Dignity and Sexuality:  
Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage  
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This essay explores competing claims on dignity in transnational debates over abortion and same-sex marriage. To do so, the essay revisits debates about abortion in the 1970s and the first constitutional litigation on abortion these debates prompted. It shows how competing claims on dignity came to shape prominent judicial decisions concerning abortion in Germany and the United States. The essay concludes by demonstrating that this struggle over dignity has begun to spread to the same-sex marriage debates.

In these different contexts, advocates and judges have invoked dignity to express liberty claims, to express equality claims, and to express respect for the value of life itself, in the process seeking to vindicate different understandings of sexuality’s role in human flourishing. After four decades of debate, advocates are now self-consciously engaged in a cross-borders struggle to establish the meaning of dignity in matters of sexuality. The story of this conflict—featuring transnational exchange among social movements, political parties, religious institutions, and courts—sheds light on how belief

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in the importance of dignity claims in human rights law unites agonists who otherwise act from fundamentally different beliefs about law’s role in regulating sexuality.¹

In an important article entitled Human Dignity and the Judicial Interpretation of Human Rights,² Christopher McCrudden has offered a legal realist account of how “dignity” functions in human rights adjudication. McCrudden argues that dignity:

does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. . . . Dignity provides a convenient cover for the adoption of substantive interpretations of human rights guarantees that appear to be intentionally, not just coincidentally, highly contingent on local circumstances…..“Dignity’s” primary beneficial function in human rights adjudication lies in its importance to legal process, rather than its philosophical substance.³

McCrudden offers a court-centered institutional and professional account of dignity’s authority: dignity meets needs of judiciary negotiating tensions of globalization.

The account of dignity this essay offers differs. However dignity may function in other areas, in debates over the regulation of sexuality, claims on dignity (1) are popular, as well as professional;


² McCrudden, supra note 1.
³ Id. at 655. Cf. MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 276 (2010) (describing how key pluralist normative concepts, such as dignity, vary across borders providing thicker and deeper transnational bonds).
(2) are asserted outside as well as inside courts; and (3) are carried across borders, by transnational social movements and religious organizations that (4) deploy dignity in regular and intelligible ways. Over the decades, these transnational processes seem to have accelerated, as courts have played an increasing role in reviewing laws regulating sexuality and as advocates have become more self-conscious about the logic and stakes of the conflict.

I. Introduction: Appeals to Dignity in the Era of Abortion’s Constitutionalization

In the late 1960s and early 1970s, calls for the decriminalization of abortion from emerging feminist movements accelerated in the United States and Europe. Feminist movements were by no means the sole impetus for reform, but feminist claims dramatically altered the stakes and tenor of conversation about abortion. Amidst this growing transnational conversation, courts in the United States, France, the Federal Republic of Germany, Austria, and Italy began for the first time to review the constitutionality of abortion laws. I sample some moments in the story of abortion’s

4 See Abortion Politics, Women’s Movements, and the Democratic State: A Comparative Study of State Feminism, 1, 4 (Dorothy McBride Stetson, ed. 2003) (hereinafter Abortion Politics) (discussing feminist efforts to gender the abortion debate). For accounts of individual national movements and their impact on law reform, see id. at 19, 25 (Austria); id. at 86-88 (France); id. at 11, 117 (Germany); id. at 186-187, 189 (Italy) and id. at 242, 252, 254 (United States). For recent scholarship on feminist mobilizations of the 1970s, see Reva B. Siegel, Roe’s Roots: The Women’s Rights Claims that Engendered Roe, 90 B.U. L. REV. 1875 (2010); Dagmar Herzog Sexuality in Europe: A Twentieth-Century History (forthcoming 2011). For a general account of legislative reform in western democracies in the 1970s, see Joel E. Brooks, Abortion Policy in Western Democracies: A Cross-National Analysis, 5 Governance 342 (1992).

5 Starting in 1970, the U.S. women’s movement began litigation in a number of states in a quest to move federal courts to address the constitutionality of restrictions on abortion, ultimately prevailing in January of 1973 in the Supreme Court. See Siegel, supra note 4 at 1884-94. After Roe, courts in several other Western democracies began to address the constitutionality of abortion restrictions. See Donald P. Kommers, Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective, 3 B.Y.U. L. REV. 371, 371-72 (1985) (“In the mid-1970s, the highest courts of several Western democracies handed down constitutional decisions concerning the legal regulation of abortion. Roe v. Wade ... was the first of these decisions. The foreign cases were decided between 1974 and 1978 (four of them in 1975). These included decisions by the Supreme Court of Canada, the Constitutional Court of Austria, the Constitutional Council of France, the Constitutional Court of Italy, and the Federal Constitutional Court of West Germany; subsequently, the European Commission of Human Rights sustained the result in the West German case.”).
constitutionalization to demonstrate how citizens and judges of very different views increasingly came to make claims on dignity of a kind that had never been associated with abortion before.

In the late nineteenth century, abortion was banned throughout the United States. By the 1960s, calls grew for legislative reform that would allow abortion for public health reasons. The American Law Institute recommended legislation permitting abortion in cases where a panel of doctors determined it was appropriate to protect the life or health of the mother, in cases of rape/incest, or of fetal anomaly.\(^6\) By 1967-68, some states had begun relax criminal restrictions on this model—a trend that accelerated as public health advocates calling for the liberalization of abortion law were joined by environmentalists worried about overpopulation.\(^7\) But many states refused.

Dignity offered one ground on which to object. In 1968, a committee of the Connecticut legislature opposed a reform proposal, stating: “The Council feels that should an unborn child become a thing rather than a person in the minds of people, in any stage of its development, the dignity of human life is in jeopardy. The family, too, which is the very basis of our society, would be minimized or perhaps destroyed.”\(^8\) Similarly, Dr. Jack Willke, a Catholic obstetrician, published a 1971 *Handbook on Abortion* which translated Catholic arguments against abortion into the discourse of science and

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\(^7\) For decades, concerns about reproductive rates of the poor and populations of color shaped conversations about “overpopulation” and birth control. But by the late 1960s, the discourse of overpopulation also supplied a language in which to discuss the virtues of nonprocreative sex for the wealthy as well as the poor, and in this form provided one mainstream idiom in which to discuss abortion. *See Greenhouse & Siegel, supra note 6*, at 54-58 (discussing forms of population control talk); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 Yale L.J. 2028, 2035-2046 (2011) (surveying early justifications for abortion reform in the U.S.). For one prominent example, see Gerritt Harden, *Abortion and Human Dignity* (1964) in *The Case for Legalized Abortion Now* 69-86 (Alan F. Guttmacher, ed. 1967) (invoking dignity in calling for abortion’s decriminalization, to emancipate women and to address overpopulation).

civil rights and featured photos of human development and appeals to human dignity. The *Handbook* sold millions of copies worldwide.

