Sexual Dignity and Rape Law

Anna High†

ABSTRACT: Dignity is a famously contested concept, suggesting its deployment as a legal principle should be closely scrutinized. This Article sets out a functional and contextual analysis of dignity as an organizing principle underpinning rape law, which I term "sexual dignity." Based on sexual violence theory, I trace the "democratization" of sexual dignity over time, as dignity and attendant rights of autonomy and equality have gradually extended from man to the (qualified) woman to women as a group, and identify an emerging contemporary feminist consensus on the meaning of sexual dignity. This framework is then applied to a critical review of how judges across common law jurisdictions understand and use dignity in decisions on rape. The caselaw of sexual dignity illustrates that dignity is a usefully capacious concept for exploring and condemning the multiplicity of rape's harms and wrongs. However, uncritical engagement with sexual dignity can be harmful, with implications both for rape law and for the regulation of sexual behaviour generally. As such, I argue that robust and reflective engagement with sexual dignity is both necessary and productive.

TABLE OF CONTENTS

---

† Senior Lecturer, University of Otago Faculty of Law, BA/LLB, BCL (Oxon), MPhil (Oxon), DPhil (Oxon). I am grateful to John Dawson, Stuart Anderson, James Allan, Patricia Viseur Sellers and Ceri Warnock, to Elinor Case-Pethica and Taís Cunha de Barros Penteado (editors), for their helpful comments, to Connor Seddon and Jonathon Yeldon for outstanding research assistance, and to Jelani Hayes and the *Yale Journal of Law and Feminism* editorial team for their meticulous technical and language editing and proofreading. This research was supported by the Marsden Fund Council from Government funding, administered by the Royal Society Te Apārangi of New Zealand.

INTRODUCTION

"Sexual assault . . . is something more than a simple act of violence. . . . It is an assault upon human dignity."

– R v. Osolin (Supreme Court of Canada, 1993)[1]

"[R]ape is a violation of personal dignity . . . ."

– Prosecutor v. Akayesu (International Criminal Tribunal for Rwanda, 1998)[2]

"Sexual violence . . . is a serious blow to her supreme honour and offends her self-esteem and dignity."

– State of Karnataka v. Krishnappa (Supreme Court of India, 2000)[3]

There are many words that can be used to describe the harms and wrongfulness of rape. One word which is frequently deployed by courts around the world in relation to crimes of sexual violence is *dignity*. In some ways, this is not surprising. Since the end of the Second World War, human dignity has emerged as the foundational principle of international human rights law and of many domestic constitutional orders. As a result, the use of dignity as a juridical device is increasingly common. Dignity is also a prevalent concept in debates on sexuality, sexism, and sex. On the other hand, contemporary rape laws generally focus on consent and autonomy, rather than dignity, when distinguishing rape from sex. Yet, time and again, as illustrated above and explored below, judges return to dignity in decisions on sexual violence.

The prevalence of dignity talk in this context suggests that dignity may be doing important expressive or doctrinal work in relation to the criminalization of sexual behaviour. However, dignity is a famously contested concept, vulnerable to accusations that it can mean or do whatever one wants it to mean or do. Such concerns about indeterminacy suggest that dignity in sexual violence caselaw should be closely scrutinized.

This Article explores and critically interrogates the deployment of dignity in judicial decisions on sexual violence. My aim is to map the broad contours of dignity's use as an organizing principle in the law of rape, which I term "sexual dignity." My approach is empirical, in that I am seeking to build a bottom-up understanding of how this concept is used in caselaw. It is also contextual, in that I am focusing on a specific legal context or "language-game," that of sexual violence, rather than seeking to identify a general, abstract concept of dignity as

1. R v. Osolin, [1993] 4 S.C.R. 595, 669 (Can.).

2. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 597 (Sept. 2, 1998), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf [https://perma.cc/8DB3-SBJS].

3. State of Karnataka v. Krishnappa (2000) 4 SCC 75, 15 (India).

a cross-cutting legal value. The inquiry does not assume that the same conception of dignity will necessarily apply in other legal contexts.[4] When it comes to rape, how is dignity understood and used in caselaw, and what are the possible theoretical and doctrinal implications of a sexual dignity approach?

I begin in Part I with an introduction to the unsettled status of dignity as a general legal principle, including concerns about vagueness. The remainder of the Article focuses on sexual dignity specifically. Before turning to the caselaw, I set out in Part II a review of dignity in sexual violence theory, first framing the evolution of sexual violence theory—from conservative to liberal to radical—as representative of a gradual "democratization" of dignity over time. Rape has been reimagined from an offence against male dignity to an offence against both woman and women. While that process is no doubt ongoing, it is also possible to identify, in contemporary feminist sexual violence theory, a number of emerging threads or points of agreement as to the meaning and significance of dignity in the context of rape: sexual dignity as personhood; sexual dignity as relating to but distinct from autonomy and consent; sexual dignity as permanent and equal; and sexual dignity as both communal and individual. These four dimensions provide a thematic framework for mapping and critiquing, in Part III, the use of dignity in sexual violence caselaw from multiple domestic criminal law jurisdictions. What conceptions of dignity are apparent, and do these measure up to a contemporary feminist understanding of sexual dignity?

In Part IV, I discuss the implications of sexual dignity as a framework for rape law. This Article adopts the stance of a "dignity realist" rather than that of a "dignity advocate." The caselaw of sexual dignity suggests that judges will continue to bring dignity, with all its normative authority, to the language-game of rape. Dignity is a usefully capacious, multidimensional rhetorical device in this context, commonly deployed to express and condemn the multiplicity of rape's harms, including to the equal dignity interests of women *qua* women. That is not to say that dignity is the only or best way to express or define the harms and wrongfulness of rape.[5] Both as a social and legal structure, non-consent is a defining element of rape, and I do not directly challenge that centrality here.

---

4. Mary Neal, *Dignity, Law and Language-Games*, 25 INT'L J. SEMIOTICS L. 107, 110-11 (2012) (applying Wittgenstein's concept of language-games to legal subdisciplines; as law is comprised of different, albeit interlocking and overlapping, language-games, it may be both problematic and undesirable to attempt to set out a general definition of dignity as a legal concept).

5. There is a rich body of jurisprudence that engages with the ethical wrong of rape, including critical interrogation of dignity, autonomy, respect and objectification as underpinning concepts. *See, e.g.*, ANN J. CAHILL, RETHINKING RAPE (2001); Joseph J. Fischel & Claire McKinney, *Capability Without Dignity?*, 19 CONTEMP. POL. THEORY 404 (2019); John Gardner, *The Wrongness of Rape*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 1 (2007); Joshua D. Goldstein & Robin Blake, *A (Reconstructed) New Natural Law Account of Sexuate Selfhood and Rape's Harm*, 56 HEYTHROP J. 734 (2015); Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J. L. & JURISPRUDENCE 47 (1998); Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFS. 249 (1995); Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, *in* FEMINISM AND PHILOSOPHY 333 (Mary Vetterling-Braggin et al. eds., 1977).

However, my analysis illustrates ways in which a dignity framework might usefully inform a broader, less asymmetrical approach to consent.

On the other hand, a dignity framework might come with its costs. First, sexual dignity, depending on how it is defined, may have implications for autonomy, such as the choice to debase oneself. Second, given its capaciousness, dignity has the potential to be used uncritically, in an "empty-headed moralistic" way, with risks for the "normative other." These pitfalls point to the importance of interrogating judicial assumptions about sexual dignity, and more explicitly engaging with dignity's various dimensions, conceptions, and underlying arguments. To that end, this Article ultimately argues that a critical and reflective approach to the concept of sexual dignity is needed.

I. THE UNSETTLED STATUS OF DIGNITY IN LAW

In the course of my research, I have come across the term "sexual dignity" used to refer, among other things, to the right of elderly persons to be seen as sexual subjects and to experience fulfillment and self-worth in sexual interactions;[6] to something that is diminished in men when insulted by a female sexual partner;[7] and to a communal sense of decency that is threatened by pornography and sexual licentiousness.[8] In the context of sexual violence specifically, sexual dignity has been used as the rallying cry for a mass march of survivors in India;[9] a catch-all value underpinning criminal laws on sexual assault ("*dos crimes contra a dignidade sexual*");[10] and something that is stolen from children who are sexually abused[11] and that can be reclaimed through therapy.[12]

---

6. Hans Wiggo Kristiansen & Linn J. Sandberg, *Older Men's Experiences of Sexuality and Their Relevance for Sexual Rights*, *in* ADDRESSING THE SEXUAL RIGHTS OF OLDER PEOPLE 42 (Catherine Barrett & Sharron Hinchliff eds., 2018).

7. Ruby Mellen, *Man Admits to Fatally Stabbing 24-Year-Old Russian Instagram Influencer*, WASH. POST (Aug. 1, 2019), https://www.washingtonpost.com/world/2019/08/01/man-admits-brutally-killing-year-old-russian-instagram-influencer [https://perma.cc/S94W-4FQW] (reporting the murder suspect as stating that his sexual dignity had been belittled by the victim, leading him to murder).

8. Bedivere Bedrydant, *Libertarians Are Coming for Your Sexual Dignity*, THE AMERICAN MIND (Feb. 18, 2020), https://americanmind.org/features/obscenity-blindness/libertarians-are-coming-for-your-sexual-dignity [https://perma.cc/B9N2-KLDN]; Betsy Hart, *Sexual Openness Versus Sexual Degradation*, DAILY REPUBLIC (Nov. 27, 2012, 12:52 PM), https://www.dailyrepublic.com/all-dr-news/opinion/state-national-columnists/sexual-openness-versus-sexual-degradation [https://perma.cc/KYT7-3RGB].

9. Sian Lewis & Rochin Chandra, *Why India's "Dignity March" Against Sexual Violence Stigma Deserves Attention*, WIRE (Mar. 8, 2019), https://thewire.in/women/india-dignity-march-sexual-violence-stigma [https://perma.cc/PP5Q-YYEC].

10. CÓDIGO PENAL [C.P.] [BRAZIL PENAL CODE] Chapter Title VI, Crimes Against Sexual Dignity (Braz.).

11. Lois Lee, *From Sexual Violation to Child Prostitution*, KIDS IN THE HOUSE, https://www.kidsinthehouse.com/teenager/parenting-teens/at-risk/from-sexual-violation-to-child-prostitution [https://perma.cc/7KWA-GZYB].

12. *Grief to Grace – Reclaiming the Gift of Sexual Dignity*, ROMAN CATHOLIC DIOCESE NELSON, CAN.,

As indicated by this small sampling of references, the idea of sexual dignity is contested. The same arguably applies *a fortiori* to the concept of "dignity." Both as a legal and philosophical concept, human[13] dignity has been critiqued as too capacious to do any real theoretical work.[14] But as a normative concept, dignity is remarkably prominent. For example, dignity has been invoked in key social and political movements of the twentieth century, including movements against Nazi ideology in Europe, systemic racism in America, and global poverty.[15] It is incorporated in the constitutional texts of numerous states—including Germany, Israel, and South Africa—and has emerged as a hallmark of international human rights law.[16] Courts in jurisdictions such as the United States—the constitutional texts of which make no express reference to dignity—frequently draw on the concept as a framework for evaluating the constitutionality of laws relating to a diverse range of personal freedoms.[17] It seems the moral authority of dignity is relatively settled, despite ongoing debates about dignity's meaning.

What is the normative pulling power of dignity? This question requires engagement with dignity's semantic status, which is far from settled. The Western understanding of human dignity has its roots in classical, hierarchical Roman ideas of rank, nobility, and status.[18] However, as used in modern legal texts and jurisprudence, dignity posits (at a minimum) that equal worth inheres in all persons by virtue of their being human and that this worth must be recognized and respected by others.[19] These two claims, which Christopher McCrudden identifies as the ontological and relational claims of dignity, respectively, comprise the minimum core or essential claim of the *concept* of

---

https://www.nelsondiocese.org/apps/pages/index.jsp?uREC_ID=1069766&type=d&pREC_ID=1358610 [https://perma.cc/LVC6-9AVR].

13. I use the terms "human dignity" and "dignity" interchangeably, but as will be apparent, I am focusing exclusively on human dignity and not a concept of dignity as applied to other subjects such as sovereign states or animals.

14. Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257 (2006).

15. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 662-63 (2008).

16. For an overview of human dignity in international and domestic legal texts, see *id*. at 664-75.

17. *See, e.g.*, Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355 (2012).

18. Jeremy Waldron, *Dignity and Rank: In Memory of Gregory Vlastos (1907-1991)*, 48 EUR. J. SOCIOLOGY 201, 201 (2007). For discussion of non-Western origins and conceptions of dignity, see THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY 145-188 (Marcus Düwell et al. eds., 2014). My focus in this introduction to dignity jurisprudence is on dignity in Western legal and philosophical thought, as it is this tradition which has typically dominated international dignity law and jurisprudence. For discussion of the intersection of Western and non-Western understandings of the intrinsic value of humankind, see, for example, Mihiata Pirini & Anna High, *Dignity and Mana in the 'Third Law' of Aotearoa New Zealand,* 29 N.Z. UNIVS. L.REV. 623.

19. McCrudden, *supra* note 15, at 679. This universal, egalitarian understanding of dignity may have theological (persons have dignity because they are made in the image of God) or secular (persons have dignity because of their unique capacities, such as rationality or autonomy) foundations. For a historical account of the secularization of human dignity as a constitutional principle, see Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39 (2014).

human dignity; it is the universal appeal of these claims which explains the strong normative status of dignity. However, beyond this minimum core, multiple *conceptions* of human dignity are possible.[20]

In Western legal traditions, the human dignity claim is perhaps most commonly tied to a Kantian moral outlook: the intrinsic worth of persons requires treating people not as means to an end, but as ends in themselves, thereby respecting their autonomy and personhood.[21] This framing of dignity places particular emphasis on subjectivity and autonomy; dignity is also commonly associated with commitments to other values such as life, equality, respect, liberty, and privacy. Given its abstract formulation in constitutional texts, dignity as a legal principle can be manipulated to frame different, and even opposing, claims—for example in relation to abortion, capital punishment, free speech, and gay rights—depending, in part, on which of its various dimensions is emphasized.[22]

This multidimensionality means dignity is vulnerable to accusations of being so broad as to be meaningless, "the shibboleth of . . . perplexed and empty-headed moralists."[23] Vagueness is not of itself sufficient to dismiss dignity as a potentially useful legal concept. Many vague and contested concepts—dignity, justice, fairness, and mercy—are used in law.[24] However, dignity's capaciousness suggests that its deployment should be scrutinized closely for intellectual laziness. It also suggests, as Mary Neal has argued, that if the concept is to be of use in a particular legal context, such as rape law (and my analysis below suggests that judges believe it to be useful and will continue to use it in that context), then its meaning must be circumscribed according to some set of parameters.[25]

---

20. McCrudden, *supra* note 15, at 679-80. See, for further discussion of concepts and conceptions, Maite Ezcurdia, *The Concept-Conception Distinction*, 9 PHIL. ISSUES 187 (1998).

21. For discussion of the Judeo-Christian foundations of Kant's theory of human dignity, see JEFFRIE G. MURPHY, RETRIBUTION RECONSIDERED 172-73 (1992).

22. *See, e.g.*, Siegel, *supra* note 17 (discussing dignity claims in abortion and gay rights adjudication); McCrudden, *supra* note 15; Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26 (2016) (discussing dignity claims in gay rights adjudication). Dignity is also commonly used in non-legal contexts to frame competing normative claims relating to sex, sexuality, and sexism, although this is beyond the scope of this Article. Compare Pope John Paul II's definition of "human sexual dignity," which emphasizes reproductive-type sexual acts, with the position of Dignity USA, a Catholic LGBTQI activist movement; Dignity USA shares allegiance with the Catholic Church to the idea of the dignity of *imago deo,* across vast differences in belief in terms of the moral implications of the dignity value. Likewise, "human sexual dignity" is a prominent idea in the sexual rights movement more broadly, which posits that as sexuality is a universal aspect of the human person, it is properly viewed as a human rights issue. *See* Alice M. Miller, *Human Rights and Sexuality: First Steps Toward Articulating a Rights Framework for Claims to Sexual Rights and Freedoms*, 93 PROC. ASIL ANN. MEETING 288, 295 (1999)).

23. MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 1 (2012) (citing ARTHUR SCHOPENHAUER, ON THE BASIS OF MORALITY 100 (1965)).

24. Neal, *supra* note 4, at 117 (citing JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 31 (1988) (arguing, in relation to the concept of property, that "imprecision or indeterminacy" is not necessarily fatal to the deployment of a legal concept)).

25. Neal, *supra* note 4, at 113.

Despite posing challenges, dignity's capaciousness might itself be productive. If, as McCrudden argues, the political and legal dominance of dignity indicates a universal baseline allegiance to dignity's essential claims, dignity may create discursive space for contests that over time tend to generate consensus on human rights and entitlements.[26] In relation to dignity in legal texts specifically, the argument that dignity is productively abstract raises the issue of dignity's "judicialization." As Samuel Moyn has argued, it may be that far from representing consensus, dignity in fact obfuscates divergence under the pretence of convergence and that this very obfuscation abets a troubling transfer of power to judges when it comes to decisions about human rights—a concern I address in the context of decisions about sexual violence below.[27]

II. DIGNITY IN SEXUAL VIOLENCE THEORY

Turning now to sexual violence theory, in this Part, I explore various dimensions of dignity as an interest underpinning rape's prohibition, as evident in feminist accounts of rape's harms and wrongfulness. My approach is inductive, in that I am identifying key patterns of dignity-related argument in feminist sexual violence theory; these patterns suggest that, to the extent sexual dignity is deployed in this space (and acknowledging that dignity is not the only way to conceptualize the wrong of rape), there is an emerging consensus as to its parameters.

Before exploring these threads or themes of sexual dignity in contemporary feminist theory, it is useful to situate the discussion within the metanarrative of sexual violence theory more generally. Specifically, my argument here is that the evolution of sexual violence theory—from conservative to liberal to radical[28]—illustrates a gradual "democratization" of dignity.[29] The harm of rape has

---

26. *See, e.g.*, CATHERINE DUPRÉ, THE AGE OF DIGNITY 158-59 (2015) (arguing that dignity's abstract formulation in legal texts "creates conceptual space for interpretations and constructions of human dignity that could not be anticipated at the time of drafting"); Siegel, *supra* note 17, at 379 (arguing that "agonists who share an allegiance to dignity . . . appeal to dignity . . . because dignity's meaning is unsettled . . . and may yet be shaped through appeal to government officials and citizens"); Debra B. Bergoffen, *The Just War Tradition: Translating the Ethics of Human Dignity into Political Practices*, 23 HYPATIA 72, 90 (2008) (arguing that "shared universal [dignity] is both a point of departure and a site of contestation"). *But cf.* Moyn, *supra* note 19, at 66 (raising the possibility that dissensus over dignity may be "so profound that . . . the premise that the same concept is still under debate on different sides becomes a fiction obscuring the reality that interlocutors have simply parted ways").

27. Moyn, *supra* note 19, at 68-69.

28. *See* Keith Burgess-Jackson, *Rape and Persuasive Definition*, 25 CAN. J. PHIL. 415, 443-52 (1995) (setting out a typology of three theories of rape: conservative, liberal, and radical).

29. I am drawing here on Waldron's work on *dignitas*. Waldron suggests that surprising linkages can be drawn between the modern egalitarian understanding of dignity as universal and the ancient legal concept of *dignitas. Dignitas* was a decidedly inegalitarian concept, referring to the respect and honor due to certain institutions (e.g. states) or people (e.g. nobles) by virtue of their rank. Over time, there has been a "generalization of the respect and solicitude for dignity that was previously confined to a particular high and exclusive rank of humanity." Waldron, *supra* note 18, at 232; s*ee also* James Whitman, *Human*

historically been framed as an affront to (white, landholding) male dignity—by violating (trespassing on) another man's wife or unmarried daughter (property) without his consent, the rapist undermined the patriarch's authority and honor (sex within marriage, by definition, involved no such affront to dignity, regardless of whether the woman consented).[30] In this conservative theory of rape, not only were women not seen as equal in dignity, but their bodies were objectified as sites of a harm done *to men*.[31] At most, a woman's "honor"—her chastity, reputation, and worth *in the eyes of men*—was incidentally implicated by rape.

In time, a more liberal theory of rape emerged, which understands rape as an affront to the victim's autonomy and dignity.[32] Radical feminism in turn has highlighted the gendered nature of rape, as an affront to the dignity of all women.[33] This evolution can be understood as a "levelling up" process, with dignity and attendant rights of autonomy and equality gradually extended from *man* to the (qualified) *woman*[34] to *women as a group*.[35] Democratization of dignity as underlying the wrongfulness and harm of rape has gone hand in hand with doctrinal changes (for example, as to marital rape, the resistance requirement, and evidential rules addressing rape myths at trial).[36] Previous marginal cases—the rape of married women, black women, gay women, slutty women, and passive women—are no longer marginal, as sexual dignity has been re-theorized as universal, inherent, and inviolable. Dignity has evolved in the process, from a narrow, patriarchal focus on individual honor, to something understood as related to our very humanity, with both individual and

---

Dignity in Europe and the United States, *in* EUROPEAN AND US CONSTITUTIONALISM 108 (Georg Nolte ed., 2005) (discussing dignity as an evolution of honor-based legal norms).

30. Burgess-Jackson, *supra* note 28, at 443-44; *see also* JACK HARTNELL, MEDIEVAL BODIES: LIFE, DEATH AND ART IN THE MIDDLE AGES 251 (2019) (noting that prosecution for rape in the Middle Ages was "typically based on the degree to which a crime had transgressed shared male codes of honour and the limitations they placed on a woman's social appeal to other men").

31. Tshabalala v. State; Ntuli v. State 2020 (5) SA 1 (CC) at 92 para. 90 (S. Afr.) (Victor, Acting J., concurring) (noting that "historically, women have been objectified in relation to the crime of rape, where the interest which was to be protected was not their human rights to dignity, equality, security or safety of the person, but rather their chastity or value as an object for their male owner").

32. Burgess-Jackson, *supra* note 28, at 447 (noting that "[w]hat makes rape morally problematic—wrong, bad—to the liberal is . . . that as an action it bypasses the victim. The rapist, by failing to secure the victim's consent to his sexual contact, treats her as an object for his use and therefore fails to respect her autonomy").

33. *Id.* at 448 ("The radical . . . views rape as a kind of degradation, as an instance of class-based (in this case the classes are sexes) subordination").

34. Masiya v. DPP (Pretoria) 2007 (5) SA 30 (CC) at 16 para. 24, 19 para. 28 (S. Afr.) (discussing the "gradual movement towards recognition of a female as the survivor of rape rather than other antiquated interests" and society's changing understanding that "rape is criminal because it affects the dignity and personal integrity of women"). History demonstrates that qualification as a dignity-bearing woman—that is, a "rapeable woman"—has depended, over time, not only on gender, but on factors of "virtue" (chastity), race, sexual orientation, occupation and more.

35. Burgess-Jackson, *supra* note 28, at 449-50 (arguing that "[t]o the conservative, rape is something a bad man does to another man; to the liberal, rape is something a bad man does to a woman; to the radical, rape is something men do to women").

36. These developments, and associated judicial dignity talk, are explored *infra* Part III.

gendered/communal dimensions. Here I explore these shifting ideas about dignity—dignity as honor versus personhood (Part II.A); dignity as gendered/communal (Part II.B); and dignity as relating to autonomy and subjectivity (Part II.C). On the basis of this exploration, it is possible to identify and map key features of an emerging contemporary feminist account of sexual dignity (Part II.D).

