.e., “hate speech”), and finds doctrinal roots in laws from the Nazi era designed to protect the SS from disrespect.⁶² These laws find their antecedents in an earlier law of insult, which followed in turn from the norms attendant upon the practice of dueling.⁶³

Like its predecessor, the law of insult that grew out of dueling norms “was careful to distinguish between persons who were ‘satisfaktionsfähig’ [honorable enough to engage in a duel] and persons who were not.”⁶⁴ Though it was a slow historical process, Whitman asserts that it was finally with the advent of Nazism that the “right to take offence [was] generalised throughout German society”⁶⁵ so that, beginning in the 1930’s and today, even low-status Germans can assert claims under the law of insult.⁶⁶

This development, as Whitman explains, was entirely consistent with Nazi populism. “Everybody who counted as a member of the *Volk*-community was a person of ‘honour,’ in Nazi ideology.”⁶⁷ Relying on examples related to the contemporary law of insult as well as to developments in German labor law, Whitman makes a compelling case that Europe’s dignity “is the latest stage in [a] long process of the social extension of

⁶¹ Whitman supra note __ at 245.

⁶² See *id.* at 249-51.

⁶³ See *id.* at 249.

⁶⁴ *Id.* at 247, 250.

⁶⁵ *Id.* at 250.

⁶⁶ See *id.*

⁶⁷ *Id.* at 246.

norms of honour: ‘human dignity’ for everybody, as it exists at the end of the twentieth century, means definitive admission to high social status for everybody,”⁶⁸ or, put even more starkly, “[l]ow-status Germans who learned to believe that they were ‘honourable’ persons in the 1930s became Europeans who believed they [were] entitled to ‘human dignity’ after 1945.”⁶⁹

Whitman writes to problematize the second convention, according to which dignity’s post-Holocaust revival constituted a total rebuke of Nazism.⁷⁰ The advent of post-war European dignity was not abrupt, but evolved before, during and after the Nazi era.

I appropriate Whitman’s analysis, however, to problematize as well the first convention drawn from the accounts above: that during the Enlightenment, when the universalist version of dignity assumed a position in the fore, the aristocratic strand withered. The Nazi promise to extend access to honor to the entire German *Volk* was seductive to ordinary Germans precisely because they imagined themselves to be rising in social status.

It probably strikes the contemporary reader as absurd, the notion that high status could possibly be extended to everyone, but, as Whitman sensitively observes,

⁶⁸ *Id.*

⁶⁹ *Id.* But see Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS* 267 (Christian Joerges & Navraj Singh Ghaleigh eds. 2003). “It is unclear how strong an explanatory force Professor Whitman claims for his central thesis, *how much* of human dignity would be ‘best understood, from the sociological point of view, as a generalization of old norms of social honour.’ Undoubtedly, there is *some* connection between human dignity and honour... [but Neuman believes that] some concerns would arise if [Whitman’s thesis] were overextended.” *Id.* at 272.

⁷⁰ Whitman, *supra* note ___ at 243. Neuman confirms Whitman’s observation that there is a “prevailing assumption that the post-War ascendancy of the value of human dignity result from a reaction against Fascism.” Neuman *supra* note ___ at 268.

[W]e have lost much of our capacity to really empathize with the yearning for respectability that gripped people eighty years ago. This makes it very hard for us to grasp the power of what the Nazis said, when they spoke, as they did so incessantly, about ‘honour’ for all Germans. People cared intensely about whether they were treated as persons of ‘honour’ or not; and a political formula, like the Nazi formula, that promised honour for everybody had real potency.⁷¹

Even as populism reigned, therefore, aristocratic values remained very much alive in the fantasy of social ascent. Whitman’s argument that post-war European dignity evolved out this populism suggests that post-war European dignity contains aristocratic elements, as well.⁷²

Of course—crucially—not everyone counted as a member of the German *Volk*-community. We can understand those who did not as serving the same analytic purpose that animals served in the older sources, *i.e.*, as constituting the lower stratum of a hierarchy that enables egalitarianism within the upper stratum.⁷³ Invocation of dignity even as an egalitarian concept establishes a structure whereby something is degraded as a matter of analytic necessity.

The next part discusses a handful of constitutional cases governing sex that, read closely, evidence a parallel structure. My analysis of those cases is an effort to show that even in a legal culture in which the notion of aristocratic dignity is likely to be viewed as

⁷¹ Whitman, *supra* note ___ at 248.

⁷² Neuman also “agree[s] that historically the modern commitment to human dignity derives from interaction of egalitarianism with the differential dignity of a stratified society.” *Id.* at 267-68.

⁷³ In fact, “the anthropocentric Kantian notion of dignity has been attacked by animal rights advocates on the ground of its ‘speciesism.’” Englard *supra* note ___ at 1922.

quaint at best and morally backward at worst, the hierarchical dimension of dignity remains in play in powerful and subtle ways.

III. The Sex Cases

The Stoics, the Greeks, the Christians and the Jews all emphasized that dignity was reserved for human beings only. Rationality distinguishes us from the animals, over which we are supposed to exercise dominion. Moreover, human beings, unlike beasts, can control their drives; they can choose between sensuality and reason. Cicero urged:

We should never forget... how much the nature of man transcends that of the rest of the animal kingdom. Animals are motivated solely by physical pleasure, and all their impulses tend to that end; man on the other hand has a rational mind which is fed by thought and learning.... But if a man is too prone to succumb to sensual pleasures, he should beware of becoming an animal. There are in fact those who are human in name only.... It is thus apparent that physical pleasure is quite unworthy of human dignity and should be scorned and rejected.⁷⁴

One might predict, reading this history, a tendency in modern law to regard sex as undignified, belonging to man's baser, more animalistic aspect. Yet the materials that my research turned up suggest that courts are more inclined to imagine sex as dignified, and to *protect the dignity of sex* – against the sundry species of threats that sex faces.

⁷⁴ CICERO *supra* note __ at 76. See also Cancik *supra* note __ at 25-26 and Starck *supra* note __ at 183

The cases discussed in this part are drawn exclusively from “modern” legal cultures, in the sense of having at least ostensibly embraced the Enlightenment value of egalitarianism and in which aristocracy and related ideas of natural or familial hierarchy have been discredited, at least as an aspirational matter. I have concerned myself only with cases in which there is a resort to the notion of dignity—presumably in its egalitarian-universalist valence—as *a* (not necessarily *the*) basis for providing or denying constitutional protection to a sexual practice.⁷⁵

Consider, to begin with, *Lawrence v. Texas*,⁷⁶ the 2003 decision of the United States Supreme Court, striking down a state sodomy prohibition on substantive due process grounds. Dignity – hardly a staple in American jurisprudence⁷⁷ – makes an appearance in Justice Kennedy’s⁷⁸ opinion for the majority when he states that anti-sodomy statutes

⁷⁵ My claim is not that dignity will be used the same way in every case, nor that judicial decisions would be certain to come out differently if the notion of dignity were removed or redefined. Still, the transhistorical and transnational usage of dignity in an ostensibly egalitarian valence without explicit recognition of its aristocratic current suggests the possibility of an underestimated discursive force and calls out for critique.

⁷⁶ 539 U.S. 558 (2003).

⁷⁷ It has shown up a few times in Supreme Court decisions on matters of criminal law and punishment, especially regarding the Eighth Amendment (*e.g.*, *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring)) and at least once in a case regarding the right to die (*Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 289 (1990)), but does not rise to the level of a doctrine in American law, at least not at the federal level. See Luis Aníbal Avilés Pagán, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 *Rev. Jur. U.P.R.* 343 (1998) (“The presence of the phrase human dignity in the jurisprudence of the U.S. Supreme Court is, at most, very tenuous; it is relegated to a background of extra-constitutional principles. Its mention surfaces most of the time in the glosses some Justices add to their dissenting opinions, and then, most notably, in cases involving the cruel and unusual punishment clause of the 8th Amendment. The main reason the values of human dignity and autonomy do not arise in constitutional litigation is that they are not explicitly contained in the text of the Constitution.”) *Id.* at 360. See also DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* (1997). Finally, see Gabrielle S. Friedman and James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 *COLUM. J. EUR. L.* 241, 245 (2003) (“European sexual harassment law came to revolve around concepts of “dignity” that have never mustered any real interest, or even sustained attention, in American Law.”) The constitutions of a few states and Puerto Rico, however, do contain dignity clauses (see LA. CONST. art. I, § 3; ILL. CONST. art. I, § 20; MONT. CONST. Art. II, § 4; and P.R. CONST. Art. II, § 1).

⁷⁸ Jeffrey Toobin article in *New Yorker Magazine* on J. Kennedy’s interest in transnationalism.

seek to control a personal relationship that... is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries.... [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.⁷⁹

Not to put too fine a point on it, but it is important for my purposes to observe that the “relationship” to which Justice Kennedy repeatedly refers is the physical relationship of oral-genital or genital-anal contact, or one person penetrating another with an object,⁸⁰ any of which he might have described strictly as “engaging in an activity,” rather than “enter[ing] upon [a] relationship.” The opinion continues “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”⁸¹ You will find no assertion that the two men appealing their sodomy convictions had any plans to form an enduring personal bond; still, that a long-term relationship *might* provide the context for sodomy seems important to Justice Kennedy, though he does not tell us why or state this forthrightly.

⁷⁹ *Lawrence* at 568.

⁸⁰ *Id.* at _____. Tex. Penal Code Ann. § 21.06(a) (2003).

⁸¹ *Id.* at 568.

Moreover, in criticizing *Bowers v. Hardwick*,⁸² which *Lawrence* purports to overrule,⁸³ Justice Kennedy employs a marital analogy. In *Bowers*, Justice White infamously stated that “[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”⁸⁴ His answer, of course, was *no*.⁸⁵ “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct,” Justice Kennedy rebuked him in *Lawrence* “demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.”⁸⁶

I have written elsewhere that it is unclear why a claim is “demeaned” for being understood to regard sex alone.⁸⁷ Justice Kennedy never squarely confronts whether a one-night stand and a sexual act that takes place in the course of an enduring personal bond are equally entitled to constitutional protection, though to be sure, the case does not exclude one-night stands from its purview. Here, though, I want to zero in on the nature of the threat that Justice Kennedy sees to the dignity of persons who engage in acts of sodomy. The sexual acts themselves are not the threat; the sexual actors do not demean themselves. Persons who engage in sodomy “still retain their dignity.” The threat, the demeaning force, is Justice White’s characterization of the issue in *Bowers*, specifically –

⁸² 478 U.S. 186 (1986).

⁸³ *Lawrence* at 579. I say “purports to overrule” because, as Justice Scalia observed in his dissent, *Lawrence* does not explicitly create a fundamental right to engage in sodomy and so may leave intact a central holding of *Bowers*. *Id.* at 587 (Scalia, J., dissenting).

⁸⁴ *Bowers* at 190.

⁸⁵ *Bowers* at ____.

⁸⁶ *Id.* at 566.