In the short time between the Connecticut legislature’s refusal in 1968 to liberalize its law, and the 1971 publication of Willke’s *Handbook*, a newly mobilizing feminist movement claimed for the first time a right to abortion, which it also justified on the ground of dignity. In 1969, Betty Friedan, president of the National Organization of Women, spoke at a Chicago conference organized to seek repeal, rather than simply reform, of abortion laws. Friedan’s speech was game-changing, beginning with its title: *Abortion: A Woman’s Civil Right.* Friedan argued: “[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process . . . . The real sexual revolution is the emergence of women from passivity, from thing-ness, to full self-determination, to full dignity. . . .” Friedan was speaking as part of a national feminist movement that by 1970 had begun to speak out about abortion, breaking conventions of shame and silence by telling stories in “consciousness raising” sessions, in strike actions, and in litigation protesting the indignities and injuries inflicted by abortion laws that punished women for nonprocreative sex and pushed women into motherhood.

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9 The Catholic obstetrician became one of the most influential strategists and leaders of the transnational Right to Life movement. DR. & MRS. J. C. WILLKE, HANDBOOK ON ABORTION (1st ed., 1971), reprinted in BEFORE ROE V. WADE supra note 6, at 99, 101 (2010) (“The value, dignity, and right to life of each individual which has been a hallmark of and lies at the core of western culture is, at least in part, directly related to our Judeo-Christian heritage.”).


11 Id. at 39-40.

12 See Greenhouse & Siegel, supra note 7, at 2043 n.46 (describing feminist testimony during legislative hearings and in constitutional litigation); id at 116 (describing protest activities associated with the 1970 women’s Strike for Equality); Siegel, supra note 4, at 1880 (describing consciousness raising efforts including March 1969 speak out *Abortion: Tell It Like It Is*).
Friedan was also speaking as part of a *transnational* feminist movement. By the early 1970s, women in a number of countries were calling for an end to restrictive national abortion laws\(^{13}\) using “speak-out” strategies of dissent, including “self-incrimination”\(^{14}\) campaigns in which women “outed” themselves as having had abortions, and so exposed themselves to criminal prosecution. By telling their abortion stories, despite threat of sanction, women performatively asserted their dignity—a strategy the gay rights movement would soon employ to challenge “the closet.”

In France, 343 women drew international attention by declaring that they had had abortions in a public manifesto that appeared in the French magazine *Le Nouvel Observateur* in April 1971.\(^{15}\) The text of the manifesto, written by Simone de Beauvoir, called for an end to secrecy and silence and demanded access to free birth control and to abortion services.\(^{16}\) Two months after the release of the French manifesto, Aktion 218, a women’s organization in West Germany named for the Penal Code Section criminalizing abortion, undertook its own “self-incrimination” campaign, publishing abortion stories and the names of 374 German women in *Der Stern*.\(^{17}\) They denounced the law criminalizing

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\(^{13}\) See *supra* note 4.


\(^{15}\) La liste des 343 françaises qui ont le courage de signer le manifest « je me suis fait avorter, » [The list of 343 French women who have the courage to sign the manifesto “I have had an abortion”] *LE NOUVEL OBSERVATEUR*, Apr. 5, 1971, at 5.

\(^{16}\) The text of the manifesto reads in full (translation from French):

> One million women in France have an abortion every year.
> Condemned to secrecy, they have abortions in dangerous conditions when this procedure, performed under medical supervision, is among the simplest.
> These women are shrouded in silence.
> I declare that I am one of them. I have had an abortion.
> Just as we demand free access to birth control, we demand the freedom to have an abortion.

*Id.* For one account of feminist mobilization in France, see Jean C. Robinson, *Gendering the Abortion Debate: The French Case, in Abortion Politics, supra* note 13, at 86. *See also HERZOG, supra* note 4, at [chapter 4].

\(^{17}\) Schwarzer, *supra* note 14, at 146.
abortion because it subjected women to “degrading and life-threatening circumstances,” coerced women, and “branded them as criminals.”18 Within months, women in Italy undertook their own self-incrimination campaign, releasing on August 4, 1971 a statement that women signed, acknowledging that they had had an abortion, and calling for abolition of the crime, on the ground that abortion should be “available for each class” and that motherhood should be a “free, conscious choice.”19 Women in the United States also joined in, with a petition, on the model of the French campaign, published in the Spring 1972 edition of Ms. Magazine.20

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18 Wir haben abgetrieben! [We Aborted] STERN (Hamburg), June 6, 1971 at 16. The full text of the German manifesto reads (translated from German):

In the Federal Republic, around one million women have abortions every year. Hundreds die, tens thousands are left ill and sterile, because the surgery was performed by non-specialists. Done by medical specialists, abortion is a simple procedure.

Women with money can safely have abortions at home and abroad. Paragraph 218 forces women without money onto the kitchen tables of the quack. It brands them as criminals and threatens them with imprisonment of up to five years.

Nevertheless, millions of women have abortions—in degrading and life-threatening conditions. I am one of them. I had an abortion.

I am opposed to Paragraph 218 and for desired children. We women do not want charity from the legislature or reform in installments!

We demand the complete elimination of § 218! We demand comprehensive sexual education for all and free access to contraception! We demand the right to abortion covered by health insurance!

Id. at 17.


20 Barbaralee D. Diamonstein, We Have Had Abortions, MS. MAGAZINE, Spring 1972, at 34 (referring to the petition by “343 prominent and respected Frenchwomen” and promising to send a complete list of signatures “to the White House, to every State Legislature, and to our sisters in other countries who are signing similar petitions”); cf. Siegel, supra note 4, at 1880, 1885 (describing feminist speak-out strategies about abortion, in public fora and through the incorporation of women’s personal stories in constitutional litigation).
II. Constitutional Claims on Dignity in Early Abortion Cases

Today, appeals to dignity are common in constitutional jurisprudence concerning abortion.\textsuperscript{21} I consider how this discursive practice began in the first constitutional cases on abortion, focusing on the American and German cases because of their prominence in modeling constitutional frameworks governing the regulation of abortion.

Claims on dignity entered this new body of constitutional case law in stages. The first major constitutional cases on abortion appeared in the United States,\textsuperscript{22} initially making no express reference to dignity. In the United States, movements seeking to liberalize or decriminalize abortion on grounds of public health, environmentalist concern about overpopulation of the planet, and sexual freedom were joined by feminists seeking to give women choice in matters of sex and motherhood—and together they achieved legislative reform in many states.\textsuperscript{23} By the early 1970s, the feminist movement was not only advocating legislative reform; movement lawyers filed numerous suits challenging the constitutionality of abortion restrictions.\textsuperscript{24} In 1973, as the Catholic Church was beginning to mount significant opposition to reform,\textsuperscript{25} the United States Supreme Court held in \textit{Roe v. Wade}\textsuperscript{26} that the


\textsuperscript{22} See supra note 5.