A. Dignity, Honor, and Humanity

When rape is viewed as an affront to a victim's respectability, this corresponds to a narrow understanding of dignity as honor. This can be seen in the longstanding use of "sexual indignity" as a euphemism for rape, including in international humanitarian law. For example, the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda both held that sexual violence falls within the category of "outrages upon personal dignity" as prohibited by Common Article 3 of the Geneva Conventions.[37] And in the *Prosecutor v. Akayesu* judgment, the ICTY's landmark decision defining the crime of rape under international law, the Tribunal declined to focus on "a mechanical description of objects and body parts" and instead highlighted the dehumanization experienced by rape victims: "rape is a violation of personal dignity."[38]

The dignity framing of wartime rape has been criticized by feminist writers, notably Rhonda Copelon, for diminishing the violent and gendered nature of most sexual crimes while centring the harm of rape on how women are seen in society *by men* in terms of their sexual honor.[39] Indeed, a patriarchal, dignity-as-honor approach is explicitly adopted in Article 27 of Geneva Convention IV, the only express reference in the Conventions to rape. The second paragraph of Article 27 states that women "shall be especially protected against any attack on their honour, in particular against rape . . . ." As Patricia Viseur Sellers and Indira Rosenthal have argued, this paragraph seems to assume that "chastity and

37. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 688 (Sept. 2, 1998), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf [https://perma.cc/PGV2-UUE4]; Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 161 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), https://www.icty.org/x/cases/kunarac/acjug/en/ [https://perma.cc/A5HF-KBA8].

38. Akayesu, Case No. ICTR-96-4-T, Judgement, at ¶ 597.

39. Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994); *see also* Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS, 298, n.152 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) (arguing that the "allusion to dignity or honor next to crimes of sexual assault de-emphasizes the violent nature of most sexual crimes and again places sexual assault survivors in a position analogous to those subjected to moral defamation"); Shana Eaton, *Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime*, 35 GEO. J. INT'L L. 873, 912 (2004).

modesty are inherent qualities of women's honour . . . and that women's dignity equates with their sexual purity."[40] Such an understanding of rape as mere "indignity" and dignity as "honour" resonates with a conservative theory of rape and seems to grossly mischaracterize and understate the wrongfulness of sexual violence.[41]

Despite these critiques, many feminist writers embrace the notion of dignity when describing the harm of wartime sexual violence.[42] But in such cases, it appears that an understanding of dignity as personhood, rather than "dignity as honour," is at play. Copelon, for example, writes of rape as attacking "the integrity of the woman as a person as well as her identity as a woman. It renders her . . . 'homeless in her own body.' It strikes at a woman's power, it seeks to degrade and destroy her; its goal is domination and dehumanization."[43]

Far from reproducing a patriarchal or understated view of rape, "dignity as personhood" has been offered as a potentially humanising way to frame sexual violence, including wartime rape. For example, Kirsten Campbell has argued that the *Akayesu* decision, with its emphasis on rape as a violation of dignity, correctly understands rape as both a traumatic violation of collective norms of humanity and as a repudiation of the victim as a member of that universal humanity.[44] Similarly, Eleni Coundouriotis has argued that the Tribunal's shift in focus from perpetrator action (penetration) to victim experience (dignity) recognizes that the injury of rape is to the person as a whole, not merely to the injured body.[45]

B. Individual and Communal Sexual Dignity Interests

Wartime sexual violence is variously classified, depending on the circumstances, as a grave breach of the Conventions, a crime against humanity, and an act of genocide. Debates about the appropriate classification of wartime

---

40. Patricia Viseur Sellers & Indira Rosenthal, *Rape and Other Sexual Violence*, *in* THE 1949 GENEVA CONVENTION: A COMMENTARY 343, 350 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015). Importantly, the authors note that there have been no cases citing "attacks upon honor" as a basis for gender-based charges—the provision seems to be largely redundant, although its underlying assumptions may endure. *Id*. at 351. The authors also note that the framing of rape as an attack on honor may resonate strongly in culturally conservative contexts and as such be useful in promoting observance of its prohibition. *Id*. at 350.

41. I acknowledge that cross-cultural perspectives could be brought to the "dignity as honor" debate, although these are beyond the scope of this Article. *See, e.g.*, Man Yee Karen Lee, *Universal Human Dignity: Some Reflections in the Asian Context*, 3 ASIAN J. COMP. L. 1, 23-24 (2008) (discussing the impact of an Asian perspective of "dignity as virtue" in Indian case law).

42. Olivier Winants, *The Interplay of Ethnicity, Gender and Sexual Violence during Wartime and in Coercive Interrogation: What Role for Human Dignity?* 43 JURA FALCONIS 137, 173 (2006-2007).

43. Copelon, *supra* note 39, at 252.

44. Kirsten Campbell, *Rape as a 'Crime Against Humanity': Trauma, Law and Justice in the ICTY*, 2 J. HUM. RTS. 507, 510 (2003).

45. Eleni Coundouriotis, *"You Only Have Your Word:" Rape and Testimony*, 35 HUM. RTS. Q. 365 (2013).

rape relate to a broader question about what individual and communal dignity interests might be at stake. For example, the classification of rape as a crime against humanity was widely heralded as a long overdue recognition in international law of *women's* humanity. Naming rape a crime against humanity arguably amounts to legal recognition that rape violates the dignity of women, in that women's bodies are a site of humanity; women are "identified . . . *qua* woman *qua* uniquely sexed and vulnerable as human," and the male body no longer determines the sphere of humanity.[46]

However, the legal tests for rape as a crime against humanity or an act of genocide, which require proof of rape as part of a systematic attack on a body of people, have also been criticized for resting on a problematic understanding of rape as a collective violation, rather than a violation of the autonomy and integrity of an individual woman's body.[47] Hilary Charlesworth has described this as the "inability of the law to properly name what is at stake."[48] Rape is a crime of violence against women, but by "fusing the bodily rights of women with the bodily rights of the polity," the objectification of women's bodies—as sites of abstract harm to a collective—is arguably perpetuated.[49] On the other hand, radical sexual violence theory contends that rape must be recognized as not only harming individual victims, but also women as a group, women *qua* women.[50] Rape is an injury to all women, a pattern that establishes and entrenches the belief that "women are 'for' men: to be used, dominated, treated as objects."[51] In this way, rape represents a denial of the permanent and equal dignity of women, not just woman.[52]

This ideological tension echoes a debate in sexual harassment theory as to whether dignity is expansive enough to express both individual interests and

---

46. Debra Bergoffen, *Toward a Politics of the Vulnerable Body*, 18 HYPATIA 116, 118, 132 (2001).

47. Katie C. Richey, *Several Steps Sideways: International Legal Developments concerning War Rape and the Human Rights of Women*, 17 TEX. J. WOMEN & L. 109, 111 (2007); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 387 (1999).

48. Charlesworth, *supra* note 47, at 387.

49. Richey, *supra* note 47, at 112; Charlesworth, *supra* note 47, at 387; *see also* Copelon, *supra* note 39, at 264 (arguing that "surfacing gender"—emphasizing the gendered nature of rape in war—is critical to surfacing women as full subjects, rather than objects, of sexual violence).

50. Or, in the case of "genocidal rape," a communal interest of ethnic women *qua* ethnic women. Winants, *supra* note 42, at 173 (noting that although some feminist writers adopt a dominant Western view in debating rape as genocidal, "[a]s shown by the Rwanda and Yugoslavia experience, women *do* care about their ethnical alienation or destruction resulting from sexual violence and it is important to recognize this").

51. Jean Hampton, *Defining Wrong and Defining Rape*, *in* A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 118, 135 (Keith Burgess-Jackson ed., 1999); *see also* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975) (similarly framing rape as threatening the dignity of *all* women); CAHILL, *supra* note 5, at 193.

52. This argument relates to feminist objections to pornography and "revenge porn" as legitimating certain societal attitudes toward women and thereby sending a message that women are not equal. *See, e.g.*, CATHERINE MACKINNON, FEMINISM UNMODIFIED (1987); Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse,* 37 OXFORD J. LEGAL STUD. 534 (2017).

communal interests of women *qua* women.[53] For example, given that the subordination of women is an underlying cause of sexual harassment, Kathryn Abrams has argued that shifting the focus towards individual dignity harms and away from the collective harm to women is a problematic depoliticization of gender inequality:

> Yes, harassment is a dignitary injury, but if we fail to appreciate that this dignitary injury is a function of, and connected to, other injuries within an unequal and hierarchical relationship, we miss much of what is morally and politically significant about the wrong. . . . Failing to highlight the fact that this humiliation arises from a context of systematic gender inequality individualizes the wrong and diminishes the imperative for responding to it.[54]

Abrams does not dispute that individual dignity is at stake when women are sexually harassed, but her focus is on the collective interests of women, which should not be invisibilized. This is an important point, but a dignity framing of harassment (or rape) does not need to elide the discriminatory context of such behaviour. Rosa Ehrenreich has advocated for a pluralistic understanding of sexual harassment as an (individual) dignitary harm that occurs in a context of discrimination against women.[55] By deemphasising the issue of gender, Ehrenreich argues that a dignity framing might correct the essentialist conception of sexual harassment as a special "women's injury."[56] The debate, then, may be not so much about two mutually exclusive paradigms, as a dispute about emphasis. By shifting the focus from the particular lived experience of women, to the individual dignity injuries of people generally, the law's expressive loyalty to women may be undermined—the "fatal depoliticization" raised by Abrams. This leads Gabrielle S. Friedman & James Q. Whitman to wonder whether protecting both women and dignity "may be more than any society can realistically manage."[57]

Such zero-sum framing is mitigated by a more expansive conception of dignity, which is not necessarily an exclusively individual interest. It may be that an individualistic understanding of dignity—as is common in Western jurisprudence—is inadequate for this purpose, but other conceptions of dignity are possible. In Aotearoa New Zealand's indigenous Māori culture, for example, sexual violence is seen as a violation of the sanctity of *te whare tangata*, the

---

53. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 19 (1999); Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 242 (2003).

54. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1186 (1998).

55. Ehrenreich, *supra* note 53, at 4.

56. *Id.* at 21 (framing sexual harassment as wrong "not because it wrongs women, but because such treatment would deeply wrong any human being, regardless of sex").

57. Friedman & Whitman, *supra* note 53, at 271-74.

woman's womb, womankind, or the "house of humanity." Accordingly, rape is framed as a transgression not only of the *mana* (prestige, status, or birthright) of victims, but also of the *mana* of *Māori Wahine* (womankind) and, therefore, of the people, including past and future generations:

> Sexual violence within Māori understandings is an absolute violation of the mana of the person and the collective mana of whānau [family], hapū [clan] and iwi [tribe]. It is a violent transgression against a person's whakapapa [genealogy] that reaches back to past generations and has direct impacts on future generations.[58]

An understanding of mana as communal leads to a *kaupapa Māori* framing of sexual violence as an act causing both individual and collective harm.[59] This is echoed in the work of Sarah Deer, a legal scholar and member of the Mvskoke nation who advocates for the development of a new indigenous jurisprudence of rape. For Deer, this jurisprudence should be grounded in a uniquely indigenous understanding of rape as both an individual and communal experience, involving a violation of humanity by the "unlawful 'invasion' of the body, mind and spirit"—an understanding that has been mediated by the violence of colonization.[60] While these two examples are by no means exhaustive of indigenous theories of sexual violence, they usefully illustrate that dignity can be understood as both individually and collectively implicated by sexual violence, whether the collective is an ethnic group, a gender, or humanity at large. So understood, sexual dignity accommodates a pluralistic approach to gendered harms such as rape, one that neither invisibilizes nor essentializes women as victims.

C. Integrity, Autonomy, Subjectivity, and Diminishment

Beyond highlighting both individual and group dimensions of sexual dignity, the indigenous rape theories above also illustrate an understanding of rape as transgressing against not only physical integrity or autonomous control of one's body, but against personhood. This theme is echoed in feminist theory on sexual violence more broadly. Despite critiques of a dignity framing in contexts such as sexual harassment and wartime rape, a Kantian understanding of dignity—as the equal, permanent, and inherent value of persons, which

---

58. Leonie Pihama et al., *Māori Cultural Definitions of Sexual Violence*, 7 SEXUAL ABUSE IN AUSTL. & N.Z. 43, 45, 48 (2016).

59. *Id.* at 48. For discussion of the conceptual association between dignity and mana in Aotearoa New Zealand jurisprudence, see Pirini & High, *supra* note 18.

60. SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 114, 150 (2015). On the Māori experience of sexual violence as mediated by colonial trauma, see Michelle Erai, *Criminal Sittings—Rape in the Colony, New Zealand, 1862*, 24 J. HIST. SOC'Y. 186 (2011).

requires treating persons as ends/subjects, not as means/objects—often imbues feminist articulations of the distinctive wrongfulness and harms of rape.[61]

Writing in 1977, Carolyn Shafer and Marilyn Frye argued that disrespecting personhood, by the instrumental use of another against her will, is the moral wrong at the heart of rape:

> [H]e is using her in furtherance of ends other than hers. Moreover, the ends for which he is using her body are ends which are contrary to hers, given that her ends include the maintenance of her bodily integrity and health. The use of a person in the advancement of interests contrary to its own is a limiting case of disrespect. It reveals the perception of the person simply as an object which can serve some purpose . . . it conveys to her that she is seen as an object with a sexual function . . . .[62]

In other words, the rapist denies the victim's autonomy and, thus, personhood, casting her as a mere object for his use. More recently, Ann Cahill's discussion of rape as an embodied experience echoes this understanding of rape as denial and destruction of the victim's subjectivity: "In the act of rape, the assailant reduces the victim to a nonperson. He . . . denies the victim the specificity of her . . . own being."[63] Indeed, such opposition to the sexual objectification of women by men is typically at the heart of feminist politics, perhaps most famously in the works of Catharine MacKinnon and Andrea Dworkin.[64] It is also strikingly congruent with Kant's writing on sex, which he saw as inherently (albeit mutually) objectifying.[65] In her philosophical account of the modern feminist concept of objectification, Martha Nussbaum has identified "instrumentality, connected in a Kantian way to denials of autonomy and subjectivity"—that is, treating others as means to an end, rather than ends in themselves—as the core wrong of sexual objectification.[66]

Other examples of dignity-focused articulations of the wrongfulness of rape abound. Consider, for example, this account from law professor and rape survivor Lynne Henderson:

---

61. For discussion of conservative/patriarchal theory of rape as harm to *male* (father/husband) dignity, see Burgess-Jackson, *supra* note 28, at 444 ("[I]t is an affront to his personal dignity; it fails to respect his domain; and it may cost him economically").

62. Shafer & Frye, *supra* note 5, at 341.

63. CAHILL, *supra* note 5, at 192. Elsewhere Cahill describes rape as "undermining the possibility (at least temporarily . . .) of the victim's personhood," *id*. at 194, and as the nullification of the victim's "embodied, sexually differentiated subjectivity," *id*. at 193.

64. *See generally* Nussbaum, *supra* note 5, at 250. Dworkin and MacKinnon's proposed legal definition of pornography hinges on the treatment of women as sexual objects. *See* Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 321 n.1 (1984).

65. *See* Barbara Herman, *Could It Be Worth Thinking About Kant on Sex and Marriage?*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 49, 60 (Louise Antony & Charlotte Witt eds., 1993) (citing IMMANUEL KANT, LECTURES ON ETHICS 163 (Louis Infield trans., 1963) ("If then a man wishes to satisfy his desire, and a woman hers, they stimulate each other's desire; their inclinations meet, but their object is not human nature but sex, and each of them dishonors the human nature of the other").

66. Nussbaum, *supra* note 5, at 268.

> [R]ape denies that you are a *person*, that you *exist*. . . . When a woman's *existence just does not matter*, intercourse becomes rape. Thus, the important factor is non-existence. . . . Thus I also disagree with theorists who see rape as an invasion of bodily integrity or privacy or personal autonomy. It is those things, too, but it is more.[67]

John Gardner has likewise argued that rape unequivocally instantiates the central moral importance of the Kantian argument against the "the sheer use of a person" and that this is the fundamental element of rape's wrongfulness: "all sheer use of human beings, all treatment of them merely as means is *abuse*; and rape is the central case of such abuse."[68]

Importantly, a Kantian conception of dignity assumes dignity's permanence; because dignity derives from our humanity, it is intrinsic and permanent. As such, dignity is not actually degraded by wrongful actions. This is highlighted by Jean Hampton, who has argued that the moral injury of wrongful acts such as rape is *diminishment*: the messaging and appearance of dignity's degradation.[69] By objectifying his victim, the rapist represents himself as master and the victim as inferior object: "distressingly, the rape is a kind of event that seeks to make that diminished status a reality. The woman is used as though she is an object, and so she is thought to be one."[70]

This is not to deny that the wrong of sexual objectification—diminishment of the dignity of personhood—can be subjectively experienced as various harms, including feelings of shame and degradation of selfhood, as indicated by Henderson's account above.[71] Robin West has set out a compelling account of the harms to selfhood involved in being treated as a sexual object, describing sexual assault as causing

> the death of a liberal and individualistic conception of subjectivity: there can be no sense of self-possession when the self has been invaded by the desires, pleasures, wills, and actions of another, and stronger, and life-threatening, human being. . . . The harm caused by invasive terror is ultimately the cessation of selfhood. The self is objectified, and when that occurs, it ceases to exist.[72]

---

67. Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 226-27 (1988).

68. Gardner, *supra* note 5, at 16. For a philosophical account of the moral wrong of using persons, see Nancy Davis, *Using Persons and Common Sense*, 94 ETHICS 387 (1984).

69. Hampton's point about diminishment echoes a debate in constitutional law as to whether dignity is a right, as opposed to a standalone principle from which rights derive. Conor O'Mahony has argued that the idea of a "right to dignity"—which implies that dignity is a state to be lost or achieved—is logically inconsistent with the concept of inherent human dignity. *See* Conor O'Mahony, *There is No Such Thing as a Right to Dignity*, 10 INT'L J. CONST. L. 551, 560 (2012).

70. Hampton, *supra* note 51, at 135.

71. I use the term selfhood here, in contrast to personhood, to refer to one's concrete, subjective experience of one's own (abstract, objective) personhood. For a useful discussion of the distinction between undermining a person's dignity, and thereby causing hurt or distress to that person, in the context of hate speech, see JEREMY WALDRON, THE HARM IN HATE SPEECH 105-44 (2012).

72. ROBIN WEST, CARING FOR JUSTICE 104, 109 (1999).

West's description of rape assumes a nexus between integrity of the body and integrity of the self.[73] Such accounts of rape suggest that despite the law's emphasis on consent in defining rape, rape's wrongfulness and harms are not fully expressed by a focus on autonomy alone. Autonomy is one aspect of personhood, and denial of autonomy is one aspect of the rapist's dignity-denying objectification of his victim, but subjectivity is also at stake when people are used as mere means to an end. This leads Nicola Lacey to argue that a focus on autonomy as the core of rape "provides a distorted or (at the very least) partial representation of the real wrong of rape, in that it displaces the embodied and affective aspects of the offence" and that "the language of embodied existence—of pain, shame, loss of self-esteem, the sense of violation and objectification—find no place within formal legal categories."[74]

D. An Emerging Feminist Account of Sexual Dignity

Based on the foregoing survey, it is possible to identify points of emerging consensus on the meaning of dignity as a value underpinning the wrongfulness and harm of rape. There are four key dimensions to this core feminist account of sexual dignity: sexual dignity as personhood; sexual dignity as relating to but distinct from autonomy; sexual dignity as permanent and equal; and sexual dignity as both communal and individual.

First, feminists reject sexual dignity as merely reputation or honor. Such a patriarchal conception of dignity objectifies women's bodies as sites of harm done to men's honor. At best, a woman's dignity and, thus, rapeability is contingent on her perceived respectability in the eyes of men. This reproduces a sexual normative hierarchy, in which the "dishonorable" woman—the unchaste, the deviant, the shameful other—is exiled as non-dignified. Sexual dignity is also more than physical integrity. The right to control access to one's body is a dimension of dignity, one that is emphasized by a liberal understanding of rape as "violence not sex," a violation of bodily/psychological integrity rather than of chastity or honor. But there is more to sexual dignity than this physical dimension. Dignity posits the inherent and equal worth of all by virtue of personhood; it is this personhood, humanity, or subjectivity that is denied when a rapist disregards non-consent and, thereby, objectifies the victim. Rape not only impinges on the right to freedom from physical violence, but also on the freedom to flourish as a self-defined, subjective self. In this analysis, just as rape,

---

73. *See also* Campbell, *supra* note 44, at 509; CAHILL, *supra* note 5, at 132 ("Rape, in its total denial of the victim's agency, will, and personhood, can be understood as a denial of intersubjectivity itself. . . . The self is at once denied and, by the totality of this denial, stilled, silenced, overcome").

74. Lacey, *supra* note 5, at 60-61. Lacey does not draw on dignity explicitly, but her "sexual integrity" analytical framework echoes the themes and meanings of dignity discussed in this Article. *Id*. at 65. ("A recognition of the value of integrity invites the incorporation of implications of sexual abuse such as shame, loss of self-esteem, objectification, dehumanization").

as a denial of subjectivity, is understood to be intrinsically different to mere physical assault, sexual dignity is not only about physical integrity, but personhood.[75]

This raises the question of how dignity and autonomy differ. Autonomy is an aspect of our personhood, and the rapist's objectification of his victim fundamentally relates to his disregard for her autonomy. But feminist theory understands sexual dignity as a more capacious concept than autonomy that better expresses the multiplicity of rape's wrongfulness and harms. When a victim is raped and her autonomy over her body is denied, there is arguably also a message of degradation and dehumanizing objectification inherent in that denial, which "sexual dignity" is capable of acknowledging.

From an understanding of dignity as relating to personhood, it follows that sexual dignity is both equal and permanent. Rape, understood as an affront to sexual dignity, is viewed as wrongful regardless of victim's race, chastity, occupation, orientation, or sexual preferences because dignity inheres equally in all. "Dignity as honor" can be lost and rape victims stigmatized as "damaged goods." But part of the expressive potential of dignity as personhood is to highlight the inherent and permanent worth of all: that the rapist's sheer use of his victim as an object may send a message of degradation, but does not in fact transform his victim from subject to object. A rape victim may experience her violation as shameful or as "the cessation of selfhood," but her dignity-bearing self endures.

Finally, sexual dignity allows for a pluralistic understanding of rape, as a harm to both individual victims (with diverse lived experiences, including male and non-conforming persons) and as occurring in a discriminatory context (with women disproportionately affected). Dignity can be used to frame the harm of sexual violence in such a way that women are neither essentialized (by perpetuating their sexuality as a site of harm) or invisibilized (by obscuring the gendered harm of rape).[76] This is because dignity is capacious enough to encompass both individual and communal dimensions: just as rape denies the dignity of each victim, so too rape denies the equal dignity and status of women *qua* women. Rape is an injury to all women, a pattern that establishes and entrenches the subordination of women to men as objects of sexual use.

---

75. This understanding of sexual dignity resonates with the idea of "free self-development" rooted in German liberalism, which underpins the German law of personality, and has influenced the interpretation of the dignity clause in Article 1 of the Grundgesetz. *See* Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/manage/create?folder=35333]. This analysis extends to the context of workplace harassment: *see generally* Friedman & Whitman, *supra* note 53, at 256.

76. Sarah Deibler, *Rape by Any Other Name: Mapping the Feminist Legal Discourse Regarding Rape in Conflict onto Transitional Justice in Cambodia*, 32 AM. U. INT'L L. REV. 501, 536 (2017) (discussing essentialization, and noting that this tends also to occlude men's bodies as a site of sexual harm); *id*. at 528 (discussing invisibilization).

III. DIGNITY IN SEXUAL VIOLENCE CASELAW

The language of dignity is common in legal discourse across subdisciplines—from human rights and humanitarian law to bio-ethics and environmental law. However, as noted at the outset, it should not be assumed that the same understanding or definition of dignity applies across these different contexts. A useful way to unpack "dignity" in a particular legal context is to take a bottom-up approach, based on practical examples of its deployment.[77] To that end, this Part critically reviews the deployment of dignity by judges addressing criminal sexual offending. What conceptions of dignity are apparent in the caselaw, and do these align with the feminist account of sexual dignity surveyed above?