⁸⁷ My initial thoughts about this case, and in particular about its references to dignity, appear in *The Future of Sodomy*, 32 *FORDHAM URB. L.J.* 197, 215-218 (2005).

as the marital analogy makes clear – the dissociation of the sexual act from the intimate relationship in which it might occur.⁸⁸

As a case note in the journal *Law and Sexuality*⁸⁹ explains, “[i]n contrast to Bowers, the Court characterized the claim [in *Lawrence*] as the right of adults to define the meaning of their relationships.”⁹⁰ In furtherance of its analysis, the *Lawrence* Court

characterized *Griswold* as holding that a privacy right... protects the marital relation[,] [then found later in Eisenstadt that] “the relation-centered... privacy right found in *Griswold* applies equally to nonmarital relationships [and concluded that] the rights protected by the Fourteenth Amendment include the right to make decisions concerning the most intimate and personal of choices – those that serve to define a person and her relationships and those needed to retain autonomy and dignity.”⁹¹

This commentator surmised that *Lawrence* “may represent an emerging doctrine where laws cannot be said to be drawn to a legitimate state interest if their primary effect and purpose is to demean, stigmatize, and control private and intimate relationships.”⁹²

Regardless of the accuracy of this doctrinal prediction, the marriage analogy combined with Justice Kennedy’s raising the possibility of an enduring personal bond

⁸⁸ Justice Kennedy’s marriage analogy skips carelessly between demeaning a claim and demeaning the claimants, but I do not think that very much rides on his (or my) being precise in that regard.

⁸⁹ Jeffrey Goehring, *Lawrence v. Texas: Dignity, A New Standard for Substantive Rational Basis Review?* 13 *LAW & SEXUALITY* 727 (2004).

⁹⁰ *Id.* at 734.

⁹¹ *Id.*

⁹² *Id.* at 736.

even where none was asserted suggests that an apologist's burden weighed on Justice Kennedy. It seems he felt that if he were going to speak in the language of dignity, two men meeting at a bar or a cruising spot and going home to one man's house for a one-time encounter was not going to serve him well.⁹³ The threat to the dignity of the sexual actors is the suggestion that their acts are merely sex, rather than one facet of a broader relationship. By invoking the image of an enduring bond—actual or potential—Justice Kennedy plausibly lends dignity to the enterprise of sodomy.

In *Jordan v. State*,⁹⁴ three criminal defendants challenged the constitutionality of various provisions of South Africa's Sexual Offences Act.⁹⁵ Section 20(1)(aA) of the Act provides that "[a]ny person who . . . has unlawful carnal intercourse, or commits acts of indecency, with any other person for reward . . . shall be guilty of an offence."⁹⁶ This section was struck down by South Africa's High Court, which determined that it discriminated against women in violation of the constitutional right to equality because it targets the purveyor of sex to the exclusion of the purchaser.⁹⁷ The South African Constitutional Court reversed, however, finding the terms of the Act to be gender-

⁹³ Cf. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (holding that licensing restrictions on motel room rentals for ten or fewer hours did not impose "an unconstitutional burden on the right to freedom of association recognized in *Roberts v. United States Jaycees* [because the Court did not believe that said restrictions] will have any discernable effect on the sorts of traditional bonds to which we referred in *Roberts*.")

⁹⁴ *Jordan v. State* cite

⁹⁵ CITE ACT.

There was some question in the case about whether South Africa's Constitution or Interim Constitution should be applied. The Court determined that the question was of no material consequence to the case, but applied the Interim Constitution based on the dates of the facts giving rise to the case.

One of the defendants owned a brothel and was thus most concerned with the prohibition against running such a business, another appears to have been employed as a cashier of sorts, and the third performed a sexual act for pay, and so was likely most concerned with the section of the Act that prohibited the sale of sex. My analysis will focus on the third defendant's concern.

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neutral⁹⁸ and suggesting that the provision could easily have been designed for the sensible purpose of targeting the more likely repeat-offender in a sex-for-reward bargain.⁹⁹ The Constitutional Court rejected appellants' other constitutional claims, as well, including claims related to freedom and security of the person, privacy, the right to engage in economic activity, and the right to human dignity.¹⁰⁰

In their separate opinion, Justices O'Regan and Sachs concurred with the majority in all respects except one: in accord with the High Court, they would have found that the sex-for-reward provision, "to the extent that it renders criminal the conduct of the prostitutes, but not that of customers," discriminates unconstitutionally on the basis of gender.¹⁰¹ To reach their conclusion, they first considered "whether the impugned provision differentiates between people or categories of people and if it does, whether it does so rationally."¹⁰² Finding that "[i]t cannot be said that it is irrational for the Legislature to criminalize the conduct of only one group and not the other,"¹⁰³ they proceeded to their second step, *i.e.*, "whether a differentiation is made, directly or indirectly on a ground which could be said to have the potential to impair human dignity."¹⁰⁴ If the answer to the second inquiry is yes, "the question that then arises is whether it is unfair."¹⁰⁵

It is important to observe that this portion of the opinion does not regard the constitutional provision guaranteeing a right to human dignity. The Act's sustainability

⁹⁸ par. 9

⁹⁹ par. 10

¹⁰⁰ par. 51 conc/dissent.

Country-specific history of dignity/ubutu in South Africa.

¹⁰¹ par. 71. The customer could face criminal liability as an "accomplice or accessory," but this did not rescue the statute in the view of the dissenting justices. Par. 58, n. 21

¹⁰² par. 57

¹⁰³ par. 58

¹⁰⁴ par. 57

¹⁰⁵ par. 57

under that constitutional provision will be taken up by these two justices later. Here, Justices O'Regan and Sachs are concerned with the constitutional guarantee of *equality*, which as an *interpretive* matter, involves the question of “whether a *differentiation* [might] impair human dignity.”¹⁰⁶

The gender-neutral language of the statute notwithstanding, Justices O'Regan and Sachs were “satisfied that... this is a case where an apparently neutral differentiating criterion producing a markedly differential impact on a listed ground [*i.e.*, gender] results in indirect discrimination on that ground.”¹⁰⁷ Nor were Justices O'Regan and Sachs persuaded by the idea that law enforcement attention was simply being directed toward the more likely repeat offender:

We see no reason why the plier of sex for money should be treated as more blameworthy than the client. If anything, the fact that the male customers will generally come from a class that is more economically powerful might suggest the reverse. To suggest... that women may be targeted for prosecution because they are merchants of sex and not

¹⁰⁶ par. 57 (emphasis added). The South Africans have debated the utility of the concept of dignity to constitutional analysis under the equality guarantee. Some argue that reliance on the concept of dignity undermines the redistributive potential of the equality provision. *See, e.g.*, D.M. Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFRICAN L.J. 398 (1999). But see Susie Cowen, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*, 17 S. AFRICAN J. OF HUMAN RIGHTS 34 (2001) for a contrary view. More broadly, the South Africans also have struggled over the extent to which the separate constitutional clause guaranteeing dignity requires the affirmative provision of such necessities as decent housing even where state resources are not adequate to the task. *See Chaskalson supra* note __. The debate over dignity's relationship to socio-economic rights has traction even beyond the South African context. *See, e.g.*, Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation*, 64 MONT. L. REV. 133, 134 (2003) (proposing that Montana's inclusion of a dignity clause in its state constitution “provides a basis for possible claims to a limited core of socio-economic rights”). Socio-economic rights are not the topic of this paper, but it is possible that socio-economics and sex (conceived as acts taken by and upon bodies, as opposed, say, to as an expression of love) raise parallel issues in relation to the concept of dignity, which is sometimes invoked with a tendency toward the abstract and may obscure material concerns. *Cf. infra* parts V and VI.

¹⁰⁷ par. 60

patrons is to turn the real-life sociological situation upside-down.¹⁰⁸

But it was not merely this sociological reversal that troubled the two justices. The provision's exclusive focus on the purveyor "brand[ing] the prostitute as the primary offender," imposes a "social stigma."¹⁰⁹

The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter.... The difference... tracks a pattern of applying different standards to the sexuality of men and women.... The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.¹¹⁰

Noting that many women "become involved in prostitution because they have few or no alternatives,"¹¹¹ and that "the differentiation [in the Act] tracks and reinforces in a

¹⁰⁸ par. 68

¹⁰⁹ par. 63

¹¹⁰ par. 64-65

¹¹¹ par. 66. Interestingly, while Justices O'Regan and Sachs appear sympathetic in the equality analysis regarding the possibility that prostitutes "have few or no alternatives," the two justices nonetheless concurred with the majority that the prostitutes could not succeed on their claim under the constitutional provision guaranteeing South Africans the right to earn a living.

profound way double standards regarding the expression of male and female sexuality,”¹¹² Justices O’Regan and Sachs concluded that the suggestion that “male patrons... are somehow less blameworthy” is unfair.¹¹³

The two justices were careful not to excuse entirely the prostitute’s behavior.¹¹⁴ Still, in the equality analysis, while considering women as a class that is disproportionately affected by the criminal prohibition, their opinion treats prostitutes as passive objects of stigmatization, victimized by some combination of social, economic and legal forces. It is this stigmatization, in comparison with the easy anonymity enjoyed by male clientele, along with the entrenchment of “double standards” regarding sexual behavior, that constitute the impairment to the dignity of women.

Justices O’Regan and Sachs have performed a feminist analysis, focusing on the relative financial and social power of most men compared with that of most women¹¹⁵ – something that is *ipso facto* unfair. They have also shown the law to be participating in this unfairness by its quiet, ostensibly neutral reproduction of women’s blameworthiness and men’s blamelessness.

Recall, however, that Justices O’Regan and Sachs dissented only from the majority’s equality holding. They concurred in rejecting appellants’ claim regarding the constitutional provision that guarantees that “[e]very person shall have the right to respect

¹¹² par. 67

¹¹³ par. 68

¹¹⁴ par. 66

¹¹⁵ This is only one feminist analysis, of course. Some feminists might object instead to the justices’ presentation of the prostitutes as passive objects of stigmatization, or to the generalization regarding the lack of choice that prompts one to sell sex for a living. (See, e.g., Margo St. James, *The Reclamation of Whores*, in *GOOD GIRLS / BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE*, 81, 82-84 (Laurie Bell ed., 1987)). I have no intention here of entering the debate about women’s agency or lack thereof in the context of prostitution. I highlight the portrayal of the prostitutes as passive because the same justices are going to present the same women differently in their analysis of the dignity claim and I am interested in that contrast.

for and protection of his or her dignity.”¹¹⁶ In analyzing whether the sex-for-reward provision violated the constitutional right to dignity, the two justices reasoned:

Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the

¹¹⁶ Par. 51 of case, par 8 of const. The history of the South African concept of dignity closely tracks the history of the idea in the West. It finds its roots in the Latin *dignitas*, sometimes translated with the double-edged meaning “worth,” and was included in the South African constitution as a rejoinder to the denial of human dignity to black South Africans who “were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.” Cowen, *supra* note __ at 42-43 (citing *Makwanyane*). The African concept of *ubuntu*, which also has appeared in decisions of the South African Constitutional Court, has been construed in a manner consistent with the Kantian ideal, *i.e.*, as “the recognition of human worth and respect for the dignity of every person.” *Id.* at 50, n. 78 (citing *Makwanyane*). See also R.B. Mqoke, *Customary Law and Human Rights*, 113 S. AFRICAN L.J. 364 (1996) for a discussion of the compatibility of African customary law, and *ubuntu* in particular, with international human rights norms.

respect that the Constitution regards as inherent in the human body.¹¹⁷

Observe how differently the prostitutes are portrayed here, and also how differently the law is portrayed. In their equality analysis, where the treatment of a group consisting mainly of women (prostitutes) is compared to the treatment of a group consisting mainly of men (customers), Justices O'Regan and Sachs depicted women as passive objects, and the law as unfairly complicit in the stigmatization of and discrimination against women. Here, the prostitutes are themselves responsible for any loss of dignity they suffer because they have undertaken work that commodifies their bodies. The law is no longer a force that acts in conjunction with economic and social forces to impair women's dignity. Women who sell sex do that to themselves.