\textsuperscript{23} Greenhouse & Siegel, \textit{supra} note 7, at 2035-46.

\textsuperscript{24} See Siegel, \textit{supra} note 4 at 1884-94.

\textsuperscript{25} See Greenhouse & Siegel, \textit{supra} note 7, at 2047-52.
constitutional right of privacy protected a woman’s decision whether to terminate a pregnancy, until the point of viability. The United States Supreme Court’s decision was plainly responsive to public health arguments, but only indirectly addressed feminist claims.\textsuperscript{27} While the appellant’s brief in \textit{Roe} argued that the Texas law banning abortion “severely impinges [a woman’s] dignity, her life plan and often her marital relationship,”\textsuperscript{28} the \textit{Roe} decision focused much more clearly on the doctor’s autonomy than on his patients.\textsuperscript{29}

In West Germany, movements seeking the decriminalization of abortion won an even more decisive victory, but the German Constitutional Court interpreted the Basic Law to prohibit the new legislation—expressly repudiating the dignity claims of the German women’s movement.

For much of the twentieth century, paragraph 218 of the German Civil Code banned abortion without exception, although in practice judges regularly read into the statute an exception to save a woman’s life/health.\textsuperscript{30} In the 1970s, organizing “hundreds of political actions—from street theatre and mass demonstrations to speak-out ‘tribunals’ and openly publicized bus trips to abortion clinics in the Netherlands,” feminists succeeded in eliciting widespread public support for reform.\textsuperscript{31} Reformers joined the cause for a variety of reasons, but feminist claims remained audible throughout. As the West German Parliament was considering liberalizing the abortion law, the \textit{New York Times} reported that

\begin{itemize}
  \item \textsuperscript{26} \textit{GREENHOUSE} & \textit{SIEGEL} \textit{supra} note 6, at 256-58.
  \item \textsuperscript{27} \textit{See} \textit{Siegel, supra} note 4, at 12 (analyzing the ways \textit{Roe} responds to, and effaces, feminist abortion rights claims of the era).
  \item \textsuperscript{28} Brief for Appellants \textit{Roe v. Wade} 410 U.S. 113 (1973), (No. 70-18) 1971 WL 128054, \textit{reprinted in BEFORE \textit{ROE V. WADE, supra} note 6, at 230, 234}.
  \item \textsuperscript{29} \textit{Siegel, supra} note 4, at 1897, 1899-1900.
  \item \textsuperscript{30} \textit{See} Donald P. Kommers, \textit{Abortion and the Constitution: The Cases of United States and West Germany, in ABORTION: NEW DIRECTIONS FOR POLICY STUDIES} 83, 88 (Edward Manier, William Lin, & David Solomon eds., 1977).
  \item \textsuperscript{31} \textit{DAGMAR HERZOG, SEX AFTER FASCISM: MEMORY AND MORALITY IN TWENTIETH CENTURY GERMANY} 225 (2005). Eighty percent of Protestant and forty percent of Catholic women supported legalized abortion in the early 1970s. \textit{Id.} (describing campaigns for legalization).
\end{itemize}
“vandals sprayed the doors and walls of the cathedral and three other Munich churches with slogans—
‘Whether to have children is for us to decide, not doctors.’”32

As in the United States, the Catholic Church mobilized in opposition to rising public support for
liberalization.33 Conservative Catholic opponents condemned abortion reform as an expression of
Nazism.34 However, despite the efforts of the Christian Democratic Union (CDU) and the Christian
Social Union (CSU) to block reform,35 the West German Parliament passed the Abortion Reform Act
of 1974 (the Reform Act).36 Enacted a year after Roe, the West German statute liberalized access to
abortion, but on more restrictive terms. The Reform Act permitted abortion up to 12 weeks of
pregnancy, provided a woman first received counseling designed to discourage abortion and to limit it
to cases of “necessity.”37

The conference of German Catholic Bishops had called for a suit challenging the abortion
reform legislation if enacted.38 Once the legislation was enacted, the Christian Democrat Union, along
with several predominantly Catholic German states, petitioned the Federal Constitutional Court for a

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32 Craig R. Whitney, Bonn Parliament Is Due To Act on Bills To Legalize Abortion, N.Y. TIMES, April 22, 1974, at 14.
33 On the role of the Catholic Church in opposing liberalization of abortion law the early 1970s, see Greenhouse & Siegel, supra note 7, at 2047-52 (United States); see LEWIS JOACHIM EDINGER, WEST GERMAN POLITICS 281 (1986) (Germany) (“The adamant opponents of any reform—spearheaded by Catholic clerical and lay leaders—were no less active.”); Regina Kopl, State Feminism and Policy Debates on Abortion in Austria, in ABORTION POLITICS, supra note 4, at 16, 25 (Austria).
34 For examples, see HERZOG, supra note 31, at 225; EDINGER, supra note 33, at 281.
36 KOMMERS (1977), supra note 30, at 89.
38 EDINGER, supra note 33, at 282.
ruling that the Reform Act violated West Germany’s Basic Law. In 1975, the Constitutional Court struck down the Reform Act as a violation of the postwar constitution, in particular the provision that: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

The German Constitutional Court ruled that the new law, which decriminalized abortion during the first 12 weeks of pregnancy for women provided abortion-dissuasive counseling, violated the dignity of human life. The court justified its decision on the grounds that life was “the living foundation of human dignity and the prerequisite for all other fundamental rights.”

The court expressly and rather brusquely dismissed the Parliament’s efforts to devise a framework that respected the dignity of women and of the unborn: “The opinion expressed in the Federal Parliament during the third deliberation on the Statute to Reform of the Penal Law, the effect of which is to propose the precedence for a particular time ‘of the right to self-determination of the woman which flows from human dignity vis-à-vis all others, including the child’s right to life’], is not reconcilable with the value ordering of the Basic Law.”

In the court’s estimation, the fetus was included in the definition of “human life,” and “[w]here human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it or know personally how to preserve it. The potential faculties present in the human being form the beginning suffice to establish


41 Abortion I at 643 (citing German Federal Parliament, Seventh Election Period, 96th Sess., Stenographic Reports, 6492).

42 Abortion I at 642. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I art. 1 para 1 (Ger.).

43 Abortion I at 643 (citing German Federal Parliament, Seventh Election Period, 96th Sess., Stenographic Reports, 6492).
human dignity.” Given the overriding importance of the dignity of human life, the Court concluded, “the legal order may not make the woman’s right to self-determination the sole guideline of its rulemaking. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term.” The state should endeavor “[t]o reawaken and, if required, to strengthen the maternal duty to protect” prenatal life, “entrusted by nature in the first place to the protection of the mother.” The Court ruled that women were subject to this duty to carry a pregnancy to term, imposed by “nature” and law, except where the burdens exceeded those “normally” associated with pregnancy. An exception was required where pregnancy posed a threat to the woman’s life, and the Court gave the legislature discretion to exempt women from the duty of pregnancy in other extraordinary circumstances, as well.