This is not an exhaustive review of dignity talk in judicial decisions about rape. However, as a first step to understanding how dignity is used by judges in this context, my research yielded a rich body of materials to draw upon, sufficient to illustrate how judges across the common law world tend to use the concept of sexual dignity. I searched the caselaw of twelve jurisdictions—Australia, Botswana, Canada, Eswatini, India, Namibia, New Zealand, South Africa, the United Kingdom, the United States, and Zimbabwe, plus the European Court of Human Rights—for criminal cases using the term dignity in discussing rape or other forms of sexual assaults.[78] Thematic textual analysis of the judgments was carried out, using content coding and with reference to key aspects of the theoretical framework outlined above; the discussion that follows is organized according to those four key themes: dignity as personhood; dignity as it relates to autonomy; dignity as permanent and equal; and dignity as both communal and individual.

A. Honor and Integrity, Personhood, and Non-Objectification

The normative authority of dignity was illustrated by its recurring use as a means of emphasizing the gravity of rape and the need for an effective response,

77. Neal, *supra* note 4, at 121.

78. Jurisdictions were selected based mainly on three criteria: (i) a common law system; (ii) English as primary civic language; and (iii) population over 10 million. The European Court of Human Rights was included on the basis of its jurisdiction over the United Kingdom, although applications against other states were also searched. Four nations with populations less than 10 million were included: Botswana, Eswatini and Namibia, on the basis of citations in South African jurisprudence, and New Zealand, due to the author's affiliation. The searches were generally not limited by time or court, although in some jurisdictions it was only possible to search superior courts. In each jurisdiction, the following searches were carried out: (i) "sexual dignity"; (ii) "dignity w/s sex"; (iii) "dignity AND rape"; (iv) "dignity AND consent AND sex." Results were then manually reviewed for relevance.

either at sentencing[79] or in sentencing appeals.[80] This was often done without explication or elaboration, but in other cases it was possible to identify various conceptions of dignity at play. For example, writing in the Supreme Court of India in 1980, Justice Krishna Iyer opined that "rape for a woman is deathless shame and must be dealt with as the gravest crime against human dignity."[81] In the same court in 2003, Justice Arijit Pasayat described sexual violence as, for a woman,

> a serious blow to her supreme honour and offend[ing] her self-esteem and dignity. It degrades and humiliates the victim . . . . A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman[,] i.e. her dignity, honour, reputation and not the least her chastity.[82]

These dicta suggest a patriarchal "dignity as honor" construct at odds with the idea of sexual dignity supported by feminist sexual violence theory. This accords with the findings of G.S. Bajpai and Raghav Mendiratta, who in their study of sexism in rape cases noted that the Indian judiciary has frequently "placed a premium on the notion of 'honour and chastity.'"[83]

More commonly, dignity was associated with physical security or bodily/psychological integrity.[84] Bodily integrity was often listed alongside

---

79. *See, e.g.*, State v. Dibotelo [2008] BWHC 195, para. 10 (Bots.) ("Rape . . . is a vicious violation of a woman's dignity and the Courts ought not treat it with kid gloves unnecessarily"); R. v. Drain HC Auckland CRI 2007-004-9065, 18 November 2009 at [34] (N.Z.) ("Not only did your acts violate your sister physically, they also violated her dignity as a person. Such offending is very serious"); R. v. D.W.B., [1998] 169 N.S.R. 2d 94, para. 13 (Can. N.S. S.C.) (discussing aggravating factors as demonstrating "the disdain you must have felt for her own sexual dignity and worth as a human being").

80. *See, e.g.*, R. v. Arcand, (2010) 499 A.R. 1, para. 272 (Can.) (guideline sentencing judgment, noting that "non-consensual sexual intercourse under any circumstances constitutes a profound violation of a person's dignity, equality, security of the person and sexual autonomy"); State of Andhra Pradesh v. Bodem Sundara Rao, AIR 1996 SC 530, para. 9 (1995) (India) (finding the High Court erred in reducing sentence for violent rape of a child, and noting that such crimes "are an affront to the human dignity of society"); Mukesh v. State for N.C.T. of Delhi, (2017) 6 SCC 1, para. 147 (India) (noting that "whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively"); Chapman v. State 1997 (3) SA 341 (SCA) (S. Afr.) (confirming sentence of 14 years for three counts of rape, noting that rape "is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim"); Dempsey v. R. [2013] NZCA 297 at [39] (N.Z.) (quashing the minimum period of imprisonment, noting that "the appellant's predatory and persistent behaviour towards a young woman who he callously violated and for whose dignity he showed a complete lack of respect . . . requires condemnation").

81. Rafiq v. State of U.P., (1981) 1 SCR 402, (1980) (India).

82. State of Punjab v. Ramdev Singh, LNIND 2003 SC 1106 (India). *See also* Shri Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922 (1995) (India); State of Madhya Pradesh v. Santosh Kumar, (2006) 2 MLJ (Crl) 1239, para. 6 (India) (describing rape as inflicting "the deep sense of some *deathless shame*" and robbing the victim of her dignity); Shyam Narain v. State of N.C.T. of Delhi, AIR 2013 SC 2209, para. 22 (India) (describing rape as "dehumanis[ing] the woman by attacking her body and *ruining her chastity*") (emphases added).

83. G.S. Bajpai & Raghav Mendiratta, *Gender Notions in Judgments of Rape Cases: Facing the Disturbing Reality*, 60 J. INDIAN L. INST. 298, 302 (2018).

84. *See, e.g.*, Newsom v. State 533 P.2d 904, 911 (Alaska 1975) (describing rape as "a desecration of the *victim's person* which is a *vital part of her sanctity and dignity* as a human being") (emphasis

other concepts—privacy, autonomy, and equality—as a cluster of related rights or interests associated with dignity.[85] This was expressly described by the Constitutional Court of South Africa:

> Often, with impunity, men forcibly violate women's bodies, privacy, dignity and self-worth, freedom, and the right to be treated with equal regard. In short, rape of women and children violates a cluster of interlinked fundamental rights treasured by our Constitution.[86]

This "cluster of rights" approach suggests a conception of dignity as involving more than physical integrity or autonomy over one's body. This came through in judgments which spoke of dignity as something associated not merely with the physical, but with one's personhood, humanity, or subjectivity.[87] For example, Justice of Appeal Tate writing in the Supreme Court of Victoria (Australia) in 2018 described rape as revealing "a reckless disregard for [the victim's] humanity and her dignity as a person of inherent moral value."[88] Similarly, in the High Court of South Africa in 2019, Judge Spilg reasoned that rape is not merely a physical assault, but an assault on dignity. This led him to reject, at sentencing, the appellant's proposition that a lack of physical injuries results in a "less serious" rape.[89] This understanding of rape as implicating dignity, not merely the physical body, also came through in *Tshabalala v. State; Ntuli v. State*, where the South African Constitutional Court relied on the constitutional value of dignity to reject the "misguided and misinformed view

---

added); Radebe v. S 2019 (2) SACR 381 (High Court of South Africa) at para. 26 (discussing rape as an offence against dignity which "*per se* equates to the most degrading and invasive of assaults on both the *physical integrity and the psyche* of the individual") (second emphasis added).

85. *See, e.g.*, R. v. Accused (CA265/88) [1989] 1 NZLR 643 (CA) at 653 (noting that all cases of sexual violation are an act of "violation to the body of another involving at the very least an invasion of *privacy and loss of personal dignity*"); R. v. Hutchinson, 2014 SCC 19, [2014] 1 S.C.R. 346, para. 91 (Can.) (referring to "*personal autonomy and physical integrity*" as the values protected by sexual assault laws); R. v. M. (G.O.) (1990), 54 C.C.C. 3d 79 (Can. N.W.T. S.C.) (describing rape as "a crime against *human dignity*. Indeed, it is the invasion of one's body in demeaning circumstances. It is the negation of the important value of a human being, one's *physical integrity and privacy*"); R. v. Leary (Unreported, New South Wales Court of Criminal Appeal, Kirby, A.C.J. and Campbell & James, JJ., 8 October 1993) (describing rape as the invasion of human dignity and privacy); S.M. v. Croatia, 68 Eur. H.R. Rep. 7, para. 62 (2019) (describing rape as threatening "*human dignity and essential aspects of private life*"); Masiya v. DPP (Pretoria) [2007] ZACC 9, 2007 (5) SA 30 (CC) at para. 37 (S. Afr.) ("The object of the criminalization of [rape] is to protect the *dignity, sexual autonomy and privacy* of women and young girls . . .") (emphasis added).

86. F. v. Minister of Safety and Sec. 2012 (1) SA 536 (CC) at para. 55 (S. Afr.).

87. *See, e.g.*, Matlho v. State [2008] BWCA 35, 9 (Bots.) (describing rape as "a violation of the personality of the victim" and " an invasion of her dignity *and* of the sanctity of her body"); Masiya 2007 (5) SA at para. 36 (positing that "[rape constitutes an] invasion of the dignity *and* the person of the survivor"); Griffin v. State 583 N.E.2d 191, 196 (Ind. Ct. App. 1991) (describing rape as not only a physical attack but "*also* . . . an affront to her personal and sexual dignity"); State of Punjab v. Gurmit Singh, AIR 1996 SC 1393, 403 (India) (discussing rape as a violation of human dignity and as "often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the *very soul* of the helpless female") (emphasis added).

88. Turner v The Queen [2018] VSCA 24 (15 February 2018) para. 15; *see also* R. v. D.W.B., [1998] 169 N.S.R. 2d 94 (Can. N.S. S.C.).

89. Radebe v. S 2019 (2) SACR at paras. 24-26.

that rape is a crime purely about sex."[90] This led the Court to reject the applicants' argument that under common law rape is an instrumentality offence which can only be committed by a male using his own genitalia and not by those acting as lookouts with a common purpose.

Relating to sexual dignity as personhood, many judges used dignity to denounce the rapist's use of the victim as a mere sexual object:

> [Rape is an] affront to the dignity and worth of its victims, [the] dehumanizing reduction of women to the status of mere objects.[91]
>
> [Finding that the rapist had disregarded the victim's dignity, the court went on to say that the victim] was not your chattel; she was not your thing that you could do with whatever you pleased.[92]
>
> To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity.[93]
>
> The treatment of a child [as an object of sexual gratification] is an attempt to deny her basic human dignity. In the eyes of the adult, the child is reduced to being a nameless thing.[94]

Condemnation of rape as a rejection of the victim's humanity infuses the following passage from the India Supreme Court, in the infamous Delhi bus gang-rape/murder case:

> [I]t is absolutely obvious that the accused persons had found an object for enjoyment in her . . . after ravishing her, [they] thought it to be just a matter of routine to throw her along with her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence.[95]

If sexual dignity is more capacious than honor and physical integrity, then rape is understood as threatening not only freedom from violence, but freedom to live as a self-defined subject. In this vein, Justice L'Heureux-Dubé in the Supreme Court of Canada has analogized from hate speech to rape, in that both impact "the individual's sense of self-worth and acceptance."[96] Her understanding of dignity as selfhood is echoed in Canadian jurisprudence on dignity generally, which encompasses not only negative "freedom from" rights,

---

90. Tshabalala v. State; Ntuli v. State 2020 (5) SA 1 (CC) at para. 45 (S. Afr.).
91. Magagula v. R. [2010] 32, para. 15 (Eswatini (formerly Swaziland) Supreme Court).
92. NPA v. Western Australia [2018] WASCA 131 (2 August 2018) para. 53 (Austl.) (quoting lower court).
93. R. v. Mabior, [2012] 2 S.C.R. 584, para. 48 (Can.).
94. R. v. E.M.W., 308 N.S.R. 2d 15, para. 13 (Can.).
95. Mukesh v. State for N.C.T. of Delhi, (2017) 6 SCC 1, para. 356.
96. R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577, para. 150 (citing R. v. Keegstra, [1990] 3 S.C.R. 697 (Dickson, C.J.)).

but the positive freedom to flourish as a person with "physical and psychological integrity and empowerment."[97]

B. Dignity, Autonomy, and Consent

In *Rusk v. State,* a decision of Maryland's Court of Appeals, Judge Wilner (dissenting) famously criticized rape law's resistance requirement:

> If the appellant had desired, and Pat had given, her wallet instead of her body, there would be no question about appellant's guilt of robbery. . . . No one would seriously contend that because she failed to raise a hue and cry she had consented to the theft of her money. Why then is such life-threatening action necessary when it is her personal dignity that is being stolen?[98]

This critique was echoed by Justice Venters' dissent in *Jenkins v. Commonwealth,* a Kentucky Supreme Court case interpreting a sexual misconduct statute as requiring physical force or threat thereof. Justice Venters argued this misinterpreted a statute intended to criminalize acts which "reprehensibly . . . deprive a victim of her right to say 'no' and the sexual dignity that goes with that right."[99]

Both Justices Wilner and Venters seem to use dignity in these passages for its rhetorical power, as a way of emphasising what is at stake when rape law, specifically rules around consent, fails to meaningfully protect autonomy. This presumed nexus between autonomy and dignity was evident in a number of significant decisions on the legal meaning of consent. In *Ewanchuk*, the Canadian Supreme Court identified dignity and autonomy as the core values underpinning the criminalization of unwanted touching:

> Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. . . . It follows that any intentional but unwanted touching is criminal.[100]

---

97. Law v. Canada, [1999] 1 S.C.R. 497, 501. In the U.S. Supreme Court, Justice Kennedy famously adopted a similarly positive (i.e. freedom *to*) conception of dignity, describing "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" as central to liberty and personal dignity. Casey v. Planned Parenthood 505 U.S. 833, 851 (1992).