In a footnote, the two justices explain their sudden shift:

We have already dealt with the impact on the dignity of prostitutes caused by their being treated differently from their male patrons. The very fact of differential treatment by the criminal law of prostitutes and customers implicates the dignity of all women, and results in indirect discrimination. Here we are concerned not with differential impact as between customers and prostitutes, but with the question of whether the criminal prohibition on its own and regardless of whether it also criminalizes the conduct of

¹¹⁷ Par. 74

customers results in a diminution of the dignity of
prostitutes.¹¹⁸

The dignity of *all* women is impaired by the differential impact of the sex-for-reward provision. When extricated from the question of equality, however, the sale of sex itself, its “very character,” brings indignity on the purveyor. It is the *sale* of sex that causes the indignity; there is no suggestion that sex itself impairs human dignity. In fact, the statute protects sex and bodies against the threat posed by commodification. This point is made additionally clear in the privacy discussion.

In their argument that the sex-for-reward provision contravenes the constitutionally guaranteed “right to... personal privacy,”¹¹⁹ “appellants relied heavily on [the] decision in the *Gay and Lesbian Coalition (Sodomy)* case”¹²⁰ in which the South African Constitutional Court struck down the common law offense of sodomy occurring between men as well as some related statutory provisions,¹²¹ on equality, privacy and dignity grounds.¹²² Majority and concurring justices in this case devote significant space to anti-gay discrimination and its relationship to the privacy and dignity of homosexuals.¹²³ The opinions are lengthy and rich on those points. I wish to direct attention only to one small piece.

In an effort to draw the connection between privacy and dignity, the majority explains: “[p]rivacy recognises that we all have a right to a sphere of private intimacy and

¹¹⁸ par. 74, n. 30. One piece of the debate over the whether dignity ought to underlie the equality provision is the question whether, absent a dignity conception, equality is merely a comparative concept, devoid of any independent content. *See, e.g.,* Davis, *supra* note __ at 400 (citing, but ultimately rejecting, Peter Westin, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982)).

¹¹⁹ par. 51, cont’l par 13

¹²⁰ par. 82, citing .

¹²¹ Sodomy case par 106

¹²² sodomy case par 30.

¹²³ Sodomy case pars 15-27 and 107-138

autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy.”¹²⁴ Observe the similarity to Justice Kennedy’s image of sodomy in *Lawrence, i.e.*, as incident to a broader relationship. Moreover, the majority in the South African sodomy case points out that the challenged prohibition “criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever.”¹²⁵ The Court discusses the prohibition against *non*-consensual sodomy elsewhere in the opinion;¹²⁶ and of course privacy is amply discussed, as well, but this leaves open the question of in what “relationship” or “other circumstances” the justices thought sodomy might be properly restricted. Perhaps they were thinking about incest, teacher-student sex, or doctor-patient sex – or perhaps they were contemplating the lesser injustice of the prohibition against same-sex sodomy when applied to strangers as compared with intimates. There is no way to know for sure. What is clear from the opinion, however, is the Court’s emphasis on intimacy and the establishment and nurturance of human relationships as the link between dignity and privacy.

But “that case highlights points of contrast rather than of correspondence,”¹²⁷ with the challenge to the sex-for-reward provision, in the view of Justices O’Regan and Sachs. For starters, the sodomy case had gay identity going for it. “[W]hat was at stake in that matter was a not just a privacy interest, but an equality one. Indeed, the principal

¹²⁴ sodomy par 32

¹²⁵ sodomy par 28

¹²⁶ sodomy pars 65-73

¹²⁷ Par. 82

complaint of the gay community was that they were being subjected by the law to unfair discrimination on the grounds of sexual orientation.”¹²⁸ Justices O’Regan and Sachs also observed that the sodomy decision employs overlapping conceptions of “equality, dignity and privacy in relation to a community that had been discriminated against on the basis of closely-held personal characteristics. Furthermore,” (and more significantly for my purposes,) the sodomy decision, “stresses that the protected sphere of private intimacy and autonomy relates to establishing and nurturing human relationships.”¹²⁹ Not so in the case of prostitution:

[I]t is the very institution of commercial sex that serves to reinforce patterns of inequality. Moreover, central to the character of prostitution is that it is indiscriminate and loveless. It is accordingly not the form of intimate sexual expression that is penalized, nor the fact that the parties possess a certain identity. It is that the sex is both indiscriminate and for reward. The privacy element falls far short of ‘deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one’s life.’

¹²⁸ par. 82

The importance of gay identity to gay dignity might easily sustain another article. It would recount the Lawrence, S. African cases, maybe Goodridge?, Mv. H and Vriend v. Alberta... A critique of the entrenchment of gay identity in this context might easily rely on past critiques of gay identity on anti-discrimination and privacy contexts. See., e.g., Janet Halley, Jeb Rubinfeld, Libby Adler. Also, Law v. Canada, Michelman on S. Africa and the tranny case from K-K @ 130 and German con law book.

The prostitutes in *Jordan* made an equality claim, as well, but again, the question in this part of the case regards the constitutionality of the ban on prostitution generally, rather than whether purveyors and clients are equally targeted by the law.

¹²⁹ par. 82

By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.¹³⁰

Justices O'Regan and Sachs reached essentially the same conclusion as the majority on this claim, though their precise take is that the Act *does* limit the prostitute's privacy right, *but* – unlike in the South African sodomy case – not much, and not unjustifiably.¹³¹ The majority's analysis, including its distinguishing the prostitutes' privacy claim from the one made in the sodomy case, was brief, but pretty much the same.

There the offence that was the subject of the constitutional challenge infringed the right of gay people not to be discriminated against unfairly, and also their right to dignity. It intruded into 'the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community' and in doing so affected the sexuality of gay people 'at the core of the area of private intimacy.' None of those considerations are present here.

¹³⁰ par. 83

¹³¹ Pars. 84, 94.

This case is concerned with the commercial exploitation of sex, which as I have found, involves neither an infringement of dignity nor unfair discrimination.¹³²

The key piece for my purposes is that sex itself is not the culprit in the derogation of the claimants' dignity. The *sale* of sex is, because once the prostitute makes sex available in the marketplace, she removes it from its normatively desirable context as elaborated by Justices O'Regan and Sachs: love, deep attachment, intimacy, marriage and family.¹³³ As both they and the majority conclude, while same-sex sodomy might take place as part of what their colleague on the United States Supreme Court would call an "enduring personal bond,"¹³⁴ warranting the overlapping constitutional protections of equality, privacy and dignity – prostitution, by its very character, cannot. Sex itself is not portrayed as undignified in *Jordan*. To the contrary, the dignity of sex and sexual actors must be protected against the threats posed by commercialization, lovelessness, indiscriminateness, and the divorce of sex from family. It is the absence of a broader

¹³² Pars. 27-28

¹³³ The Court's holding is consistent with the construction of the African humanist idea of *ubuntu*, which has been translated by the South African court to include the concept of dignity and which has been read to encompass respect for "interpersonal relationships *at family level*." Mqoke, *supra* note ___ at 369 (citing *S v. Makwanyane and another* 1995 (3) SA 391, (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (cc), pars. 263 and 308) (emphasis added).

¹³⁴ It is important to note that just because the leading cases of the United States and South Africa strike down sodomy prohibitions relying at least in part on a concept of dignity that involves a strong relational component, that does not mean that sodomy cannot be constitutionally protected, even using a dignity ideal, in any other way. In 1957, in a much criticized decision, the German Constitutional Court upheld a sodomy prohibition on morality grounds. (See 6 BVerfGE 389, 432-33 (1957).) This case is no longer considered to be good law. Subsequent German case law rejects the morality rationale and the sodomy prohibition was itself repealed. (See Berle, *supra* note ___ at 137-38, 156 n. 81. See also the governing precedent from the European Court of Human Rights, *Dudgeon v. The United Kingdom* (7525/76) [1981] ECHR 5 (22 October 1981). As Berle argues, however, sodomy could be protected on the basis of German law's "emphasis on human dignity and the free unfolding of personality." *Id.* at 138. Berle's vision centers on the autonomy dimensions of dignity, using the language of "sexual autonomy" and associating the concept with individual self-actualization in the Kantian mode. (*Id.* at 138.)

relationship that impugns sex-for-reward and renders it unworthy of the constitutional protection afforded by the South African dignity provision.

A German case known as “the Peep Show Decision,”¹³⁵ while operating with altogether different expectations for the “dignified” relationship, nonetheless shares this general preoccupation. Citing the constitutional value of human dignity, a Federal Administrative Tribunal refused to license a peep show in which a naked woman would be seen by individual “spectators sitting in one-person cabins placed around the stage.”¹³⁶ According to the tribunal’s own account, the star of the show would have participated willingly, but this did not obviate the dignity violation.¹³⁷ As a result, the case has gained attention for running dignity *against* consent or autonomy.¹³⁸ What has drawn less notice (at least in my reading) is the anti-relational aspect of the peep show. The tribunal stated that

[t]he mere display of the naked female body does not violate human dignity, so that, at least as regards a violation of human dignity, no objections exist in principle against the usual striptease performances. (...) Peep shows are fundamentally different from striptease performances. The actions of a woman performing a striptease in front of an audience she can see are in line with the traditional stage and dance show and leave the personal individuality of the

¹³⁵ SABINE MICHALOWSKI AND LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 104-107 (1999) citing BVerwGE 64, 274 (1981). This case was reviewed and upheld albeit based on different reasoning. See Klein, *supra* note __ at 158.

¹³⁶ MICHALOWSKI AND WOODS *supra* note __ at 104.

¹³⁷ *Id.* at 105.

¹³⁸ See, e.g., *id.* at 105-06. See also MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 146 (2004) (Nussbaum thinks the tribunal was on to something in its consideration of the woman’s dignity, but she would have given more weight to autonomy considerations).

performer intact (...). In a peep show, however, the woman is placed in a degrading position, she is treated like an object.... for the stimulation of [the spectators'] sexual interests.¹³⁹

This last line is a strange way to explain the distinction between a striptease and a peep show. Surely women are treated as “object[s].... for the stimulation of... sexual interests” in either case. It is arguably true, as critics charge, that in this case the tribunal has dignity and consent/autonomy running counter to one another. But why would the woman’s consent be overridden by dignity concerns for purposes of licensing one kind of performance but not the other? What seems to bother the tribunal, driving articulation of this distinction, is that in the peep show, the gaze travels in only one direction, from audience to performer. Unlike a stripper, the star of a peep show cannot interact with, respond to or relate to her audience. The indignity, one could conclude from the tribunal’s analysis, lies there.