This expressly gendered justification for the first German abortion decision has drawn less attention than the collective memory justification the court offered in concluding the decision. Famously, the German court justified its interpretation of the Basic Law as requiring Parliament to re-criminalize abortion on the grounds that criminalizing abortion repudiated Germany’s Nazi past:

Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience of the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all states of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of

44 Abortion I at 641.
45 Abortion I at 644.
46 Abortion I at 644.
47 Abortion I at 647.
48 Abortion I at 624, 647-48. The Court gave the legislature discretion whether to allow abortion on eugenic, rape, and social emergency indications. Id. See Mary Anne Case, Perfectionism and Fundamentalism in the Application of the German Abortion Laws, in CONSTITUTING QUALITY: GENDER QUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93, 95 (Susan H. Williams ed., 2009).
Germany has erected an order bound together by values which places the individual being and his dignity at the focal point of all of its ordinances.49

Two justices dissented, including the only woman on the court. The dissenting justices insisted that the court had overstepped the scope of its authority in interpreting the Basic Law to require the recriminalization of abortion.50 Looking abroad, the dissenters insisted that it was reasonable to regulate abortion in terms that evolved over the course of pregnancy through a trimester framework,51 noting other European countries did not see liberalized access to abortion as incompatible with the right to life.52 The dissenters also disputed the historical justification for criminalization offered by the majority, arguing that criminalizing abortion did not repudiate, but instead preserved a mode of regulating women associated with National Socialism. The dissenters pointed out that the Nazi regime was known for its natalist policies and harsh punishment of abortion,53 including sentencing some women who procured abortions to death for “‘injur[ing] the vitality of the German people.’”54 Far from justifying continued punitive measures, they argued, the lessons of history counseled “restraint in employing criminal punishment, the improper use of which in the history of mankind has caused endless suffering.”55

The decision of the Constitutional Court drew strong public reaction. A majority of West Germans opposed the court’s ruling,56 and the feminist movement quickly moved to denounce it. A radical feminist wing of the Red Army Faction bombed the Court and the headquarters of the Federal

49 Abortion I at 662.
50 Abortion I at 677-83.
51 Abortion I at 673 (citing the U.S. Supreme Court’s decision in Roe v. Wade)
52 Abortion I at 683.
53 Abortion I at 669-70 (Rupp von Brüeneck & Simon, JJ., dissenting). See generally JILL STEPHENSON, WOMEN IN NAZI GERMANY 38-40 (2001) (describing Nazi efforts to combat abortion among the “‘valuable’”).
54 Abortion I at 670.
55 Abortion I at 670. For a rich account of the ways that “conflicts over sexual mores [in post-War Germany became] an important site for managing the memory of Nazism and Holocaust,” see HERZOG, supra note 31, at 5.
56 EDINGER, supra note 33, at 283 (“Mass opinion polls indicated that most West Germans disapproved of the Court’s decision and only about a third endorsed it.”).
Doctors’ Association, which had opposed abortion reform.\textsuperscript{57} Once again, women’s groups used the tactic of the public speak out, with six thousand women declaring in \textit{Der Stern} that they would continue to seek abortions and help other women to do so.\textsuperscript{58}

Parliament subsequently rewrote paragraph 218 to provide immunity from prosecution for abortion in the case of specific “indications” including the life and health of the mother, fetal deformity, rape and incest, or “social need/emergency.”\textsuperscript{59} Figures differ, but approximately eighty to ninety percent of abortions fell in the latter category.\textsuperscript{60}

\textbf{III. Competing Conceptions of Dignity in the Abortion Cases}

The abortion conflict involves more than a story about two rights holders with conflicting claims on dignity. As early debates over abortion illustrate, there are also competing \textit{conceptions} of dignity at play, which I have elsewhere termed: dignity as liberty, dignity as equality, dignity as life.\textsuperscript{61}

Dignity as liberty entails claims on autonomy, on privacy, and on free development of personality. By contrast, dignity as equality involves claims about status, honor, respect, and recognition. Dignity as life appeals to something prior to these forms of social relations, seeking through the regulation of birth, sex, or death to give symbolic expression to the value of human life itself.


\textsuperscript{60} Marx Ferree & Gamson, \textit{supra} note 59, at 41.

The German Court interpreted the nation’s post-war constitution to prohibit the decriminalization of abortion by reading the Basic Law’s guarantee of dignity in this symbolic register, as requiring government efforts to protect life and to affirm its value. The women of Aktion 218 advanced, in part, a dignity claim of this kind; they argued that laws criminalizing abortion threatened women’s lives, a claim to which the 1975 decision in part responded. But German women sought more: they appealed to dignity as liberty and equality, seeking freedom to decide whether to continue a pregnancy and recognition of their authority and competence to make decisions about sex, health, parenting, partners, and life plans.

In ruling that the Basic Law’s protections for dignity required the criminalization of abortion, the German Constitutional Court expressly rejected dignity claims of the kind that the women of Aktion 218 had been asserting. Instead, the Court ruled that the state must act to “[t]o reawaken and, if required, to strengthen the maternal duty to protect” prenatal life, unless continuing a pregnancy would impose extraordinary burdens on a woman. The German Court based its interpretation of dignity, not only on a contested claim about the Holocaust and abortion, but also on a contested claim about the state’s role in enforcing the duties of a pregnant woman. The German Constitutional Court refused to extend constitutional protections to pregnant women of the kind the United States Supreme Court had extended two years earlier in its 1973 decision in Roe v. Wade.

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62 Compare supra note 18, (Der Stern manifesto protesting the death and injury criminal abortion laws inflict on women) with supra text at note 48 (German decision providing exception to constitutional ban on abortion where doctors determine abortion is necessary to save a woman’s life).

63 See supra note 18 (manifesto in Der Stern demanding “comprehensive sexual education for all and free access to contraception”).

64 See supra text at notes 45-48.

65 See id.

66 See supra text at notes 50-55 (dissenting opinion).
In what follows, I consider the competing conceptions of dignity in constitutional decisions concerning abortion in United States and Germany. As we will see, courts in each nation have reasoned about dignity differently—and differently over time. As a result, two constitutional frameworks that once seemed quite fundamentally opposed have grown in important respects to resemble one another. Each now understands dignity as liberty and dignity as life to be implicated in the regulation of abortion; each now reasons about the dignity claims of pregnant women in ways unheard of before 1970.