98. Rusk v. State 406 A.2d 624, 633 (Md. Ct. Spec. App. 1979). The resistance requirement in Maryland at the time required that the victim resisted or that failure to do so was due to the threat of force or violence.

99. Jenkins v. Commonwealth 496 S.W.3d 435, 471 (Ky. 2016).

100. R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 28; *see also* R. v. Park, [1995] 2 S.C.R. 836, para. 38 (criticizing the common law approach to consent, which reinforces the view that sex is consensual in the absence of communicated non-consent, as perpetuating "social stereotypes that have historically victimized women and undermined their equal right to bodily integrity and human dignity").

The Court went on to reject an "implied consent" approach to determining consent. Such use of dignity and autonomy as a justificatory lens for reforming various aspects of consent law was apparent in a number of other jurisdictions, including New Zealand (affirmative consent),[101] Australia (recklessness as to consent)[102] and the European Court of Human Rights (resistance requirement).[103] Returning to Canada, in *Mabior*, a leading decision on HIV exposure as sexual assault, the Supreme Court again expressly tied reform of consent law to dignity, explaining that Canadian law is interpreted by reference to the values of autonomy, equality, and dignity.[104] In light of those values, Canada's "formerly narrow view of consent" had been broadened over time, for example by abolition of the "hue and cry" rule and rejection of rape myths that had previously operated to "systematically bias[] the trial process in favour of finding consent."[105] The Court expressly linked a progressive consent approach to a modern understanding of sexual assault as "wrong because it denies the victim's dignity as a human being" by "treat[ing] him or her as an object."[106]

C. Dignity as Permanent and Equal

Many judges spoke of dignity as being irreparably "destroyed," "shattered" or "buried" by sexual violence, suggesting a conception of dignity as something impermanent such as reputation or honor.[107] This sense of impermanence also came through in references to dignity as associated with physical security or

---

101. *See* Christian v. R. [2016] NZCA 450 at [49] (relying on the Ewanchuk, [1999] 1 S.C.R. at para. 28 to support an interpretation of the sexual violence statutory provisions as requiring an active expression of consent to ground a reasonable belief in consent).

102. R. v. Kitchener (1993) 29 NSWLR 696, 697 (Court of Criminal Appeal) (Kirby, P. concurring) (agreeing that failure to advert at all to the possibility that the complainant was not consenting satisfied a *mens rea* requirement of "recklessness," based on statutory language and precedent, but also noting a dignity-based policy argument supporting the outcome, in that "sexual intercourse with another, without the consent of that other, amounts to an affront to that other's human dignity" and that as such, indifference to consent is plainly reckless in our society today).

103. M.C. v. Bulgaria, 40 Eur. H.R. Rep. 20, 22 (2005) (referencing an international obligation to ensure that rape laws protect women's dignity, in holding that Bulgarian law, which required active resistance on the part of the victim to found a rape prosecution, failed to adequately protect the autonomy of individuals, and was therefore a breach of victims' Convention right to freedom from inhumane or degrading treatment (art. 3) and respect for private and family life (art. 8)).

104. R. v. Mabior, [2012] 2 S.C.R. 584, paras. 43-44 (Can.).

105. *Id.* paras. 45-46.

106. *Id.* paras. 45, 48. Importantly, the Mabior Court failed to engage explicitly with the connection between objectification and HIV exposure. As such, difficult questions about whether failure to disclose risk of HIV transmission is rightly treated as sexual assault, rather than assault or a separate non-disclosure offence, were side-stepped. Further analysis of the potential impact of a sexual dignity framework on the issue of HIV non-disclosure would be worthwhile.

107. *See, e.g.*, S v. Oxorub [2015] NAHCMD 171, para. 17 (Namib.) (arguing that "*no length of custodial sentence can restore* the dignity of those women and child girls"); R. v. Causby [1984] Tas R 54, (Court of Criminal Appeal) (Austl.) (noting that forced non-consensual fellatio "can only be described as . . . *destructive* of the human dignity of the victim"); Shyam Narain v. State of N.C.T. of Delhi, AIR 2013 SC 2209, para. 22 (India) (describing the dignity of a rape victim as "*shattered*" and going on to say that rape "is a monstrous *burial* of her dignity in the darkness") (emphases added).

bodily/psychological integrity, which was spoken of as being "violated," "invaded," "negated," "obliterated," or "desecrated" by rape.[108]

By contrast, cases which expressed dignity as associated with personhood and non-objectification tended to use terms like "affront to," "disregard," and "attempt to deny" when discussing rape and dignity, suggesting an understanding of dignity as permanent and inviolable.[109] This permanence was expressly discussed in the United States Ninth Circuit Court of Appeal*,* in a case dealing with sexually exploitative photos of children:

> The pornographic photographer subordinates the humanity of his subject to the sexuality of the subject. The humanity of the subject is not eliminated; how could it be? Indeed the interest of the pornographer is in the human person treated as sexual object. From a feminist perspective, this reduction of humanness has been seen as a male offense. . . . But whether the person is male or female, the essential operation is the same: an assault upon the humanity of the person pictured, making that person a mere means serving the voyeur's purpose.[110]

If dignity is understood as contingent on humanity, rather than reputation or physical state, it follows that dignity is not only permanent, but equally inherent in all people, regardless of external factors such as race, orientation, chastity, or occupation. This view was expressed powerfully by the Supreme Court of

---

108. *See, e.g.*, State v. Batsile [2008] BWHC 315, para. 10 (Bots.) ("[rape is] *invasive* of the dignity, emotional, physical and psychological integrity"); R. v. McCraw, [1991] 3 S.C.R. 72 (Can.) ("[rape] is the *violation* of the bodily integrity of a woman [and an] affront to human dignity"); K v. Minister of Safety and Security 2005 (6) SA 419 (CC) at para. 57 (S. Afr.) (describing rape as an "*infringe[ment]*" of "dignity and security of the person"); Aydin v. Turkey, App. No. 23178/94, 25 Eur. H.R. Rep. 251, para. 189 (1996) (Eur. Comm'n on H.R.) (noting rape's incompatibility with human dignity, and describing rape as "strik[ing] at the heart of the victim's physical and moral integrity"); CRIMINAL LAW REVISION COMMITTEE, FIFTEENTH REPORT: SEXUAL OFFENCES, 1984, Cm. 9213, ¶ 2.2 (UK); R. v. Billam [1986] 1 WLR 349, 350 (CA) (UK) (describing rape as an "indignit[y]" which inflicts "emotional and psychological trauma; it may be described as a violation which in effect *obliterates* the personality of the victim"); Newsom v. State 533 P.2d 904, 911 (Alaska 1975); *supra* text accompanying note 108 (emphasis added).

109. *See, e.g.*, Griffin v. State 583 N.E.2d 191 (Ind. Ct. App. 1991); Turner v. The Queen [2018] VSCA 24 (15 February 2018) (Austl.); R v. E.M.W., 308 N.S.R. 2d 15 (Can.); NPA v. Western Australia [2018] WASCA 131 (2 August 2018) (Austl.); *see also* R. v. JED [2007] VSC 348 (21 September 2007) para. 13 (Austl.) (describing a sexual assault as having been carried out "with a profound *contempt* for her dignity as a human being"); R. v. McCraw, [1991] 3 S.C.R. at para. 34 (opining that "[i]t is hard to imagine a greater *affront to* human dignity" than rape); Dempsey v. R. [2013] NZCA 297 at [39] (N.Z.) ("he callously violated [the victim and for her] dignity he showed a complete lack of *respect*"); N. v. T. 1994 (1) SA 862 (High Court of South Africa) at 863 ("Rape is . . . [an] act in which the aggressor treats with *utter contempt* the dignity and feeling of his victim") (emphasis added).

110. United States v. Wiegand 812 F.2d 1239, 1245 (9th Cir. 1987). Importantly, the court also reasoned that adults can legally consent to the "diminishment" of their dignity; but where a child is the target, "the statute will not suffer the insult to the human spirit, that the child should be treated as a thing." *Id*. at 1245; *see also* R. v. Hajar, 2016 ABCA 222, [2016] 12 W.W.R. 435, 435 (Can.) (finding that de facto consent of a child is not a mitigating factor in sentencing for statutory rape, because dignity is violated even in cases of ostensible consent). These decisions point to the question of whether dignity can be used to "trump" autonomy, which is discussed *infra* Section 4B.

Canada in a case involving the sexual violation of an Indigenous sex worker who died from her injuries:

> Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law's full protection and to be treated with dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest.[111]

The equality dimension of dignity was similarly emphasized in a number of sentencing cases, to refute arguments that certain victims are less impacted by rape. For example, in *R v Leary*, in the New South Wales Court of Appeal, Acting Chief Justice Kirby wrote separately to concur with the sentencing judge's rejection of a line of cases from Victoria in which the rape victim's occupation as a prostitute was considered a mitigating factor: "prostitutes, male or female, were entitled to the same protection of the law as any other citizen. They have their human dignity and their privacy . . . ."[112] Likewise in *R v. M (GO)*, Justice Boilard in the Northwest Territories Supreme Court began by noting that rape is "a crime against human dignity," and as such its gravity

> does not vary in accordance with the colour of the skin of the victim, her cultural background, or the place of her residence. The progress of civilization and science during the 20th century has taught us that the human race shares the same ancestors and that we are equals and entitled to the same rights and obligations because of our human condition. . . . Accordingly, it is my view that this offense of which the accused was found guilty is as serious as any other rape committed anywhere in Canada. The race or cultural background of the victim has nothing to do with that.[113]

These cases illustrate the "democratization of dignity" that has played out in rape law, discussed above at Part II, whereby over time the "normative other" has come to be recognized as also possessing dignity and, therefore, as equally wronged by rape, regardless of externalities.

The abolition of marital rape immunity is an important example of this extension of dignity—specifically, from men to women. In South Africa, the statutory abolition of the exemption was described by the Constitutional Court in *Masiya v. DPP* as reflecting a changing understanding of rape as a question

---

111. R. v. Barton, [2019] SCC 33, 435 D.L.R. 4th 191, para. 210.

112. R. v Leary (Unreported, New South Wales Court of Criminal Appeal, Kirby, A.C.J. and Campbell & James, JJ., 7 October 1993) (citing lower court).

113. R. v. M. (G.O.) (1990), 54 C.C.C. 3d 79 (Can. N.W.T. S.C.). Importantly, this case was handed down in the context of a broader controversy over remarks made by another Northwest Territories judge suggesting that rape in the majority-First Nations territory was different in gravity to southern Canadian cases, due to cultural and social factors. *See* Laurie Sarkadi, *Rape in North Different, Judge Says*, EDMONTON J., Dec. 20, 1989, at A1.

of women's dignity, rather than male interests, and a rebuke of embedded patriarchal gender norms.[114] In the High Court of Australia, Justice Brennan has likewise drawn on the dignity of women to argue that Hale's famous proposition of marital rape immunity was wrong in principle.[115] Importantly, Justice Brennan also found that the immunity had been fixed at common law by Hale's statement, despite its offensiveness to women's dignity.[116] However, in *PGA v The Queen*, the High Court held that spousal rape *was* an offence under the common law of Australia at least as early as 1963, despite the fact that marital rape immunity was treated as a settled common law rule at that time.[117] As a matter of principle, the *PGA* decision can be defended as vindicating the equal dignity of women. Indeed, South Australia argued in *PGA* that Hale's proposition was offensive to dignity. But the decision also failed to engage with the common law's role in condoning marital rape and women's sexual subjection for most of the 20th century.[118] This whitewashing of legal history problematically invisibilizes a significant historical harm to women's equal sexual dignity.