IV. Exiling Shame

But why? Why is it that the same physical acts are dignified in one context, but undignified in another? Why does the dignity of sexual acts turn on the extent of the relationship between the participants? And in *Jordan* specifically, why do commerce and lovelessness defeat the dignity of sex?

Recall Whitman’s discussion of the origins of European dignity in the customs associated with dueling. The Nazis’ rhetorical success, which Whitman contends was not entirely repudiated in the post-war conception of dignity, was in the promise of

¹³⁹ *Id.* at 105.

widespread access to high status norms. Of course, the extension of high status to all Germans is more than simply a hollow proposition and a logical impossibility; it reflects shame. A preposterous belief that one has *high* status is best read as an instance of overcompensation, or, in Freudian terms, a *reaction-formation*¹⁴⁰ – that is, an unconscious defense against the shame of having *low* status.

A couple of the authors in the Kretzmer-Klein volume appear to share this intuition. David Weisstub, in a particularly lucid essay, observes that dignity has its own “stylistics.”¹⁴¹ He believes that the term still signifies “[t]he aristocratic attributes of being ‘above the crowd,’ being able to control excessive sentiment or emotion, being un-needy materially (or apparently so), [and] looking like the product of good breeding in dress and mannerisms.”¹⁴² These stylistics cannot help but precipitate a minor crisis when the term is applied to “persons in involuntary states of committal, the mentally and medically incapacitated... and the underclasses, [because while] one’s ‘liberal’ instinct is to avow the human dignity of all these groups.... this flies in the face of popular use.”¹⁴³

As a psychological matter, Weisstub maintains,¹⁴⁴ the humiliated person often “becomes morally incapacitated, [triggering] instincts such as revenge and desire to reconstitute the psyche through acts of distancing.”¹⁴⁵ The revenge point is interesting enough,¹⁴⁶ but I am more concerned with distancing as way of managing shame. What a

¹⁴⁰ Freud

¹⁴¹ Weisstub, *supra* note __ at 270.

¹⁴² *Id.* at 269.

¹⁴³ *Id.*

¹⁴⁴ Weisstub “holds the Philippe Pinel Chair of Legal Psychiatry and Biomedical Ethics at the University of Montreal Faculty of Medicine.” THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 296 (David Kretzmer & Eckart Klein eds., 2002)

¹⁴⁵ Weisstub, *supra* note __ at 279-80.

¹⁴⁶ Weisstub calls on Shakespeare’s Shylock to demonstrate this point, making particular reference to the famous speech in which Shylock asks “if you pricke us doe wee not bleede,” noting Shylock’s complaint

humiliated person experiences as dignity, Weisstub contends, might instead be “identification with the aggressor [or] spurious notions of elitist or aristocratic affect.”¹⁴⁷

Dignity is a reaction-formation against shame or humiliation, therefore, when a humiliated person’s response to the condition of humiliation is to distance herself from that experience, to don an aristocratic affect, and to adopt the pretentious stylistics of a higher social status, the exclusion from which caused the humiliation in the first place. This reaction is unconscious and therefore difficult to reach and engage, lending dignity the tremendous power of psychic intransigence.

An analogous reading explains the judicial inclination to protect the dignity of sex from threats posed by anonymity, lovelessness and commerce. A crucial piece of my argument is that when a court dignifies some judicially favored brand of sex, it simultaneously and inherently degrades sex that occurs outside of the normatively prized context. That conclusion, it seems to me, is logically required and is exemplified by the pairing of the two South African cases. I want to push forward one more step, though, and urge that labors on the part of courts to protect the dignity of sex from the threat

that he has been disgraced and that his nation has been scorned, and swearing that “[t]he villanie you teach me I will execute.” *Id.* at 280.

¹⁴⁷ *Id.* at 281. A good illustration of Weisstub’s point comes from Orit Kamir, *Honor and Dignity Cultures: The Case of Kavod and Kvod Ha-Adam In Israeli Society and Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 231 (David Kretzmer & Eckart Klein eds., 2002). Kamir offers a helpful taxonomy of meanings for the Hebrew *kavod* (which she translates as *glory, honor, dignity or respect*, depending on the context) (*see id.* at 236-37) and argues that political Zionism began principally as an honor discourse. (*See id.* at 245.) “Zionism transformed pain, widely felt by European Jews as a result of the continuous assault on their dignity and human rights, into anger in the context of national honor. The honor code, eagerly adopted from European and especially from German culture by Zionists and presented as authentically Hebrew, made it possible to present Jewish life in Europe as degrading and humiliating to the collective entity. The national state in Palestine was presented as an honorable solution to a dishonorable existence in exile.” (*Id.*) An interesting historical note cited by Kamir in support of her position is that the writings of Theodor Herzl, the father of political Zionism, apparently “reveal him [to be] obsessively concerned with issues of honor. . . . The first solution Herzl devised for the problem of Europe’s Jews was a public duel between a leading anti-Semite and himself, or another Jewish leader.” (*Id.* at 247 (citing Herzl, *Herzl’s Writings in Ten Volumes* (1960 vol. I, p.5).) Note in this example the Jewish identification with the European aggressor, a point made by Weisstub, as well as the proposal that the Jews redeem their honor through a practice associated with the aristocracy.

posed by that which takes place outside of the ideal, loving, intimate, familial setting are evidence of a reaction-formation. The reaction is not unlike the reaction against being lower-class and the desire to distance oneself from that indignity; it is a reaction against—and desire to distance oneself from—the shame, terrors and anxieties associated with sex.

A. Aloneness

In his *Is the Rectum a Grave?*, Leo Bersani argues that the problem with phallogentrism is its “denial of the *value* of powerlessness.”¹⁴⁸ He explains:

In making this suggestion I’m also thinking of Freud’s somewhat reluctant speculation... that sexual pleasure occurs whenever a certain threshold of intensity is reached, when the organization of the self is momentarily disturbed by sensations or affective processes somehow ‘beyond’ those connected with psychic organization. Reluctant because... this definition *removes the sexual from the intersubjective*.... For on the one hand Freud outlines a normative sexual development that finds its natural goal in the post-Oedipal, genitally centered desire for someone of the opposite sex, while on the other hand he suggests not only the *irrelevance of the object in sexuality* but also, and even more radically, *a shattering of the psychic structures*

¹⁴⁸ Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM* (Douglas Crimp ed., 1988).

*themselves that are the precondition for the very
establishment of a relation to others.*¹⁴⁹

At a certain point on the arc of a sexual encounter, Bersani seems to be suggesting, the desired object becomes virtually irrelevant. At the moment when psychic organization is disrupted, sexual orientation and gender identity become moot¹⁵⁰ and—as the sexual is “remove[d]... from the intersubjective,”—sex is the province of the solo practitioner.

Bersani is zeroing in on that facet of sex which implicates power. He continues:

[T]he self which the sexual shatters provides the basis on which sexuality is associated with power.... For it is perhaps primarily *the degeneration of the sexual into a relationship that condemns sexuality to becoming a struggle for power.* As soon as persons are posited, the war begins.¹⁵¹

Janet Halley elucidates Bersani’s argument this way:

The self-shattering which Bersani finds in our sexual intensities is to be valued as a political project because it gestures to a state of being in which the self/other structure of social life is suspended and the political will to dominate rendered inarticulate and helpless. The social and the political inevitably involve domination or at least the struggle for it, but sexuality has a fleeting existence prior to and free of them.... [Bersani] argues that the very self

¹⁴⁹ *Id.* at 217 (emphasis added).

¹⁵⁰ Halley, *Queer Theory by Men* (around p. 26?)

¹⁵¹ *Id.* at 218 (emphasis in original).

respect which, in liberal theory, is supposed to check social subordinations in the sexual domain--homophobia, misogyny and sexual moralism being his examples-- actually produces them and every form of power struggle. They cannot be traced to mastery or submission, but to the self which would transcend its own relentless problematic. Sexual abjection with its momentary disorientation of the self offers to interrupt this generation of social dominance through the self, and constitutes a vast critique of political and social power.¹⁵²

Bersani's purpose is to discern political value in sexual practice – he sees the disruption of the self in sex as a disruption of the relationship and the attendant struggle for power that occurs intersubjectively resulting in domination and subordination. My purpose in appropriating Bersani's idea is less ambitious. I wish mainly to direct attention to that facet of sex which occurs outside of relation.

Consider this account of the sexual arc by psychoanalyst Christopher Bollas, noting the importance of both relatedness and anti-relatedness:

In lovemaking, foreplay begins as an act of relating. Lovers attend to mutual erotic interests. As the economic factor increases, this element of lovemaking will recede somewhat (though not disappear) as the lovers surrender to that ruthlessness inherent in erotic excitement. This ruthlessness has something to do with a joint loss of

¹⁵² Halley, *Queer Theory by Men*

consciousness, a thoughtlessness which is incremental to erotic intensity. It is a necessary ruthlessness as both lovers destroy the relationship in order to plunge into a reciprocal orgasmic use. Indeed the destruction of relationship is itself pleasurable [as is] the conversion of relating to using...¹⁵³

While the *Lawrence* and *Jordan* courts extol the virtues of intimacy and struggle to defend the dignity of sex that occurs in the context of an enduring relation, they seem less inclined to highlight the unrelated facet of sex. Perhaps anonymous, loveless and commercial sex reveal something about even the most loving, marital brand of sex that judges do not want to see. Bersani's essay begins "[t]here is a big secret about sex: most people don't like it."¹⁵⁴ I take him to be referring to the imminent disaggregation of the self, which can be terrifying, as can the aloneness implicit in both the Bersani and Bollas accounts. By emphasizing the relationship, though, this terrifying aspect of sex can be discursively exiled.

The German Peep Show Decision highlights this anxiety around anti-relational sexuality, as well. Some shame, anxiety or terror was triggered by the dropping off of relating that occurs in the peep show, prompting the tribunal to distinguish the peep show from the striptease *on dignity grounds*. That the same act of nude dancing was seen as sufficiently dignified when the dancer could see her audience but contrary to the constitutional value of dignity when she could not, suggests that dignity was acting as a textual/doctrinal container for an anxiety about anti-relatedness.

¹⁵³ CHRISTOPHER BOLLAS, FORCES OF DESTINY: PSYCHOANALYSIS AND HUMAN IDIOM 26 (1989). See also ADRIA E. SCHWARTZ, SEXUAL SUBJECTS: LESBIANS, GENDER AND PSYCHOANALYSIS 61 (1998).

¹⁵⁴ Bersani *supra* note __ at 197. See also Halley *supra* note __ at __.

In Halley's explication of Bersani, she writes "the very self respect which, in liberal theory, is supposed to check social subordinations... actually produces them."¹⁵⁵ Once we bring in the idea of reaction-formation, we might add that the liberal ideal of dignity, a consummate expression of liberal self-respect, when conceptually tied to a morally privileged relationship, not only undermines its own egalitarian ethic, but also obscures fear and shame about aloneness in sex—that is, the particular moralism expressed in the normative privileging of the enduring relationship reflects (and deflects) unconscious feelings about aloneness.