A. Competing Conceptions of Dignity in U.S. Abortion Cases

*Roe* does not mention dignity. While the appellant’s brief in *Roe v. Wade* had argued that the Texas law banning abortion “severely impinges [a woman’s] dignity, her life plan and often her marital relationship,”67 the *Roe* decision did not adopt this language, and focused more on the doctor’s autonomy than his patients.68 Yet over years of conflict, the United States Supreme Court has come to reason about constitutional protections for women’s decisions about abortion in the language of dignity—despite the fact that dignity is not expressly mentioned in the U.S. Constitution.69

Facing opposition to its decision in *Roe*, the Court has since increasingly emphasized women’s autonomy and privacy interests in making decisions concerning abortion and has characterized the right in the language of dignity and equality, as well as privacy. In 1986, in concluding his opinion for the

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68 See Siegel, supra note 4, at 1897, 1899-1900 (considering the ways that *Roe* recognized and the ways that the decision ignored feminist claims for abortion rights).
Court in *Thornburgh v. American College of Obstetricians & Gynecologists*,\(^{70}\) Justice Blackmun wrote: “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”\(^{71}\) Blackmun’s appeal to dignity in describing women’s constitutional interests in making decisions about abortion expressly concerned, not only autonomy, but also equality: women’s equal freedom with men to be self-governing.

In the Supreme Court’s 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,\(^{72}\) the portion of the plurality opinion attributed to Justice Kennedy invoked dignity to explain why the Constitution protects decisions regarding family life: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”\(^{73}\) *Casey* also invokes dignity in sex-equalitarian registers; as it reaffirms the abortion right, the joint opinion summons the understanding that the state cannot impose “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.”\(^{74}\)

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\(^{71}\) *Thornburgh*, 476 U.S. at 772.


\(^{73}\) *Id.* at 851 (O’Connor, Kennedy, Souter, JJ., Joint Opinion).

\(^{74}\) *Id.* at 852. The opinion ties constitutional protection for women’s abortion decision to the understanding, forged in the Court’s sex discrimination cases, that government cannot use law to enforce traditional sex roles on women. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 831 (2007) (“The joint opinion expresses constitutional limitations on abortion laws in the language of its equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of the liberty cases.”).
Yet, *Casey* reflects, not only the influence of decades of feminist advocacy, but also of antiabortion advocacy. Even as *Casey* reaffirms women’s constitutionally protected right to decide whether to end a pregnancy, it also allows government more authority to regulate abortion, throughout the course of pregnancy, to protect potential life, so long as the regulation does not impose an “undue burden” on women’s right to end a pregnancy. In *Casey*, the U.S. Court upheld for the first time counseling designed to dissuade women from ending pregnancies, so long as such counseling is “truthful and not misleading.”

The United States Supreme Court’s increasing solicitude for the government’s interest in regulating abortion to protect potential life has come to shape the Court’s understanding of dignity in the abortion context. While *Thornburgh* and *Casey* invoke dignity as a reason to prevent the government from depriving women of control over the abortion decision, Justice Kennedy invokes dignity quite differently in the Court’s 2007 decision in *Gonzales v. Carhart.* In *Carhart*, Justice Kennedy authors an opinion upholding, under the *Casey* framework, the Partial Birth Abortion Ban Act, which proscribed a particular method of performing late term abortions. The Court emphasized that Congress had authority to adopt a law regulating the methods physicians use to perform late term abortions in order to “express respect for the dignity of human life.” The “dignity” to which the Court refers in *Carhart* is plainly not the “dignity” invoked in *Thornburgh* and *Casey*, which concerned women’s equal freedom to lead self-governing lives. In *Carhart*, the Court makes no mention of

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75 *Casey*, 505 U.S. at 882.


77 Id. at 157.
women’s decisional interests in dignity, and instead speaks of the government’s interest in protecting women from making mistaken decisions in choosing abortion methods that they might later regret.\footnote{78}{Id. at 159. For the social movement roots of woman-protective antiabortion arguments, see Siegel, \textit{supra} note 61. Antiabortion groups throughout the world have adopted the woman-protective argument.}

\textit{Carhart} reasons about abortion by appeal to dignity as life rather than dignity as autonomy or dignity as equality. Even so, \textit{Carhart} doesn’t interpret the United States Constitution to require the criminalization of abortion, as the German Court insisted. Rather, in \textit{Carhart}, the U.S. Court upholds a law restricting the methods doctors may use in performing late term abortions, reasoning about this legislative restriction on abortion expressively, as a vehicle for constructing social meaning. The \textit{Carhart} opinion allows Congress to restrict the methods of performing late term abortions in order to communicate ethical understandings that “express respect for the dignity of human life.”\footnote{79}{\textit{Carhart}, 550 U.S. at 157.} The Court presents this form of expressive regulation of abortion as consistent with the \textit{Casey} framework, insisting that respect for the dignity of human life can be vindicated in a framework that \textit{also} respects women’s dignity in making decisions about abortion.\footnote{80}{For closer analysis of the different roles of dignity in the United States abortion decisions, see Siegel, \textit{supra} note 61.}

\textbf{B. Competing Conceptions of Dignity in German Abortion Cases}

As in the United States, constitutional law governing abortion in Germany has evolved since the 1975 decision of the Constitutional Court, and there are now striking convergences between the two systems.\footnote{81}{Gerald L. Neuman, \textit{Casey in the Mirror: Abortion, Abuse, and the Right to Protection in the United States and Germany}, 43 \textit{Am. J. of Comp. L.} 273, 273 (1995). \textit{See also} McCrudden, \textit{supra} note 1, at 717-19.}

Reunification of West and East Germany in 1990 required reconciling two bodies of abortion law.\footnote{82}{Prior to reunification, women in East Germany had access to abortion on demand in the first}
Upon reunification, the German Federal legislature enacted the Pregnant Women’s and Family Assistance Act, which decriminalized abortion in the early weeks of pregnancy, but instituted new forms of dissuasion, including a modified counseling requirement for pregnant women as well as social supports for pregnant women and mothers of young children.

Again, the German Constitutional Court intervened. In a 1993 decision handed down a year after *Casey*, the Court reaffirmed its 1975 decision requiring the that the legislature recriminalize abortion throughout pregnancy, urging “[w]herever human life exists, it should be accorded human dignity.” Yet the Court allowed the government to offer immunity from prosecution for abortion to women who submitted to counseling designed to persuade them to continue the pregnancy. The Court’s acceptance of dissuasive counseling, rather than threat of criminal punishment, as a means of protecting life rested in part in a changed understanding of a woman’s responsibility for making decisions concerning the shape of her own life. The Court recognized that laws criminalizing abortion implicated, not only dignity as life but dignity as liberty, warning however: “reference to a woman's human dignity and her ability to make responsible decisions herself does not demand that unborn life be abandoned.” (The dissenting justices argued that decriminalization of abortion was constitutionally permissible, given “an altered understanding of the personality and dignity of the woman.”)