Relating to the extension of dignity protection to all rape victims, a number of Canadian judgments emphasized the harm to women's equal dignity when trial procedures embed and reflect rape myths. For example, where previously "unchaste" women were seen as inherently unreliable or more likely to have consented to the sexual activity in question, now rape shield laws are commonly in place to prohibit such inferences in order to protect the equal dignity of women.[119] Likewise, whereas the myth of false rape complaints has historically given rise to various corroboration and cautionary requirements, the equal dignity of women is arguably recognized and affirmed when such requirements are abandoned.[120] And in the *Ewanchuk* decision on implied consent, discussed

---

114. Masiya v. DPP (Pretoria) 2007 (5) SA 30 (CC) at para. 28; *see also* S.W. v. U.K., 21 Eur. H.R. Rep. 363, para. 44 (1996) (noting that "the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is *respect for human dignity and human freedom*") (emphasis added).

115. R. v. L (1991) 174 CLR 379, 396 (reasoning that Hale's statement of marital rape immunity was inconsistent with ecclesiastical court doctrine, which viewed marriage as an institution that "[f]ar from relegating a wife to the position of sexual chattel . . . casts upon a husband an obligation to respect a wife's personal integrity and dignity").

116. *Id.* at 399; *see also* R v. R [1992] 1 AC 599 (HL) (appeal taken from Eng.) (UK); S v. HM Advocate (1989) SLT 469 (Scot.).

117. PGA v. The Queen (2012) 245 CLR 355.

118. Wendy Larcombe & Mary Heath, *Developing the Common Law and Rewriting the History of Rape in Marriage in Australia:* PGA v. The Queen, 34 SYDNEY L. REV. 785, 804-06 (2012).

119. *See* R. v. Barton, [2019] 435 D.L.R. 4th 191, 212 (Abella & Karakatsanis, JJ., dissenting in part) (discussing rape myths and the "insidious harm" they cause to the "goals of truth *and of dignity*," goals which rape shield laws aim to protect) (emphasis added).

120. *See, e.g.*, R. v. A.G., [2000] 1 S.C.R. 439, 441 (Can.) (L'Heureux-Dubé, J.) (in an appeal on the reasonableness of a verdict based on uncorroborated evidence, noting in her concurring judgment that the justification for rejection of the corroboration requirement is "the need to affirm the principles of *equality and human dignity* in our criminal law") (emphasis added). Interestingly, in India a "dignity as honor/rape as shameful" argument has been used to argue that women do not tend to make false rape accusations and

above, Justice L'Heureux-Dubé wrote separately to centre the case on dignity and equality; she criticized the reasoning of the lower courts as based on rape myths that deny the equal dignity of women—such as the assumption that "no" sometimes means "yes," "try again," or "persuade me."[121]

D. The Dignity of Women

A number of judgments expressly addressed the gendered communal dignity interests underpinning rape, by situating individual rape cases in the context of broader societal structures and patterns. By acknowledging that rape is disproportionately a crime against women and that the threat of rape has functioned to subordinate women in society, courts showed an understanding of rape as harming the sexual dignity of womankind:[122]

> It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.[123]

> [F]or far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity.[124]

The issue of women's sexual dignity was critical in the South African case of *Masiya*, a constitutional challenge to the exclusion of anal penetration from the common law definition of rape. Masiya was convicted of indecent assault for anally penetrating a nine-year-old girl, resulting in a more lenient sentence than if the charge had been rape. The Regional Court held that the definition should be extended to include non-consensual sexual penetration of the anus of another person and convicted Masiya of rape. On appeal, the majority agreed the

---

therefore that corroboration is not required as a matter of law. *See* Rafiq v. State of U.P., (1981) 1 SCR 402; *see also* State of Punjab v. Gurmit Singh, AIR 1996 SC 1393.

121. R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 87.

122. Notably, I did not find any instances in the dataset of judges expressly adopting an intersectional communal understanding of sexual dignity, such as the group dignity of indigenous women *qua* indigenous women. *See supra* note 60 and accompanying text. For acknowledgement of the (individual) dignity of an indigenous woman as an indigenous woman, *see* R. v. Barton, 435 D.L.R. 4th 191 and *infra* text accompanying note 135. A number of Indian cases described rape as a threat to the dignity of humankind generally, rather than women specifically. *See, e.g.*, Rafiq v. State of U.P., (1981) 1 SCR 402 (describing rape as an outrage on women's dignity that "puts to shame our ancient cultural heritage and *human claims*"); Dhananjoy v. State of West Bengal, (1994) 1 SCR 37, para. 21 (rape as "an affront to the *human dignity of the society*"); Shyam Narain v. State of N.C.T. of Delhi, AIR 2013 SC 2209 (rape as "a crime against [both] the holy body of a woman and *the soul of the society*") (emphasis added).

123. R v. Osolin, [1993] 4 S.C.R. 595, para. 165 (Can. S.C.C.) (Cory, J. dissenting).

124. Tshabalala v. State; Ntuli v. State 2020 (5) SA 1 (CC) at para. 1 (S. Afr.); *see also* F v. Minister of Safety and Security 2012 (1) SA 536 (CC) at paras. 55-56 (S. Afr.) (describing rape as entrenching patriarchy and going to the core of women's subordination).

definition should be extended to include penetration of a female anus, recognizing this as an assault on dignity akin to vaginal rape.[125] However, the Court declined to extend the definition to cover anal rape of a male. This was primarily because it was not raised on the facts. But an additional reason given was that

> historically, rape has been and continues to be a crime of which females are its systemic target. It is . . . a humiliating, degrading and brutal invasion of the dignity and the person of the survivor. It is not simply an act of sexual gratification, but . . . an extreme and flagrant form of manifesting male supremacy over females.[126]

By using the dignity of women as an argument against extending protection to male rape victims, the majority took a "zero-sum" approach[127] to individual versus group dignity interests, highlighting the communal dimension of dignity at the expense of the individual. In his partial dissent, Chief Justice Langa parted ways with the majority on this point:

> Women have always been and remain the primary target of rape. That is not a fact that this Court can or should ignore. Nor can we deny that male domination of women is an underlying cause of rape. But to my mind that does not mean that men must be excluded from the definition . . . . To my mind the criminalization of rape is about protecting the "dignity, sexual autonomy and privacy" of all people, irrespective of their sex or gender.[128]

Chief Justice Langa's approach is pluralistic, embodying a feminist understanding of rape as *both* a harm to individual (including male) dignity and as occurring in a broader context that threatens the equal dignity of women. Indeed, Chief Justice Langa expressly situated male-on-male rape in this broader context, when he argued that even male rape is gender-based; male victims "are dominated in the same manner and for the same reason that women are dominated: because of a need for male gender-supremacy."[129] This pluralistic approach allowed for recognition of the gendered, group harm of rape, but without denying the dignity interests of male victims, without setting up the rape of a man as less serious than the rape of a woman, and without essentializing women as (the only) rape victims. Indeed, Chief Justice Langa went on to expressly warn against essentialization, when he cautioned that limiting the definition of rape to female victims

---

125. Masiya v. DPP (Pretoria) 2007 (5) SA 30 (CC) at paras. 38-39 ("The extended definition would protect the dignity of survivors, especially young girls who may not be able to differentiate between the different types of penetration . . . the trauma associated with [non-consensual anal penetration] is just as humiliating, degrading and physically hurtful as that associated with [non-consensual vaginal penetration]").

126. *Id.* at para. 36.

127. *See supra* Section 2B.

128. Masiya v. DPP (Pretoria) 2007 (5) SA at para. 84 (Langa, C.J.).

129. *Id.* at para. 86.

> might well entrench the vulnerable position of women in society by perpetuating the stereotype that women are vulnerable, which in turn enforces the dangerous cycle of abuse and degradation that has historically led to placing women in this intolerable position. The unintended effect is to enforce the subordinate social position of women which informed the very patriarchy we are committed to uproot. The social reality of women cannot be ignored, but we should be wary not to worsen it.[130]

Chief Justice Langa's nuanced approach allowed him to validate the equal sexual dignity interests of male victims, while taking care to avoid either invisibilizing or essentializing the communal/gendered dignity interests he saw as being at stake when it comes to sexual violence.

IV. ASSESSING A DIGNITY APPROACH TO SEXUAL VIOLENCE

Dignity has strong normative pulling power and is a prevalent legal concept across subdisciplines, including sexual violence law. Regardless of divergence on its parameters, a common baseline allegiance to dignity's core claims of equal and inherent worth, and attendant respect for others, means dignity lends some degree of rhetorical weight to judgments about sexual violence. As such, it is unsurprising that, as the case analysis illustrates, judges frequently draw on dignity in this context, and this is likely to continue. But is dignity necessary here? Is sexual violence a context in which "nothing but dignity will do"?[131] What are the doctrinal implications of "sexual dignity," and what are the potential drawbacks of a dignity framing of rape?

A. The Expressive Function of Sexual Dignity

Dignity is not the only way to talk about the ethical wrong of rape, just as there is no universal experience of the harms of rape. As Cahill has noted, each victim is "an embodied and therefore sexed subject," with different harms accruing to "differently sexed beings." As such, attempts at ethical universalism—identification of the "real" wrong inherent in rape—belie the "multiplicity of rape as an embodied experience."[132] Judges are also constrained in their ability to explore that multiplicity at length in written judgments. Faced with the complexity of sexual assault, judges frequently resort to dignity in their attempts to describe and condemn the harms and wrongs of rape.

---

130. *Id.* at para. 85.
131. Charles Foster, *Human Dignity in Bioethics and Law*, 41 J. MED. ETHICS 935, 935 (2015).
132. CAHILL, *supra* note 5, at 197.

This expressive function is important, because judgments have narrative power for victims, offenders, and society.[133] Judgments use language, including "dignity," to mediate the experience of sexual assault. This can be done in troubling ways, such as by reproducing and reifying harmful stereotypes and assumptions, for example that the rape victim's status as a dignity-bearer is indelibly changed or that some women are undignified and thus unrapeable. But dignity can equally be used in a way that aligns with and empowers a feminist understanding of the multiple harms of sexual violence. Situated in feminist theory, sexual dignity is both closely related to and more capacious than honor, physical integrity, autonomy, privacy, and equality; it follows that rape is about more than chastity, physical violence, or subjugation alone. This understanding of sexual dignity may be particularly appropriate for framing sexual violence in a way that validates the lived experiences of rape victims, capacious enough to more fully express and condemn the multiplicity of rape's harms. More than an assault on any one interest, sexual dignity might frame rape as an embodied attack on subjectivity itself.

Relatedly, dignity may be a particularly effective concept for highlighting the group interests at stake when it comes to sexual violence. This is an important aspect of dignity's expressive power, with potential doctrinal flow-on effects. Feminist theory understands sexual violence, both as a societal phenomenon and a legal construct, as not only about individual autonomy interests; it also impacts the recognition of the equal dignity of women *qua* women. The case analysis suggests that dignity can reflect and galvanize more expansive ways of thinking about consent by focusing on the equal autonomy interests of women. In other words, a democratized, egalitarian understanding of "women's sexual dignity" is conducive to the questioning of rape myths and asymmetrical legal standards that do not equally protect female subjectivity and freedom to flourish.[134] This is seen in cases that both affirm the value of autonomy and challenge the embedded patriarchy of rape law's understanding of consent—resistance, "hue and cry," implied consent, implied marital consent, corroboration, admission of a complainant's sexual history, lesser sentences for "lesser victims"—by reference to women's dignity. On the other hand, the *Masiya* case demonstrates that a group dignity perspective, if applied in a zero-sum way at the expense of recognizing individual dignity, can in fact work to undermine the protection of non-members (men) from sexual violence and problematically essentialize

133. Stacy Moreland, *Talking About Rape—and Why it Matters: Adjudicating Rape in the Western Cape High Court*, 47 S. AFR. CRIME Q. 5, 5-7 (2014).