B. Intimacy

On the flip side, paradoxically, are shame, anxiety and fear regarding intimacy. In Philip Roth's novel *The Human Stain*, the protagonist's lover, ruminates on "[w]hat the hookers told her, the whores' great wisdom: 'Men don't pay you to sleep with them. They pay you to go home.'"¹⁵⁶ Sex, Roth's hookers seemed to intuit, is not that hard to come by. By itself, it might not sustain the prostitution market. But the escape that the prostitutes offer men from having to perform intimacy afterwards – now that's worth something.

"[H]uman intimacy," as Susan Miller writes, "is risky business and often very costly."¹⁵⁷ Miller's work examines the role of disgust in regulating intimacy, and guarding against the many risks intimacy poses, including the risk of a total collapse of

¹⁵⁵ *Id.* at ____.

¹⁵⁶ PHILIP ROTH, *THE HUMAN STAIN* 236 (2000).

¹⁵⁷ SUSAN B. MILLER, *DISGUST: THE GATEKEEPER EMOTION* 98 (2004). Susan Miller is not to be confused with a perhaps more well-known Miller who has taken up the same subject matter. See WILLIAM I. MILLER, *THE ANATOMY OF DISGUST* (1997).

the self into another.¹⁵⁸ (Roth’s hookers provide a quite low-cost alternative by comparison.) According to Miller, sex and disgust are partners in a dance,¹⁵⁹ playing out “our conflicting desires for union and separateness.”¹⁶⁰ Disgust, as Miller’s title indicates, (“Disgust: The Gatekeeper Emotion”), acts as a gatekeeper, mediating between our need for and fear of intimacy. While the Bersani and Bollas accounts depict an aloneness in sex that can be terrifying, Roth and Miller suggest that intimacy can be equally frightening. Judicial prizing of the nicety of the “enduring bond” brand of intimacy—a one-dimensional account that raises none of the psychic complexities but dignifies morally privileged sex at the expense of the more disreputable varieties—avoids confrontation with that difficulty.

C. Animality

As discussed above,¹⁶¹ one can discern, in the history of human dignity, an emphasis on the distinction between human beings and non-human animals. In the Kretzmer-Klein volume, for example, Hubert Cancik explains:

It is *ratio* (mind, reason) through which man excels beasts. Reason is, according to Stoic anthropology, the distinctive quality of man.... The mind.... controls the drives... and represses the irrational affects.... It is from this rule of

¹⁵⁸ S. Miller, *supra* note __ at 97-110.

¹⁵⁹ *Id.* at 110. She is drawing on but slightly modifying Freud, who “understood disgust – along with shame and morality – to be a reaction-formation against desire, meaning it is an expression of aversion that disguises a desire or an appetite,” *Id.* at 110-11.

¹⁶⁰ *Id.* 97.

¹⁶¹ See *infra* cite to Cicero at 76.

reason over the irrational forces that Cicero derived the
'dignity of our nature.'¹⁶²

Since animals, according to Stoic assumptions, have only
sense and sensuality, they are fixed in the present and have
only a limited foresight and memory. Man should rule over
beasts as over his own sensuality, emotions, drives.¹⁶³

Human beings, according to this conceptualization, live with the capacity for both
rationality and irrationality, dignity glorifying the former to the exclusion of the latter,
which one imagines to encompass our unglamorous bodily desires. Sex, one could take
from the Stoic formulation, is a domain in which we are our less rational, more
animalistic selves.

Susan Miller also has observed the existence of a certain "anxiety associated with
sexual behavior [due to] its underscoring of our membership in the animal kingdom,"¹⁶⁴
and Michael Warner has similarly surmised that "[p]erhaps because sex is an occasion for
losing control, for merging one's consciousness with the lower orders of animal desire
and sensation, for raw confrontations of power and demand, it fills people with aversion
and shame."¹⁶⁵ These commentators are picking up on vestiges of the Stoic view (and of

¹⁶² Cancik *supra* note __ at 25.

¹⁶³ *Id.* at 26. See also Starck, *supra* note __ at 183 (citing "an ability, inherent in every human being, which enables him to choose freely between sensuality and reason.").

¹⁶⁴ S. Miller *supra* note __ at 114. Miller adds "'the homophobic reaction is not necessarily the response to same-sex body contact per se, but may be the response to the animal nature of all sexual passions, seen more clearly when looking at something less familiar and slightly alien.'" *Id.* She goes further to suggest that "[f]or many men, the humiliation associated with surrendering adult sensibilities and reverting to infantile anality may be compounded by the humiliation of assuming the passive, stereotypically feminine role of being penetrated [or by] the idea of penetration from behind, which connotes for both genders animal sexuality.'" *Id.*

¹⁶⁵ Warner, *supra* note __ at 2.

some analogous religious views¹⁶⁶) discernable in contemporary conceptions that observe a sharp dichotomy between the rational mind and the beastly drives, only the former meriting dignified regard.

In her recent book *Hiding from Humanity*,¹⁶⁷ Martha Nussbaum suggests that disgust “has to do with our interest in policing the boundary between ourselves and nonhuman animals, or our own animality”¹⁶⁸ and with a “fantasy of self-transcendence [or of] impossible strength or purity.”¹⁶⁹ She argues that through the mechanism of projection, disgust has the dangerous capacity to produce subordination:

So powerful is the desire to cordon ourselves off from our animality that we often don't stop at feces, cockroaches, and slimy animals. We need a group of humans to bound ourselves against, who will come to exemplify the boundary line between the truly human and the basely animal.... Thus, throughout history, certain disgust properties—sliminess, bad smell, stickiness, decay, foulness—have repeatedly and monotonously been associated with, indeed projected onto, groups by reference to whom privileged groups seek to define their superior

¹⁶⁶ On the religious side, Orit Kamir reports that “[r]elying on the biblical portrayal of Man as created in the image of god, Rabbinical Judaism attributes some of god’s *kavod*-glory to mankind.” Kamir *supra* note ___ at 244. This godly element “precludes suicide, abortion, homosexual intercourse and masturbation among other ‘unglorified’ treatments of a person’s body.” *Id.* Kamir distinguishes between *kavod* as glory and *kavod* as dignity, contending that the former refers not to “people’s human essence, but to the godly element within them.” *Id.* While her taxonomy of the Hebrew term is useful for her purposes, I do not see this distinction as crucial here, except perhaps insofar as she asserts that a compromise of *kavod* as glory is regarded as sin, rather than with shame. *Id.*

¹⁶⁷ Nussbaum, *supra* note ___.

¹⁶⁸ *Id.* at 89 (citations omitted). Nussbaum treats disgust and shame separately, but I do not see a reason to adhere to her separation for purposes of this sub-part or the next.

¹⁶⁹ *Id.* at 106.

human status. Jews, women, homosexuals, untouchables,
lower-class people—all these are imagined as tainted by the
dirt of the body.¹⁷⁰

Nussbaum posits that “[d]isgust at the body and its products has collaborated with the maintenance of injurious social hierarchies” and urges the dismantling of social formations that result from an unhealthy relationship to human animality.¹⁷¹

In the domain of sex, in particular, Nussbaum is troubled by “the time-honored view that sex itself has something disgusting about it,”¹⁷² and appears to endorse the idea that “a healthy society would be one that comes to grips with its own mortal bodily nature and does not shrink from it in disgust.”¹⁷³ At moments such as these in Nussbaum’s book, her thinking grows utopian,¹⁷⁴—it is not clear to me that the eradication of disgust around sex and the human body is an avenue worth pursuing.¹⁷⁵ Still valid and important to my argument, however, are her observations regarding the fantasy of purity, the projection of disgust to create hierarchy,¹⁷⁶ and the general anxiety surrounding reminders of human membership in the animal kingdom.¹⁷⁷ My interest is in the

¹⁷⁰ *Id.* at 107-08.

¹⁷¹ *Id.* at 117.

¹⁷² *Id.* at 137. Nussbaum is highly suspicious of disgust as a guide to the regulation of sex. She sees it as a “red herring in the law of pornography,” for example, and believes it does not justify sodomy prohibitions. *Id.* at 75.

¹⁷³ *Id.* at 138 (citations omitted).

¹⁷⁴ James Q. Whitman also has criticized Nussbaum’s book on grounds of utopianism, but on a different point. James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2709 (2005) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (2004)). Whitman accepts hierarchy as probably inevitable and would have liked to see Nussbaum engage some of the difficult questions regarding the exercise of power under hierarchical conditions. *See id.* at 2720-24.

¹⁷⁵ A “healthy society” that has conquered disgust at the human body strikes me as neither possible nor unequivocally desirable. Some sex might be exciting precisely because of the risk of disgust that it just barely skirts.

¹⁷⁶ To avoiding subjecting myself to the criticism levied at Nussbaum by Whitman (see *infra* note __), I note that this paper is not an argument against hierarchy in all its forms. (See *infra* note __). It is an argument identifying a specific hierarchy and evaluating that hierarchy for its desirability.

¹⁷⁷ See also SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 62 n.7 (James Strachey trans., 1961) (“[W]ith the assumption of an erect posture by man and with the depreciation of his sense of smell, it was

explanatory contribution of animality in trying to understand the judicial application of dignity to a subset of sexual practices.

One might expect judges to regard sex as belonging to the beastly domain within the Stoic formulation and therefore to treat sex as undignified, but the cases discussed in this article defy this expectation. Instead, judges who cannot seem to find any dignity in the thought of human beings on the prowl for utterly self-regarding, unrelated, animalistic sex can siphon off sex that occurs in the context of an enduring relation from its deprivileged counterpart, foisting the shame and anxiety of animalism onto the latter and moving the former into the realm of dignity – if only by ignoring its animalistic, irrational aspects.

D. Need

The deep hunger or sense of need associated with sex might also be expected to produce feelings of vulnerability and shame. To the extent that unrelated sex foregrounds the base sexual need, shame might prompt a person (such as a judge) to draw a sharp distinction between anonymous sex and its more respectable counterparts.

In her discussion of shame, Nussbaum finds origins in infantile helplessness and the wish for omnipotence and comfort¹⁷⁸ and links sexual shame to “a more general

not only his anal eroticism which threatened to fall victim to organic repression, but the whole of his sexuality; so that since this, the sexual function has been accompanied by a repugnance which cannot further be accounted for, and which prevents its complete satisfaction and forces it away from the sexual aim into sublimations and libidinal displacements.... Thus we should find that the deepest root of the sexual repression which advances along with civilization is the organic defence of the new form of life achieved with man's erect gait against his earlier animal existence.”)

¹⁷⁸ Nussbaum, *supra* note __ at 173.

neediness and vulnerability.”¹⁷⁹ The danger then comes when one cannot manage one’s feelings about neediness internally, but must externalize it by shaming others:

[P]eople who inflict shame are very often not expressing virtuous motives or high ideals, but rather a shrinking from their own human weakness and a rage against the very limits of human life. Their anger is not really, or at least not only, anger at immorality and vice. Behind the moralism is something much more primitive, something that inherently involves the humiliation and dehumanization of others...¹⁸⁰

In the area of sex in particular, “insecurity” and “lack of control” leads to hierarchy and “scapegoating, in which some vulnerable minority bears the burden of the fears of the majority.”¹⁸¹ Nussbaum explains:

In sexual relations all human beings feel deeply exposed, and sex is a particular site of both physical and emotional vulnerability, but if normals can brand a certain group as sexually deviant, this helps them to avoid the shame that they are prone to feel. In short, by casting shame outwards, by branding the faces and the bodies of others, normals

¹⁷⁹ *Id.* at 183.