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84 Case, *id.* at 97.
85 *Abortion II*, at para. 146 (citations omitted).
86 *Abortion II*, at para. 224. Women who submitted to counseling were granted access to abortion with immunity from criminal prosecution, and in some cases, even given public support. See *id.* at paras 347–48.
87 *Id.* at para. 156.
88 Compare *id.* at para. 380 (Mahrenholz and Sommer, JJ., dissenting) *with Abortion I*, at 669-70, 683.
In the wake of the 1993 decision, abortion remains criminally prohibited except under restricted indications, but a woman who completes counseling can receive a certificate granting her immunity from prosecution for an abortion during the first 12 weeks of pregnancy. Counseling is designed expressly to persuade a woman to continue the pregnancy and to counter any pressure from third parties who might be pushing her to end the pregnancy. In this new compromise framework, the state pays for “the overwhelming majority of abortions,” and Catholic lay groups are involved in counseling, and where necessary, issuing abortion certificates and providing the sex education required by law, although this has been the subject of much and extended controversy.

As the contest over dignity in the American and German cases illustrates, the abortion conflict is not a “zero sum game” in which only one interest can prevail. The case law vindicates competing dignity interests. Today, German constitutional law requires government to provide dissuasive counseling as a condition for allowing women access to abortion, while U.S. constitutional law permits state governments to require dissuasive counseling as a condition for allowing women access to abortion—symbolic regimes understood to vindicate both the dignity of women and of the unborn. Despite the dramatically different foundational premises of the two constitutional systems, today the

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90 Abortion II, at para. 303. The court also required the government to keep statistics on abortion, on the theory that the regime of counseling was only constitutionally permissible if it reduced the number of abortions more effectively than criminalization had. Id.

91 Id. at paras. 103, 106. See Case, supra note 48, at 100 (noting the “paradoxical” nature of this scheme).

92 The U.S. framework gives expression to federalism, allowing states to regulate abortion within the constitutional framework Casey sets forth.
German framework, in which abortion remains criminalized, functions to provide greater access to abortion in many parts of Germany than in the United States.93

IV. Dignity, Sexuality, and Life

Why have constitutional courts allowed or imposed restrictions on women’s access to abortion, given the dignity claims about abortion that women have been asserting over the last several decades? On the familiar account, courts are responding to the belief held by many citizens that abortion involves taking at least a potential human life. On this view, objections to abortion, even if rooted in religious belief, embody concerns about the unborn that are fully consistent with liberalism’s harm principle—not illiberal views about women’s roles or the proper ends of sexual expression. On this view, constitutional law incorporating these views would grant women dignity and self-determination in matters of sex and motherhood, but for the harm done to the dignity interests of another: the fetus. Given accidents of physiology, in matters of abortion, dignity as life “trumps” dignity as autonomy.

93 Regional variations in access in the United States and Germany greatly complicate cross-country comparisons. In Germany today, access to abortion during the trimester of pregnancy is described as “relatively simple,” involving counseling and a short waiting period. MYRA MARX FERREE ET AL., SHAPING ABORTION DISCOURSE: DEMOCRACY AND THE PUBLIC SPHERE IN GERMANY AND THE UNITED STATES 3 (2002). State-funded counseling is available at family planning organizations, such as Pro Familia, and Catholic Church-affiliated centers. While counseling must be directive, favoring continuation of pregnancy, there has always been significant variance in practice. Profamilia offers counseling services intended to support free and informed decision-making consistent with science and law, emphasizing acceptance of the woman’s decision. EUROPEAN WOMEN’S HEALTH NETWORK, STATE OF AFFAIRS, CONCEPTS APPROACHES, ORGANIZATIONS IN THE HEALTH MOVEMENT. COUNTRY REPORT: GERMANY 123-124 (2000). Popular reports suggest that in cities such as Berlin, counselors tend to adopt an even more liberal interpretation of the law, while in smaller towns church-affiliated counseling tends to be more directive with open persuasion. Why are there more abortions in Berlin? Local (Jun. 8, 2008) http://www.thelocal.de/lifestyle/20080605-12291.html.

In the United States, states have incrementally restricted access to abortion in ways that test the limits of the Casey ruling, enacting more intrusive counseling requirements, waiting periods and burdensome regulations on facilities and providers. See Siegel, supra note [Dignity and the Politics of Protection], at 1707-1712. These vary by state. See Guttmacher Institute, State Policies in Brief: Mandatory Counseling and Waiting Periods for Abortion (June 2011), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf; Rachel K. Jones et al., Abortion in the United States: Incidence and Access to Services, 2005, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6 (2008).
In what follows, I demonstrate that this common account ignores claims about human dignity frequently asserted by opponents of abortion, because it misreads certain religious claims about dignity—as if they were secular claims about dignity—as if the wrong of abortion could be wholly grasped through the harm principle. For many conservatives, the wrong of abortion involves more killing; it also concerns sex. Both are implicated in conservative claims about respecting the dignity of human life.

I draw this account of dignity’s sex from the Catholic Church, which led opposition to abortion’s decriminalization in the United States and Germany, and today works actively to oppose abortion transnationally. But as I show, the view that respect for the dignity of life requires limits on sex as well as killing is held by many religious denominations.

In Catholic doctrine, respecting the dignity of human life entails restrictions on extramarital and nonprocreative sex. In the words of the Catholic catechism: “Fornication is carnal union between an unmarried man and an unmarried woman. It is gravely contrary to the dignity of persons and of human sexuality which is naturally ordered to the good of spouses and the generation and education of children.” In the 1968 encyclical Humane Vitae, the Church reasserted that both abortion and contraception violate the procreative ends of sexual expression.

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94 See infra notes and accompanying text; see also Julieta LeMaitre, By Reason Alone: Catholicism, Constitutions, and Sex in the Americas.


96 Pope Paul VI, Humanæ Vitæ, Acta Apostolicae Sedis, 60 (1968), 481-503 [HUMAN LIFE, The Pope Speaks, 13 (Fall. 1969), 329-46], para 14., available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html [hereinafter Humanæ Vitæ] In the 1968 encyclical, Pope Paul IV explained “the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children.” See id. at para 20 (observing that “this endures enhances man's dignity and confers benefits on human society”).
The Catholic Church contends that abortion and contraception violate the dignity of human life, in different but ultimately interconnected ways. A year after the International Conference on Population and Development at Cairo, where the Vatican energetically opposed efforts to promote contraception and to legalize abortion, Pope John Paul II issued the encyclical *Evangelium Vitae* (“Gospel of Life”). In the encyclical, which appeals to dignity, Pope John Paul II distinguished abortion and contraception, saying:

contraception and abortion are *specifically different* evils: the former contradicts the full truth of the sexual act as the proper expression of conjugal love, while the latter destroys the life of a human being; the former is opposed to the virtue of chastity in marriage, the latter is opposed to the virtue of justice and directly violates the divine commandment "You shall not kill".