134. Lacey, *supra* note 5, has similarly argued that an integrity framing of rape law could transform the legal concept of consent. *See* Lacey, *supra* note 5, at 154. Lacey does not draw on dignity explicitly, but the themes and meanings of dignity discussed in this Article echo her 'sexual integrity' analytical framework. My enquiry differs from Lacey's in that my focus is the judicial deployment of dignity, rather than a theorization of rape's ethical wrong. However, Lacey's top-down approach and my bottom-up approach raise similar questions about the limits of an autonomy framing of rape.

women as (the only) subjects of such harm. Sexual dignity has strong rhetorical power, but it must be deployed thoughtfully.

In all, the foregoing suggests that, while there are other ways to express and explore the ethical wrong of rape, sexual dignity is a potentially powerful and productive concept, capable of conveying the multiple and varied impacts rape can have on both individuals and groups. But beyond this validating, expressive function of sexual dignity in relation to "typical" cases of sexual violence, it is also possible to imagine less typical scenarios where a dignity/objectification framing is not only useful but necessary for articulating the ethical wrong of non-consensual sex—such as rape of a "non-autonomous" person. Consider intentional sexual intercourse with a patient who is permanently comatose and therefore incapable of exercising autonomy, and incapable of coming to learn, ex post facto, of the violation. The law rightly recognizes this as rape, as the sexual contact is (knowingly) non-consensual; dignity is not needed to do any doctrinal work. But in this thought experiment, the reason absence of consent renders such contact wrongful is not because autonomy is being disregarded (as there is no autonomy to be exercised in this scenario; perhaps the sex is better described as un-consensual rather than non-consensual), but because dignity—in the sense of personhood, the right to be treated not as a mere means to an end—is being denied. In other words, in such a scenario, dignity is arguably needed theoretically to justify condemnation of the sexual behaviour. John Gardner has explored this idea in *The Wrongness of Rape,* applying a Kantian framing of rape as objectification to argue that the "wrong of rape is a wrong against the person raped, even when she is unaware of it and suffers no harm as a result."[135] Without the concept of sexual dignity, it is difficult to identify the wrongfulness of behaviour which might theoretically be harmless.

B. Risks of Sexual Dignity Discourse: "Dignitarian" Dignity, Autonomy, and the Normative "Others"

Beyond this expressive function, are there doctrinal implications to adopting a sexual dignity framework in rape law? Notably, dignity was not relied on in the surveyed caselaw as a way to legally distinguish sex from sexual assault. Dignity might be a useful conceptual tool for more broadly framing the ethical wrong of non-consensual sex as objectification; it does not follow that the legal definition of rape should extend to consensual but purportedly objectifying sex—that would be to conflate discrete ethical harms and risk diluting the moral authority of rape laws.[136] For example, prostitution or sadomasochistic sex might

135. Gardner, *supra* note 5, at 31.

136. I have previously discussed the conflation of fornication and exploitation as discrete ethical breaches in the context of statutory rape laws. *See* Anna High, *Good, Bad and Wrongful Juvenile Sex:*

be characterized as objectifying, which could be moral/political grounds for imposing criminal or civil limitations on those behaviours. But if practised consensually, such sexual contact is ethically distinct from non-consensual sexual contact.[137]

This points to a broader concern with the concept of sexual dignity, one that extends beyond the confines of rape law. When sex is non-consensual, we might say that the dignity and autonomy interests of the victim coincide—the conduct should be criminalized based on the wrong of dignity-denying/autonomy-defying objectification. But unthinking allegiance to dignity forged in the context of rape law might have consequences beyond those confines, in situations where dignity and autonomy can be viewed as clashing. Specifically, an uncritical dignity approach to sexual behaviour generally might lead to a moralistic preoccupation with dignity as honor or respect, abstracted from or prior to autonomy, resulting in situations where consent to allegedly "undignified" or "dishonorable" behaviour is deemed irrelevant or of secondary importance. That is, dignity could be used to justify the "trumping" of sexual autonomy, including the choice to debase oneself, with implications for the legal regulation of consensual but non-normative sexual behaviour. In other words, when it comes to the regulation of sex generally, the impacts of uncritical participation in dignity talk on the normative "other," and minority sexual rights, must be taken seriously.[138]

The use of dignity to justify limits on autonomy has been termed "dignitarian": human dignity is read so as to ground obligations—such as the obligation to act honorably—rather than rights, to the end of protecting humanity's (noble, honorable, *dignified*) rank.[139] A number of scholars have tracked the use of "dignitarian dignity" in constitutional law, where it has been used to justify prohibitions on various consensual acts, from dwarf-throwing to peep shows to prostitution.[140] This dignitarian trend relates to an important debate in criminal law: whether criminal doctrine should include dignity violations in the concept of wrongdoing, even in instances where there is consent to the violation.[141] Generally, the framing of rape as an offence against dignity

---

Rethinking the Use of Statutory Rape Laws Against the Protected Class, 69 ARK. L. REV. 787, pt. II (2016).

137. Gardner, *supra* note 5, at 20-21 (arguing that "resort to prostitutes . . . objectifies the prostitute . . . even when her consent is genuine. But when her consent is genuine such resort . . . is not a wrong against the prostitute . . . *under the same heading* as that under which rape is a wrong against its victim").

138. For discussion of dignity as reproducing normative hierarchies in the context of constitutional protection of certain sexual practices, see Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1 (2008).

139. Stéphanie Hennette-Vauchez, *A Human* Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 INT'L J. CONST. L. 32 (2011).

140. *See, e.g.*, *Id*.; Adler, *supra* note 138.

141. *See generally* R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397 (1995); R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13 (2001); Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CALIF. L. REV. 759 (2000);

does not speak to that debate directly because, as noted above, rape is a context in which non-consent is assumed. But the caselaw presented here illustrates that judges do descriptively assume dignity; and in some instances, a patriarchal "dignity as honor" conception seems to be assumed, which might resonate with and embed a dignitarian approach to the regulation of "dishonorable" sexual behaviour generally. In other words, it is possible that embracing the rhetoric of sexual dignity in the "easy cases" involving non-consent might lead to dignitarian limits being read onto the concept of consent itself.

Consider, for example, the question of whether consent to sexual intercourse can be provided in advance. If a woman agrees in advance to her unconscious body being used by another for sexual acts, it could be argued that her autonomy is not, thereby, harmed, and the sex should be regarded as consensual.[142] The actus reus of rape would be absent, regardless of whether the other party was aware of her (advance) consent.[143] But equally, a sexual dignity argument could be deployed to refute the moral and, therefore, legal validity of advance consent: because sex involves using the body of another as a sexual object, it is inherently objectifying and wrongful in the absence of some degree of mutuality and intersubjectivity (which requires, at a minimum, the other's conscious and consenting *presence*).[144] As such, sex in the absence of *contemporaneous* consent should satisfy the actus reus of rape, regardless of the woman's expressed prior wishes. Framed in this way, the use of the woman's unconscious body for sex she desires is wrongful, not because it constitutes a denial of her autonomy, but because of the denial of her personhood inherent in the act.

As the thought experiment suggests, the question of whether dignity should prevail over autonomy, in circumstances in which they are in tension with one another, is complex. Put differently, the question is whether one can waive one's own dignity. The Court in *United States v. Wiegand* assumed that adults can consent to the "diminishment" of their own dignity,[145] but that is not self-evident. Indeed, Joseph J. Fischel and Claire McKinney have argued that the question of whether one can consent to one's own debasement is a moral/political question that may be undecidable.[146] If undecidable, then allowing an assumption of "sexual dignity" to smuggle in dignitarian limits on autonomy recalls Moyn's

---

Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007).

142. This thought experiment is inspired by a disturbing plot line in *Luther* [season 2, episode 1], involving a prostitute who was rendered consensually unconscious by her pimp so that her body could be used to create death-fetish pornography; a less extreme example would be blackout due to consensual asphyxiation. If intercourse with an unconscious body was performative—for example, observed by others through a pornographic peep show or recording—the question of harm to other women would arise, but that is beyond the scope of this discussion.

143. If the other party was not so aware, but the "advance consent" was deemed valid, presumably they would be guilty of attempted rape, a kind of "not raped, but by a rapist" situation.

144. *See supra* note 67 and accompanying text.

145. United States v. Wiegand 812 F.2d 1239, 1245 (9th Cir. 1987); *see supra* note 110.

146. Fischel & McKinney, *supra* note 5, at 414.

warning about the judicialization of dignity: a robustly theorized approach is needed to ensure that dignity does not simply mean whatever a particular judge wants it to mean, which could be as concerning in the context of sex and sexual violence as it is in the context of human rights.[147]

Returning from the marginal to more "typical" rape cases, the foregoing survey has shown that judges clearly sometimes do adopt an uncritical understanding of sexual dignity. When dignity is used to equate only to honor, or as something impermanent and lost when a person is raped, this may reinforce the shame and stigma of rape as "undignified." It also risks reproducing a normative sexual hierarchy in which some victims are cast as less honorable and some rapes as less serious than others. Again, even within the confines of sexual assault law, uncritical engagement with dignity may be harmful for the normative "others."

CONCLUSION

Dignity is an appealingly capacious rhetorical device. But that capaciousness comes with pitfalls; uncritical dignity talk can be harmful. One way to avoid those pitfalls would be to break dignity down into its components, and to talk expressly about particular aspects or dimensions of dignity—honor, physical integrity, autonomy, subjectivity, permanence, women's equality, or some intersection thereof. Such explicit unpacking might allow for more meaningful engagement with dignity's competing conceptions, facilitating convergence over time on both "sexual dignity" and sexual violence. However, it remains that a robust, multidimensional concept of sexual dignity is potentially a powerful expressive tool when it comes to the multiple harms of rape. Further, the caselaw of sexual dignity suggests that judges believe sexual dignity to be a useful normative concept and will continue to deploy it in decisions on rape. As such, principled and reflective engagement with the assumptions and conceptions underpinning sexual dignity is necessary. The case analysis also illustrates that in many instances, judges are using dignity in ways that align well with the parameters evident in contemporary feminist sexual violence theory.

Importantly, these parameters have shifted over time, and sexual dignity will continue to be a site of contest. But throughout, a baseline allegiance to the idea of dignity can be assumed. Given this allegiance—and I return here to a theme of dignity jurisprudence raised in Part I above—dignity may create discursive space for contests that over time tend to generate consensus.[148] This progression is apparent in the history of rape law, framed as a process of "democratizing" dignity, with contests and convergence about dignity playing out over time.

147. *See supra* note 27 and accompanying text.
148. *See supra* note 26 and accompanying text.

Along the way, marginal cases have become non-marginal, a process that is likely to continue. The equal dignity of yesteryear's "unrapeable" woman has been vindicated by recognition of her right to protection from sexual violence. So too an expansive dignity framing of sexual violence might continue to facilitate contest and eventually convergence, such that today's marginal cases become non-marginal over time—for instance, consensual but coercive sex, or sex in the absence of affirmatively communicated consent. That is to say, if robustly and critically theorized, the normative power of dignity—a concept which resonates strongly in a twenty-first century world—might be useful for advocating for an expansive, evolving approach to sexual violence.

Debates about dignity relate to broader questions about the fundamental harms and wrongs of rape, and how these should be expressed in criminal law. I do not assert that rape is a context in which "nothing but dignity will *ever* do"; but given that dignity talk is "being done," we must attempt to do it thoughtfully. It will not do to resort to platitudes when it comes to rape. Victims deserve more when we attempt to articulate the multiplicity of rape's harms and wrongs in legal language. Moreover, the concept of sexual dignity that emerges in the context of rape might permeate legal, moral, and political debates about the regulation of non-normative sexual behaviour more broadly. Dignity talk can be powerful but should not be engaged in uncritically, or we risk perpetuating patriarchal assumptions and "empty-headed moralism" in sexual violence law and beyond.