¹⁸⁰ *Id.* at 232.

¹⁸¹ *Id.* at 296. Nussbaum’s utopianism shows up in this discussion, as well, particularly where she describes a “good development” in which an “infant learns not to be ashamed of neediness.” *Id.* at 191. She mitigates this somewhat later, however, in an admission of the inevitability of shame. *See id.* at 336.

achieve a type of surrogate bliss; they satisfy their infantile wish for control and invulnerability.¹⁸²

Shame over one's need, therefore, like disgust at one's own animality, poses the risk of projection, and might, for example, find its way into a judicial opinion that is intent on distinguishing between privileged sex and a deprived variety in which need, vulnerability and hunger are more vivid.

So, if sex has an anti-relational dimension – and of course I cannot prove that this is always or necessarily so¹⁸³ – *or* if intimacy is characterized by high costs and high risks, *or* if in sex we are our most animalistic selves (*i.e.*, irrational and sensual), *or* if sex is a domain of vulnerability and need, *and* if any or all of these facets of sex provoke fear, anxiety or shame, then one could conclude that by conceptually fastening dignity to relatedness, courts are effectively proposing that practitioners of anonymous, loveless and commercial sex bear the shame and anxiety that attends to sex generally. Exiling some forms of sex from the realm of dignity plainly degrades those forms, but if you are persuaded that sex in general comes with some dimensions that provoke shame, fright or anxiety, then the degradation produced by the *Lawrence* and *Jordan* courts by their preoccupied protection of dignified relatedness attaches not only to the exiled varieties of

¹⁸² *Id.* at 219.

¹⁸³ This part contains a number of psychoanalytically-oriented assertions, none of which, as far as I know, can be proven in the strictest sense. As Nussbaum concedes, “many people do not have a high regard for psychoanalysis.” Nussbaum, *supra* note __ at 342. My best pitch to the skeptically inclined is this: There is no need to buy into psychoanalysis wholesale, no need for example to find purchase in the Oedipal triangle, the death drive, or the meaning of dreams. My argument in this part relies mainly on the existence of unconscious motivation and the possibility of projection. My hope is that when faced with the conceptual linkage in the cases between dignity and relationship, as well as the non-inevitability of said linkage (*e.g.*, there is the option of linking dignity to absence of harm), few alternative explanations for the judicial conception will present themselves and the suggestions offered in this part will come to seem like the most plausible, if not only, explanation.

sex, but to sex in general. In the short term, some sex benefits from the constitutional shelter befitting such a dignified endeavor, but play out these implications, and sex in general is degraded.¹⁸⁴

In short, the dignity of sex reflects the shame of sex. Like the extension of dueling norms to low-status Germans, dignity is the cover story, shame and distancing the painful undercurrents.

Observe for example the similarity between the shame of sexual need and the shame of having low social status. As Weisstub observed, a “stylistic” of aristocracy to be mimicked by those with a longing for upper-class respectability is that of “being un-

¹⁸⁴ Avishai Margalit has argued that the concept of human dignity comes with two hazards: kitsch and deification. (Avishai Margalit, *Human Dignity: Between Kitsch and Deification*, Dean’s Lecture Series, Radcliffe Institute for Advanced Study, Harvard University (Feb. 17, 2005) (video available at <<http://www.radcliffe.edu/events/video.php>>).) He defined “kitsch” – fabulously – as “the absolute denial of shit in our life.” *Id.* His concern about dignity is that it is easily sentimentalized so that vulnerability and innocence (“kitsch”) or Kantian moral autonomy (“deification”) serve as justifications for a universal principle of human dignity. *Id.* His preference is that human dignity be premised on the notion that human beings are “icons of each other.” *Id.* Mere universality of humanness, without the need for further justification in human traits or conduct, seem to Margolit to contain more promise for tapping into the concept when it is most needed. He cited the treatment of Saddam Hussein, hardly an innocent or noble figure, as an example. *Id.* Rather than focusing on Saddam’s deservedness, Margolit argued, we should treat him with human dignity because he is an icon of all of us. *Id.*

This formulation holds significant appeal for me because my concern is the implicit drawing of a boundary between innocent, deserving sex (relational, marital, intimate, etc.) and guilty, undeserving sex (anonymous, commercial, otherwise depraved). The sidelining of undeserving sex has consequences for all sex, I have argued. It is not entirely different from Margolit’s idea that indignities committed against Saddam Hussein are indignities to an icon of all of us.

Margolit’s argument broke down, however, during the question-answer period. He could not offer a reason to draw the line at human beings, for example. Why is a pet dog not equally a universal icon? He could not offer a justification for his inclination not to intervene where someone has consented to be humiliated. Most importantly, for my purposes, after making frequent use of forced nudity as an example of a plain violation of human dignity, he could not say why his obsessive return to the indignity of nudity was not a reproduction of the problem of “the absolute denial of shit in our life.”

This is not to say that I favor parading prisoners around naked. Rather, I mean to point out that in the answers each of these questions, not only does even Margolit’s refined conception of dignity reveal itself to be an abstraction rife with all of the predictable problems of indeterminacy, but also even this critic of kitsch and deification feels compelled to extricate dignity from the horror of bare naked animality. See also Nussbaum, *supra* note __ at 186 (“Why has shame been so often connected to the sexual and to a desire to cover our bodily organs from view?”).

needy materially.”¹⁸⁵ The impulse to distance oneself from one kind of neediness is highly reminiscent of the impulse to distance oneself from the other kind.¹⁸⁶

Observe further the similarity between Nussbaum’s idea about projecting shame onto some deviant class and Whitman’s account of the power of Nazi rhetoric that appealed to the ordinary German’s wish to be included in the aristocracy and the concomitant requirement of a low-status outcast on whom one could unload one’s shame.

Even when the dignity of sexual relatedness blankets some range of practices in a manner that seems egalitarian in these contexts, it is performing a hierarchical function by foisting the shame somewhere else. It may be true that the nature of constitutional line-drawing requires that *some* hierarchy be produced, but in this part I have urged that the *particular* hierarchy produced by the exiling of sex that occurs outside of the context of a normatively privileged relationship is a bad one,¹⁸⁷ both because we might see more

¹⁸⁵ Weisstub, *supra* note __ at 269-71.

¹⁸⁶ Susan Miller identifies a parallel between the disgust associated with sex (remaining mindful of both the fear and desire implicated) and the disgust associated with carnivals, where people go to watch “the interplay between the desirable and the revolting,” and she points out that this “duality... often associates with other dualities, such as upper class and lower class.” S. Miller, *supra* note __ at 111 (citations omitted). For Miller, the analogy encompasses the tense coexistence of desire and aversion in relation to sex and oddities, and this recalls for her the duality of class. The analogy I mean to draw is close though not identical. It encompasses shame over sexual need and shame over material need. Both might easily produce the wish to distance oneself from the indignity of need by adopting an aristocratic “stylistic” of “being un-needy.”

¹⁸⁷ This paper is written in the mode of critique, and I wish it to remain that way, but anticipating that some readers at a moment such as this will want to know what hierarchy I would deem more desirable, I will digress briefly here to the prescriptive. My views are best described as “pro-sex,” a position I explained in detail in *The Future of Sodomy*, *supra* note __ at 199-203. It is not, at least as I understand it, an “anything goes,” libertarian position. I favor prohibition of some sexual activities, such as rape and child abuse. A pro-sex position does, however, encompass some tendencies that affect how I would construe those terms. Among those tendencies are: opposition to an onerous suspicion about sex according to which sex always begins by having to justify itself, a general attitude of tolerance and pluralism around sex, refusal to permit the difficulties of power in sex to lead to a position that all power differentials in sex are inherently wrong, willingness to engage in a cost-benefit analysis around the regulation of sex that takes into account costs associated with excess enforcement against sex, and wariness of externalizing the shame of one’s own sex by shaming others. See *id* (citations to Gayle Rubin, Judith Butler, Duncan Kennedy and Michael Warner omitted). These tendencies still leave plenty of room for context-specific analyses that place consent and harm concerns at the center. Consent and harm, of course, are both concepts that have been subject to critique, including by me. See *id.* at 207-15. I do not, however, propose them as litmus tests with plain

of the kind of concrete legal consequences seen in *Jordan*,¹⁸⁸ and because even that sex which, by virtue of its relational context, looks as if it were safe under the blanket of dignity, is subject to degradation.

V. Dignity, Rationality and the Ghost of Fascism

This part discusses yet another role for shame in post-war, universal human dignity. Here, I am not concerned with an unconscious phenomenon, but I do continue to be interested in the unique power of dignity to resist critical engagement. This part examines the deployment of shame—at whatever level of consciousness—to insulate dignity as a liberal concept from the attacks of critics. After the Holocaust, the specters of fascism and National Socialism haunt those who would express skepticism in the direction of liberal rights and reasoning; this might be especially true with regard to dignity, the right that undergirds or supercedes all other rights¹⁸⁹ and which was so utterly eclipsed during the fascist era.

This defense of dignity grows out of what I labeled earlier “the second convention” – *i.e.*, that the appearance of dignity provisions in post-war national and international legal texts can be explained as a stark renunciation of Nazism. The second convention is a kernel that has developed into a free-standing case for liberalism,

meanings, but as concepts with heuristic value, to be employed with vigilant attention to the distributive implications (*i.e.*, the costs and benefits to a wide range of interests) of their use in each case.

¹⁸⁸ Hopefully, it is clear from the preceding note why I view the concrete legal consequences seen in *Jordan* as evidence of danger.

¹⁸⁹ Dignity’s preeminent place among the rights is asserted over and over in the Kretzmer-Klein volume. *See, e.g.*, Dicke, *supra* note __ at 114 (“dignity is the foundation of freedom, justice and peace” in the Universal Declaration of Human Rights). A primer on German Constitutional Law describes human dignity as the foremost principle in German constitutionalism. MICHALOWSKI AND WOODS *supra* note __ at 97. Nussbaum states that “the idea of human dignity, as a political idea, is pivotal to all known forms of political liberalism; it may reasonably be included within the core of moral ideas that form the basis for a political-liberal conception.” Nussbaum, *supra* note __ at 343.

according to which there exists a plain continuity between antagonism to liberalism, and fascism or Nazism. Rejection of fundamental principles and rights (such as the right to dignity), rejection of Enlightenment rationality (including the possibility of chaste, apolitical deduction from first principles), moral relativism and legal positivism, all have been linked to fascism by liberalism's adherents.

The Kretzmer-Klein volume contains multiple assertions of this continuity. Dietrich Ritschl, for example, urges that without a concept of human dignity, “[w]e would... end up with an arbitrary situation ethics” and that “for jurisprudence operating with a legal system not ultimately grounded in ethics and in anthropological creeds, all that would be left is legal positivism.”¹⁹⁰ Similarly, after reciting the second convention, Klaus Dicke asserts that “faith in human dignity goes along with a call for the establishment of democratic states under the rule of law.”¹⁹¹ Weisstub, (not stating his own position, but rather reporting on what he regards as a “naïve” view), explains that after the shock of the Holocaust, “democrats, in order to avoid the punishing consequences of radical relativism, turned to human dignity as the over-arching protector-value.”¹⁹²

¹⁹⁰ Dietrich Ritschl, *Can Ethical Maxims Be Derived from Theological Concepts of Human Dignity?*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 87, 98 (David Kretzmer & Eckart Klein eds., 2002).