At the same time, Pope John Paul II asserted that contraception and abortion were “fruits of the same tree” because “such practices are rooted in a hedonistic mentality unwilling to accept responsibility in matters of sexuality, and they imply a self-centered concept of freedom, which regards procreation as an obstacle to personal fulfillment [sic].” Thus, he observed, “[t]he close connection which exists, in mentality, between the practice of contraception and that of abortion is becoming increasingly obvious.” On this understanding, respecting the dignity of life entails views about sex, and not only killing: “*The port of entry for the culture of death in our society has been the abandonment of the* 

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97 See, e.g, ANDRZEJ KULCZYCKI, THE ABORTION DEBATE IN THE WORLD ARENA 55-60 (1999); Françoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN*, in Sex Politics: Reports from the Front Lines, 311, 324, 328 (Richard Parker, Rosalind Petchesky &Robert Sember, eds., 2007).


99 Evangelium Vitae appeals specifically to dignity to ground its arguments on abortion and contraception. *Id.* at para.81 ("Society as a whole must respect, defend and promote the dignity of every human person, at every moment and in every condition of that person's life.").

100 *Id.* at para.13.

101 *Id.* at para.13.

102 *Id.* at para.13.
respect for the procreative meaning of the conjugal act. It is the contraceptive way of thinking, the fear of the life-giving dimension of conjugal love, which very much sustains that culture.”

Not surprisingly, on this view of dignity as life, women have a special gender-differentiated role in the family, with implications for the Catholic understanding of dignity as autonomy and dignity as equality. Evangelium Vitae explains:

In transforming culture so that it supports life, women occupy a place, in thought and action, which is unique and decisive. It depends on them to promote a "new feminism" which rejects the temptation of imitating models of "male domination", in order to acknowledge and affirm the true genius of women in every aspect of the life of society, and overcome all discrimination, violence and exploitation.

On this view, respecting the dignity of human life is realized by imposing restrictions on sexual expression and on sex roles—restrictions on liberty that cannot be explained through secular understandings of the harm principle.

The belief that respect for dignity as life is promoted by channeling sexuality into procreation in marriage enjoys strong support from a variety of non-Catholic organizations that are part of an

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104 Evangelium Vitae, supra note 98, at para.99. See POPE JOHN PAUL II, MULIERIS DIGNITATEM, [THE DIGNITY OF WOMEN] (1988) available at http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html (describing sex role complementarity in the dignity and vocation of women). See id. at para. 10 (“In the name of liberation from male "domination", women must not appropriate to themselves male characteristics contrary to their own feminine "originality". There is a well-founded fear that if they take this path, women will not "reach fulfilment", but instead will deform and lose what constitutes their essential richness.”).

emerging global alliance “between conservative Christians, Muslims, and, to a lesser extent, Jews,” working internationally to defend and support the “natural family.”\textsuperscript{105} One of the key actors in the global “natural family” movement is the Howard Center for Family, Religion and Society, the headquarters of the World Congress of Families, which connects Christian groups around the world, and has promulgated a natural family manifesto that numerous conservative religious groups have endorsed.\textsuperscript{106} Vocal in its absolute opposition to abortion and homosexuality, the Center declares that all “Policy should respect the inherent dignity of human life.”\textsuperscript{107}

V. Dignity Claims in Cases Concerning the Rights of Gays and Lesbians

A brief consideration of claims on dignity in the gay rights context demonstrates that common concerns link the abortion and gay rights debates, despite manifest differences between them.

In the United States and Commonwealth countries there is a growing body of judicial decisions restricting government’s power to criminalize sodomy and recognizing the right of same-sex couples to marry that appeal to dignity as liberty and to dignity as equality in terms that are conceptually consistent with appeals to dignity in the abortion cases we have examined. In this emergent line of U.S. and Commonwealth cases, judges invoke dignity in support of gay and lesbian claims for sexual freedom, and to condemn laws that punish or denigrate same-sex sexual expression. Those who oppose


legal recognition of same-sex relations increasingly appeal to dignity, as well. As in the abortion context, opponents of same-sex relations reason from an understanding of dignity as life that is very much concerned with reserving sex for procreation.

Examining this emergent conflict over dignity exposes deep rivers of common concern linking debates over abortion and same-sex marriage—two issues that many believe involve fundamentally different questions. Analyzed with attention to competing claims on dignity, we can see that in the debate over same-sex marriage, as in the debate over abortion, a crucial question recurs: Do legal restrictions on nonprocreative sexuality violate or vindicate human dignity?

**A. Dignity as Liberty and Equality**

When the United States Supreme Court struck down the law criminalizing same-sex sodomy in *Lawrence v. Texas*, Justice Kennedy quoted *Casey* on the importance of according persons dignity and autonomy in the ordering of their intimate and family lives, observing “[p]ersons in homosexual relationships may seek autonomy for these purposes [loving sexual relations] just as heterosexual persons do.”¹⁰⁸ In *Lawrence*, as in *Casey*, the Court appealed to dignity to vindicate values of liberty and equality. Courts have invoked dignity in the register of equality to protect gays and lesbians against

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discrimination in Canada, South Africa, and India. The European Court of Human Rights is beginning to employ this usage as well.

More recently, dignity as equality has figured centrally in judicial decisions recognizing claims to same-sex marriage, in Ontario, Canada and in the Constitutional Court of South Africa, which declared that the failure of the common law and Marriage Act to provide for same-sex marriage violated the express constitutional guarantee of dignity. Noting the close relationship between dignity and equality, the Court held: “[R]ights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.”

The California Supreme Court similarly found, pursuant to the state’s constitution, that “reserving the historic designation of “marriage” exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect. . .” thus “perpetuating an understanding of gay individuals and same-sex couples as “second-class citizens.”

**B. The Conservative Counterclaim: Dignity as Life and the Right to Marry**

Appeals to dignity as life in the abortion cases are commonly construed as expressing concerns about killing, not sex; if this were so there would be no analogous claim on dignity in the marriage
cases, which all agree involve no killing. But there is a conservative rejoinder to marriage claims that appeals to dignity as life. Once again, I locate the genesis of the dignity as life objection to same-sex marriage in Catholic doctrine, but note that these arguments are taken up by the broader “natural family” movement.

An advisory entitled Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons, issued by Joseph Cardinal Ratzinger, now Pope Benedict XVI, when he was Prefect of the Congregation for the Doctrine of Faith, undertakes to provide arguments drawn from reason which could be used by Bishops in preparing more specific interventions, appropriate to the different situations throughout the world, aimed at protecting and promoting the dignity of marriage, the foundation of the family, and the stability of society, of which this institution is a constitutive element. The present Considerations are also intended to give direction to Catholic politicians by indicating the approaches to proposed legislation in this area which would be consistent with Christian conscience.116

Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons confirms that marriage between persons of the same sex can never fulfill the procreative, society-building ends of heterosexual marriage:

Homosexual unions are totally lacking in the biological and anthropological elements of marriage and family which would be the basis, on the level of reason, for granting them legal recognition. Such unions are not able to contribute in a proper way to the procreation and survival of the human race. The possibility of using recently discovered methods of artificial reproduction, beyond involving a grave lack of respect for human dignity, does nothing to alter this inadequacy.117

On this view, sex complementarity is required to preserve the dignity of marriage.\textsuperscript{118} Although arguing from religion, \textit{Considerations Regarding Proposals to Given Legal Recognition to Unions Between Homosexual Persons} “was not only addressed to Catholics, other Christians or even just people of faith, it was addressed to all people” as a question of “right reason, the natural law, the biological and anthropological order, the social order and the legal order.”\textsuperscript{119} Similar claims are advanced by the pan-Christian, transnational “natural family” movement whose manifesto affirms “that women and men are equal in dignity and innate human rights, but different in function,” and promises that “We will build legal and constitutional protections around marriage as the union of a man and a woman. We will end the war of the sexual hedonists on marriage.”\textsuperscript{120} A conservative pan-Christian “Manhattan Declaration,” whose drafters include prominent Catholic spokesperson Robert George and evangelical Protestant leader Chuck Colsen, condemns abortion and same-sex marriage,\textsuperscript{121} repeatedly invoking human dignity within a worldview that depicts procreation in marriage as the only sacred form of sexual expression.\textsuperscript{122} George denounced New York State’s decision to recognize same-sex marriage:

“The vote in New York to redefine marriage advances the cause of loosening norms of sexual ethics,

\textsuperscript{118} The Catechism teaches that “[e]ach of the two sexes is an image of the power and tenderness of God, with equal dignity though in a different way.” CATECHISM OF THE CATHOLIC CHURCH, supra note 95, ¶ 2335. The Catechism further instructs that “[e]veryone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life.” \textit{Id.} ¶ 2333 (emphasis added).


\textsuperscript{120} Carlson & Mero, \textit{supra} note 106, at 1, 16.


\textsuperscript{122} See Robert George, Timothy George, & Chuck Colson, \textit{Manhattan Declaration: A Call of Christian Conscience} (Nov. 20, 2009), \url{http://www.manhattandeclaration.org/the-declaration/read.aspx} (arguing that marriage is intrinsically “about procreation,” a relationship shaped by its “aptness for the generation, promotion and protection of life”). See generally Sherif Girgis, Robert P. George, & Ryan T. Anderson, \textit{What is Marriage?} 34 HARV. J. L & PUB. POL’Y 245 (2010) (arguing that that same-sex couples can be excluded from marriage because the core purpose of the institution is procreation).
and promoting as innocent — and even “liberating” — forms of sexual conduct that were traditionally regarded in the West and many other places as beneath the dignity of human beings as free and rational creatures.”123 (By contrast, members of DignityUSA, the nation’s oldest association of Catholics organized to promote the rights gays and lesbians, celebrated New York’s decision to recognize same-sex marriage, announcing “We rejoice in this tremendous victory for equality, justice, and human dignity.”124)

VI. Conclusion

The competing claims on dignity that we have been examining are part of a contest over social ordering that is of transnational dimensions.

In both the abortion and gay rights contexts, those who invoke dignity in support of claims of sexual freedom assert that (1) sexual expression can be separated from procreation and parenting and can be coordinated with parenting, according to an individual’s decision—and that (2) that these acts of self-fashioning and relationship building are worthy of social respect. The dignity-based claims for abortion rights and marriage equality seek more than tolerance, privacy, or freedom from social control; they seek social recognition of relationships that resist traditional norms and roles enforced by family and the church. In both the abortion rights and gay rights contexts, those who invoke dignity to contest traditional roles are endeavoring to democratize control over sexual norms and social structure.

Their opponents invoke dignity to defend traditional sexual roles. They understand human dignity as realized through discipline and conformity with customary sexual roles rather than through

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freedom and self-fashioning, and so interpret acts in defiance of traditional sexual roles as violating human dignity.

This conflict over dignity’s sex has run on for decades, across borders, and is now spilling from abortion rights to gay rights. It offers a fascinating window on processes through which dignity has acquired meaning and authority in human rights contests.

Claims on dignity in cases concerning the regulation of sexuality exhibit forms of conceptual consistency, not only within, but across constitutional orders. The abortion and same-sex marriage cases do not fit Christopher McCrudden’s observation that there is “little common understanding of what dignity requires substantively within or across jurisdictions.” In the cases we have examined, judges are not endeavoring to elide or mask differences in usage. Dignity is not functioning as a specialized legal discourse that conceals variance in meaning from popular audiences. Judges and the advocates interested in influencing their judgments seem acutely aware of the stakes. They disagree about dignity’s meaning and proper entailments—and seem well aware that they disagree. Both

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125 See supra text at note 1.

126 For example, in the course of embracing dignity as life, West Germany’s 1975 abortion decision was quite clear in repudiating women’s claims to dignity as liberty. See supra text at notes 41-48.

supporters and opponents greeted New York’s enactment of same-sex marriage by appeal to dignity.128 The association of Catholics who support rights for same-sex couples calls itself DignityUSA.129 The newly formed conservative “family values” organization monitoring developments in Brussels calls itself European Dignity Watch.130

In the conflict we have been examining, dignity’s authority does not arise because ambiguous language conceals disagreement. Instead, dignity’s authority seems to be produced through disagreement. Human rights organizations, on the one hand, and the Catholic Church (and the transnational family values movement), on the other, act from conflicting pictures of human flourishing—but they are agonists who share an allegiance to dignity, enough to fight for the authority to establish dignity’s meaning in debates over sexual freedom. They appeal to dignity—not because dignity’s meaning is obscure, or because dignity’s meaning is naturally or historically fixed—but instead because dignity’s meaning is unsettled in matters concerning the regulation of sexuality, and may yet be shaped through appeal to government officials and citizens.131 Today, as in the 1970s, dignity’s meaning is being forged in cross-borders conflict over dignity’s sex.

128 See supra text at notes 123-124.

129 See DignityUSA, available at http://www.dignityusa.org/.


131 As European Dignity Watch explains, “You can support our cause by spreading important information, contact[ing] decision makers, discussing current issues and thus influencing our political and cultural atmosphere in favor of the dignity of the person.” See European Dignity Watch (Network), available at http://www.europeandignitywatch.org/network/our-network.html