¹⁹¹ Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 111, 116 (David Kretzmer & Eckart Klein eds., 2002).

¹⁹² David N. Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 263, 264 (David Kretzmer & Eckart Klein eds., 2002). Weisstub adds later that “[t]he pursuit of human dignity as the ultimate governing principle of a legal order is based upon the profound disquiet endemic to pragmatic societies who, in their discomfort with positivistic science, have turned toward value analysis. This avenue has been frustrated however by the inability of legal philosophers to analyze fundamental values as absolutes, given the modernistic rejection of ontological certitude, and the cynicism attendant to it... The relativism that has lain at the heart of North American jurisprudence since the rapid evolution of American Legal Realism since the 1930's has never been resolved...”

Of course, the Kretzmer-Klein volume is far from the only place in which this conceptual link can be found. Anthony Sebok, observing Lon Fuller's "attribut[ion of] the rise of fascism to the European embrace of positivism,"¹⁹³ noted further that

natural lawyers in American Catholic law schools cited [Fuller's] arguments with approval. Francis Lucey, a major figure in the neo-scholastic movement at Georgetown, completed Fuller's equation by adopting the connection between legal positivism and legal realism, and then linked legal realism to totalitarianism: 'Realism is being tried out today in Germany and Russia... There is not a single tenet of Realism that these dictatorships do not cherish, adhere to, and try to apply.'¹⁹⁴

Sebok points as well to F.A. Hayek, who "argued in 1960 that, by dismissing the idea of the 'rule of law' as a metaphysical superstition, positivists prepared the way for fascism and communism."¹⁹⁵

This particular case for liberalism – that ideas, critiques and impulses antagonistic to liberal ideals such as rationality and rights, are continuous with fascism or Nazism – exerts a particular kind of power against liberalism's strong skeptics: the power of shame. Who could oppose the fundamental right to human dignity or question the necessity of rationality after the Holocaust? By raising the specter of fascism or National Socialism, the liberal marshals the power of shame to thwart criticism of liberal rights and

¹⁹³ Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L.REV. 2054, 2059 (1995).

¹⁹⁴ *Id.* at 2060 (Full citation omitted, but it is worth including the title of an article cited from a 1945 ABA Journal: *Hobbes, Holmes and Hitler.*)

¹⁹⁵ *Id.* at n. 24 (citing F.A. HAYEK, THE CONSTITUTION OF LIBERTY 236-247 (1960).)

reasoning. The case built from the second convention puts liberalism's skeptics in an awkward position. The threat of shame associated with expressing skepticism toward dignity and Enlightenment rationality as overarching ideals exerts tremendous power to secure acquiescence.

It is crucial to note, however, that this strategy, while powerful, carries with it a serious hazard. By producing the mutual necessary entailment of irrationalism and fascism or Nazism, the liberal stakes his claim to legitimacy on his own unflinching rationality, thereby lending the same immense power to shame to argument strategies – such as internal critique¹⁹⁶ – that expose the limits of the liberal's rationality. When you identify the limit of reason and highlight the moment of political choice in an opponent's legal argument, you shame him: you expose as pretense his claim to rightness apart from his own desire. Followed to its logical conclusion, this exposure suggests his fascism, or his willingness to rule from sheer power rather than rightness.

There is, therefore, something mutually shaming in the clash between liberals and left deconstructive critics. The liberal deploys shame to discipline whoever dares assail the sacred cows of liberal rights and reasoning by conjuring the ghost of fascism, but this shame might easily boomerang back to the liberal when the limits of his own rationality, the pretense of his own principled rightness, and the baldness of his own political desires are exposed.

Interestingly, however, liberalism's detractors have levied the contrary charge, *i.e.*, that Enlightenment rationality itself ought to bear some of the blame for the Holocaust. As Barbara Stark has observed, “[p]ostmodernists such as Theodore Adorno... questioned the role of the Enlightenment project itself in the Holocaust. The

¹⁹⁶ Derrida or Duncan's book

‘final solution’ was not, after all, a barbarian rampage, but an orderly, systematic ‘scientific’ program of genocide – authoritarian, bureaucratic and perversely ‘rational.’”¹⁹⁷ Gillian Rose (lamenting what she seems to regard as an unhelpfully dismissive line of postmodern reasoning) describes the “argument... as follows: a tight fit is posited between the Holocaust and a general feature of modernity – its legal-rationality.... This leads to the judgement that the feature in question made the Holocaust possible or realisable.”¹⁹⁸

Stark and Rose are describing the views of some of liberalism’s postmodern skeptics, but even among liberal thinkers it is sometimes rationality and its mechanistic variants—including legalism and the market—that are experienced as affronts to human dignity. Observe, for example, the commodification debate over the sale of sex, human organs, or babies.¹⁹⁹ In contexts such as these we save ourselves from being Nazis – from exhibiting contempt for human dignity – not by embracing rationality, but by eschewing it, especially in the form of the market, even where the market might be the most efficient and rational approach to distribution.

In a more elaborate example, when former slaves of the Third Reich’s industrial sector sued German corporations in American courts in the 1990’s, the proposed monetizing of the plaintiffs’ suffering as well as the exercise of ordinary legalism to

¹⁹⁷ Barbara Stark, *After/word(s): ‘Violations of Human Dignity’ and Postmodern International Law*, 27 YALE J. INT’L L. 315, 324 (2002) (citing Theodore Adorno & Max Horkheimer, *Dialectic of Enlightenment* (John Cummings trans., 1972)).

¹⁹⁸ GILLIAN ROSE, *MOURNING BECOMES THE LAW: PHILOSOPHY AND REPRESENTATION* 27 (1996). Rose adds: “Sociologists, architectural historians and philosophers conclude that the methods and means of their own disciplines are principle actors in the Holocaust. The devastation of the respective discipline is declaimed.” *Id.* I believe this to be a bit of a vulgarization of a postmodern trend of which Rose is critical in her book, but I include it nonetheless to provide a crisp counter-point to the second convention.

¹⁹⁹ See, e.g., *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams eds., 2005) (including classic and recent essays on the sale of sex, human body parts, babies, cultural property, care work, etc.). See also MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 95-103 (1983).

address Holocaust-related claims stirred discomfort even among people who might have been expected to be sympathetic.²⁰⁰ The rhetorical mainstays that helped to condition the outcome of those lawsuits²⁰¹ were first, that the lawsuits were “not about the money” because Holocaust survivors could not possibly be financially compensated for their suffering, and second, that the very practice of litigation demeaned the survivors and “debase[d] the sacred.”²⁰² The language of “sacred” governed perhaps more than the language of “dignity,” though dignity made appearances, as well.²⁰³ The terms strike a similar chord with regard to both meaning and power in that both are shaming to would-be assailants, (*i.e.*, who could be so crass as to assert that mere money could compensate survivors of the Nazi Holocaust?).²⁰⁴

In a more doctrinal example, the German Federal Court of Justice (FCJ) and Federal Constitutional Court (FCC) spent a few years duking it out over whether a Benetton ad that featured human buttocks bearing the tattoo “H.I.V. POSITIVE,” could be prohibited, notwithstanding expressive rights.²⁰⁵ The FCJ twice determined that a ban on the ad was justified under Article I of the German Basic Law, which guarantees the

²⁰⁰ See Libby Adler and Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 54-55 (2002).

²⁰¹ The suits resulted in a privately administered foundation that offered severely limited payments and no “acknowledgment” to the survivors of Nazism. See generally *id.*

²⁰² *Id.* at 54-55.

²⁰³ For example, the leading American diplomat in the negotiations leading to the foundation, Stuart Eizenstat, referred to the (low) amount of the settlement as a “dignified sum.” *Id.* at 56, n. 338.

²⁰⁴ In addition, both reflect a reaction-formation against shame on the part of participants in the discourse. In the case of the Holocaust, at least some of the underlying shame concerned a Jewish demand for money. *Id.* at 54-57. Commentators expressed anxieties about reviving “Shylockian stereotypes,” reducing “the moral stature of [Holocaust victims’] martyrdom to that of a Monte Carlo casino,” and supplying business to an “ambulance chaser.” *Id.* at 54-55. The fact that most claimants under the foundation were not Jewish did not ameliorate these concerns. *Id.* at 14.

²⁰⁵ Craig Smith, *More Disagreement Over Human Dignity: Federal Constitutional Court’s Most Recent Benetton Advertising Decision*, 4 GERMAN L.J. __ (2003).

right to human dignity,²⁰⁶ first because it stigmatized persons with the virus, and then (on remand with instructions to consider other interpretations of the ad) because even though the ad's meaning *could* be read to promote "solidarity with suffering human beings, [it did so] only cynically; profit was the real motive."²⁰⁷

In the end, the FCC overruled the FCJ, holding that a ban on the ad was not justified.²⁰⁸ The FCJ erred, according to the FCC, in

using the ad's purpose to establish a violation of human dignity.... The advertisement employs the misery of AIDS sufferers for commercial purposes... [but while an] ad's *content* can justify prohibition... as violative of human dignity.... an ad's commercial *purpose* cannot. The [FCJ]... improperly ruled that a profit motive can, by itself, rob an ad's message of the constitutionally mandated respect for human beings that the message otherwise possesses, thereby transforming a protected expression into an infringement of the constitution.

The FCC is the court of last resort here,²⁰⁹ so the point is made more strongly by the dispute than by the ultimate outcome. Making rational use of – that is, marketing and profiting from – a humanitarian and compassionate message (assuming *arguendo* that this is the best reading of the ad) somehow sullies it, raising the question of whether it constitutes an affront to Germany's dignity guarantee.

²⁰⁶ Art. I German Basic Law

²⁰⁷ Smith, 4 German L.J. at __

²⁰⁸ *Id.* at __

²⁰⁹ MICHALOWSKI AND WOODS *supra* note __ at 37.

In these examples, shame afflicts not the *limits* of rationality and the exposure of sheer desire (as would be the case after a successful internal critique of an ostensibly neutral deductive process), but the *application* of rationality in its legal or market forms. That is, the privileged corollary, according to the case evolved from the second convention, is between rationality and dignity. Shame, then, would be the unfortunate corollary to irrationality. But this is not how it always works. On some occasions (such as the examples above), resistance to rationality appears as the more dignified course, while rationality seems cold, brutal and contrary to human dignity. Still, it is not clear what unifies the examples (selling sex, selling babies, selling human organs, using litigation to redress the wrongs done to survivors of the Nazi Holocaust, marketing a stigmatizing image of the HIV-positive body, and countless others you can no doubt imagine) beyond the fact of their seeming incompatibility with the mechanisms of brute rationality.

It may be that the market stands as a uniquely degraded variant of rationality, but the market is *sometimes* ennobled, for example, when its requisite competitiveness and industriousness are juxtaposed against welfare-style paternalism and dependency.²¹⁰ Likewise, contrast the degradation of litigation practices in relation to the Holocaust with the sometimes dignified ideal of the rule of law. Rationality and its mechanisms, therefore, can be found in either a correlative or an inverse relationship to dignity.

To sum up, dignified rationality (*e.g.*, the “rule of law”), degraded rationality (*e.g.*, Holocaust litigation, baby selling), dignified irrationality (*e.g.*, organ donation, love, art for art’s sake), and degraded irrationality (*e.g.*, “legislating from the bench”) together

²¹⁰ Weber’s Protestant Ethic or Philo’s sociologist

compose a matrix that cannot be made determinate. We can only place items in the boxes by reference to the content of our desire.

All together, this suggests that the specter of fascism or Nazism is not necessarily entailed by rationality *or* by sheer desire, but by the very *specific* desires and fantasies made real by those perpetrators.²¹¹ If Nazism can be made to appear at the bottom of both slippery slopes (rationality and irrationality) then maybe it is not really at the end of either and the consequences of both the presence and absence of rationality have been overstated. Or, conceived just a bit differently, it may be that the dichotomy *between* rationality and sheer desire is not as sharp as the second convention (or some of its postmodern detractors) would have us believe.²¹² According to that formulation then, it would not be merely the *consequences* of the presence or absence of rationality that have been overstated, but the *discernibility* of the difference.²¹³

VI. Bringing the Critique Back to Sex

²¹¹ Cf. ROSE, supra note __ at 53 (describing “mobilised Fascism” as something which “breaks the barrier between the fantasy of revenge and the carrying out of murderous feelings on arbitrarily selected scapegoats by joining a movement which has publicly abolished the distinction between fantasy and political action.”).

²¹² Cf. Daniel Statman, *Humiliation, Dignity and Self-Respect*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 209, 217-221 (David Kretzmer & Eckart Klein eds., 2002) (urging that rationality and emotions are not necessarily opposed, that emotions have evolutionary value, and that emotions may be rational or irrational). See also WILLIAM B. IRVINE, *ON DESIRE: WHY WE WANT WHAT WE WANT* (2005) (for an evolutionary account of desire) and ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* (1999) (for the idea that one requires emotion to make rational decisions).

²¹³ I hope not to be read to suggest that rationality is a completely incoherent or useless concept. In fact, I hope the analytic progression of this paper will be regarded as showing evidence of rationality. I am willing to concede, however, that if you trace my argument back you will find evidence of some normativity (such as the pro-sex position) that contains a compound mix of rationality and desire, and that it is not exactly clear where one ends and the other begins. Owning the desire facet of one’s argument, it seems to me, is worthwhile, if only to preempt charges of bad faith or unexamined premises. Moreover, as discussed in the next note, rationality has deep conceptual ties to self-interestedness, which at the very least implicates desire.

The dignity that protects sex from the hazards of commerce, lovelessness and anonymity teeters on the tail of this fish that flips this way and that. Anonymous and commercial sex could be undignified because they are irrational in the animalistic sense, but they could also be undignified because they are rational—in the sense of being driven by self-interested calculation.²¹⁴ While disfavored brands of sex might be degraded because they highlight irrationality and animalism, it is rationality that puts the “commerce” in “commercial sex.” We could even understand loveless, anonymous sex as depraved precisely because of its utterly rational selfishness.

Now notice how turned around we are: I argued above that the irrational animalism of sex can instill shame and prompt the exiling of the more disreputable varieties. But the rationality of commercial or anonymous sex also instills shame. It is selfish and loveless, and to the extent that sex and love are supposed to travel together, they should also defy and exceed rationality; love is a “deeply anti-nomian” ideal.²¹⁵

So, irrational sex can be dignified (*i.e.*, by love) or degraded (*i.e.*, by animalism). Likewise, rational sex can be dignified (*i.e.*, by virtue of controlling the beastly drives, or confining oneself to a normatively privileged context) or degraded (*i.e.*, by selfishness, especially commercialism).

²¹⁴ See, e.g., RICHARD A. POSNER, SEX AND REASON 3-5, 111-145 (1992). Posner devotes a chapter to “Sex and Rationality” in which he proposes that individuals choose to engage in sexual practices after calculating the costs (*e.g.*, search costs, moral disapprobation, risk of disease, unwanted procreation) and benefits (*e.g.*, hedonistic pleasure, cultivation of social relationships, wanted procreation) of those practices to them. Posner’s rational decision-maker begins with a sexual preference (*e.g.*, for persons of the same or different sex), but then engages in acts based on a more elaborate calculus in which preference is one (key) factor. See *id.* at 114-15. Nothing in this model, Posner urges, denies love or the emotional or passionate dimensions of sex; these feelings can be assigned an economic value in the rational calculus. See *id.* at 3-5, 118. Observe the interconnectedness of self-interest and rationality, an idea to which we are quite accustomed in the field of economics generally, though Posner’s bringing it to bear on sex might rub some people the wrong way.

²¹⁵ See WARNER, *supra* note __ at 100 (critiquing a love-based argument for same-sex marriage).

The connections and breaks between dignity and rationality, dignity and sex, and rationality and sex are indeterminate, volatile and chaotic—and this can be immobilizing. The point of this kind of critique is to muscle through the chaos and demonstrate that the distinction drawn between sex dignified by virtue of its normatively privileged context and sex degraded by its disfavored context is a product of something other than analytic necessity—something, I have suggested, that is rooted in sexual shame and anxiety.

The critique is also designed to open a place for intervening in the discourse of dignity. The unconscious shame that underlies dignity and the specter of fascism that dignity allegedly repudiates render the concept formidable and bewildering. One place to intervene is here, in the propensity to prettify sex by distancing it from its shames, terrors and anxieties. Even when it seems like an egalitarian idea, such as when it extends constitutional protection to sexual practices associated with gay people,²¹⁶ it shares a hidden structure that other incarnations of egalitarian dignity have illustrated: it relies on a hierarchy, the very notion of aristocratic dignity that we supposedly left behind at the time of the Enlightenment. In the short run, aristocratic dignity has the understandable appeal of the victories in *Lawrence* and the South African Sodomy case, but *Jordan* or

²¹⁶ See Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1722-23 (1993) (for explication of a “rhetorical system” of act and identity related to sodomy that places gay men and lesbians in a dangerous “double bind” and cuts in favor of political alliances oriented around sexual practices rather than around politically malleable identity categories).

See also EVE KOSOFSKY SEDGWICK, *Shame, Theatricality, and Queer Performativity: Henry James’s The Art of the Novel* 35, 62-64, in TOUCHING FEELING: AFFECT, PEDAGOGY, PERFORMATIVITY (2003) for the suggestion that “therapeutic and political strategies aimed directly at getting rid of individual or group shame, or undoing it, have something preposterous about them... for instance... gay pride...” Relying heavily on the work of psychologist Silvan Tomkins, Sedgwick urges that “[t]he forms taken by shame are not distinct ‘toxic’ parts of a group or individual identity that can be excised; they are instead integral to and residual in the processes by which identity itself is formed.” From this, Sedgwick extracts political value, especially the possibility of conceiving identity without essence. Sedgwick’s idea provides a nice counter-point to Nussbaum here, in that while the latter shares (with me and probably also with Sedgwick) a certain wariness about projecting one’s shame outward, she sometimes seems to harbor a utopian wish to eradicate shame through some other, less politically odious, means. Sedgwick calls into question both the feasibility and the desirability of this wish.

the Peep Show Decision or another case regarding sex that has not yet benefited from relative respectability—as sodomy did not until recently—might be just around the corner.

In addition, the materials on which I focused are meant as evidence of a shaming, anti-sex discourse. I use *discourse* in the Foucauldian sense of the term – that is, as an exertion of power that can produce and reproduce truth in a way that can be quite difficult to see.²¹⁷ Foucault maintained that “there can exist different and even contradictory discourses within the same strategy.”²¹⁸ Discourses of both the rationality and the irrationality of sex, or its dignity and its shamefulness, can coexist to produce a truth about sex, such that its dignity consists in the denial of its terrifying or anxiety-provoking facets. “We must not expect the discourses on sex to tell us... what strategy they derive from, or what moral divisions they accompany, or what ideology... they represent,”²¹⁹ Foucault advised. The constitutional courts did not explicitly embrace any anti-sex ideology—they represented themselves as protecting sex’s dignity. They apparently had the idea that they were employing dignity in its modern, universal, egalitarian valence.

To see beyond this, Foucault proposed that “we... question... [the discourses’] tactical productivity (what reciprocal effects of power and knowledge they ensure).”²²⁰ This paper has been such an effort. Dignity—its historical double-meaning, its volatile relationship to rationality, and its connection to normatively privileged relationships in constitutional jurisprudence regarding sex—is born of and reproduces shame.²²¹

²¹⁷ Foucault, *History of Sexuality* Vol. I. at 100 (“it is in discourse that power and knowledge are joined together.”)

²¹⁸ *Id.* at 102.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ A number of queer theorists have written richly of shame, not merely as an unfortunate affective experience, but as identity constituting and politically valuable. See Sedgwick, *supra* note __ and also

In short, if you are inclined, as I am, to believe that a discourse of dignified sex that denies the terror of aloneness, the costs of intimacy, or the anxieties people feel about their animalism and need, left uncritiqued, poses hazards to sex that are not always easy to guess, then the conclusion must be to critique. Dignity functions as a warning sign, steering us away from what is painful in our own experience as well as from critically engaging with liberal rights and reasoning. Don't heed it.

It remains only to propose a parallel between the shaming of sex and the shaming of politics. I have suggested that the judicial exiling of sex that takes place outside of an “enduring bond”—sexual excess, if you will—in favor of a dignified ideal of intimate relatedness, reflects and also produces shame regarding various aspects of sexual experience. Those aspects might be most vivid in the context of anonymous or commercial sex, but, I have proposed, a little more consideration turns them up in enduring relationships, as well. But aristocratic dignity and the ennobling of rationality have a much more capacious domain. Perhaps especially in the judicial realm, they exile and shame the sheer political desire²²² that – as critically inclined writers have exposed on many, many occasions – often can be found lurking in seemingly chaste judicial reasoning. I do not claim here that the shaming of sex causes the shaming of politics or even that one entails the other, merely that each is easier to see in the other's light. My hope is that there is some transferability to my analysis.

VII. Conclusion

Bersani, *supra* note __ at 215-218 on the political value of shame/abjection. The shame to which I refer here, however, is what Michael Warner referred to as “more shame”—a secondary sort of shame that comes in response to the shame/abjection of sex (Warner, *supra* note __ at 3). This secondary sort, as both Warner and Nussbaum recognize, poses a high risk of projection. See also Adler, *supra* note __ at 203.

²²² Thanks to Janet Halley for an important piece of this thought.

This critique suggests the advisability of wariness about advocating in terms that overcompensate for shame by promoting an ideal of dignity. Uncritical participation in a dignity discourse around sex carries hidden costs. If what we want is increased constitutional protection for sex—notwithstanding its shames, terrors and anxieties—then we should think carefully about the benefits and hazards of the advocacy terms we choose, rather than plunging headlong into the discursive banishment of our most terrifying selves.