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# Dignity and sexuality: Claims on dignity in transnational debates over abortion and same-sex marriage

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*Dignity's meaning is famously contested. This essay explores competing claims on dignity in late twentieth-century debates over abortion and in the first decisions on the constitutionality of abortion legislation that these debates prompted. Advocates and judges appealed to dignity to vindicate autonomy, to vindicate equality, and to express respect for the value of life itself. Appeals to these distinct conceptions of dignity are now appearing in debates over the regulation of same-sex relations. Analyzed with attention to competing claims on dignity, we can see that in the debate over same-sex relations, as in the debate over abortion, a crucial question recurs: Do laws that restrict non-procreative sexuality violate or vindicate human dignity? Agonists who hold fundamentally different views about sexuality share an allegiance to dignity, enough to fight for the authority to establish dignity's meaning in debates over sexual freedom. Today, as in the 1970s, dignity's meaning is being forged in cross-borders conflict over dignity's sex.*

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.

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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 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.<sup>1</sup>

In an important article entitled *Human Dignity and the Judicial Interpretation of Human Rights*,<sup>2</sup> 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.<sup>3</sup>

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) 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.

<sup>1</sup> My aim in this brief essay is not to canvass all of dignity's meanings, nor to analyze differences in dignity's authority across legal systems, nor to survey all the arguments advanced in the abortion and same-sex marriage debates. For other accounts of dignity in domestic and transnational law, see Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417 (2009); Stéphanie Hennette-Vauchez, *A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence*, 9 INT'L J. CONST. L. (I-CON) 32 (2011); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); and Jeremy Waldron, *Dignity and Rank*, 48 ARCHIVES EUROPÉENNES DE SOCIOLOGIE 201 (2007).

<sup>2</sup> McCrudden, *supra* note 1.

<sup>3</sup> *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).

## 1. 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.<sup>4</sup> 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.<sup>5</sup> I sample some moments in the story of abortion's 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.<sup>6</sup> By 1967–8, some states had begun to 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.<sup>7</sup> But many states refused.

<sup>4</sup> 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 scholarship on feminist mobilizations of the 1970s, see THE NEW POLITICS OF ABORTION (Joni Lovenduski & Joyce Outshoorn eds., 1986); 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 (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).

<sup>5</sup> 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, *Roe's Roots*, *supra* note 4, at 1884–1894. Over two years (1974–5), four courts in Western Europe issued judgments on the constitutionality of the legal regulation of abortion. MACHTELD NIJSTEN, ABORTION AND CONSTITUTIONAL LAW: A COMPARATIVE EUROPEAN-AMERICAN STUDY (1990). See also Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 3 B.Y.U. L. REV. 371, 371–372 (1985).

<sup>6</sup> See MODEL PENAL CODE § 230.3 Abortion (1962), reprinted in BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 24, 25 (Linda Greenhouse & Reva B. Siegel eds., 2010).

<sup>7</sup> 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, BEFORE ROE V. WADE, *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 early example, see Gerritt Harden, *Abortion and Human Dignity*, 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).

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.<sup>8</sup>

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 civil rights and featured photos of human development and appeals to human dignity.<sup>9</sup> 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*.<sup>10</sup> 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. . . .<sup>11</sup>

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.<sup>12</sup>

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<sup>13</sup> using “speak-out” strategies of dissent, including

<sup>8</sup> *Abele v. Markle*, 342 F. Supp. 800, 815–816 (D. Conn. 1972) (Clarie, J., dissenting).

<sup>9</sup> 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.”).

<sup>10</sup> Betty Friedan, President, Nat'l Org. for Women, Address at the First National Conference on Abortion Laws: *Abortion: A Woman's Civil Right* (Feb. 1969), reprinted in *BEFORE ROE V. WADE*, *supra* note 6, at 38, 38–40.

<sup>11</sup> *Id.* at 39–40.

<sup>12</sup> See Greenhouse & Siegel, *Before (and After) Roe v. Wade*, *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, *Roe's Roots*, *supra* note 4, at 1880 (describing consciousness raising efforts including March 1969 speak out *Abortion: Tell It Like It Is*).

<sup>13</sup> See *supra* note 4.

“self-incrimination”<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> Two months after the release of the French manifesto, Aktion 218, a women’s organization in the Federal Republic of 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*.<sup>17</sup> They denounced the law criminalizing abortion because it subjected women to “degrading and life-threatening circumstances,” coerced women, and “branded them as criminals.”<sup>18</sup> Within months, women in Italy undertook their own self-incrimination

<sup>14</sup> Alice Schwarzer, *Nachwort [Epilogue] to FRAUEN GEGEN DEN § 218. 18 PROTOKOLLE, AUFGEZEICHNET VON ALICE SCHWARZER [WOMEN AGAINST § 218: EIGHTEEN INTERVIEWS, RECORDED BY ALICE SCHWARZER]* 133 (Alice Schwarzer ed., 1971).

<sup>15</sup> *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*, April 5, 1971, at 5.

<sup>16</sup> 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 156–159.

<sup>17</sup> Schwarzer, *supra* note 14, at 146.

<sup>18</sup> *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.

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.”<sup>19</sup> 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*.<sup>20</sup>

## 2. Constitutional claims on dignity in early abortion cases

Today, appeals to dignity are common in constitutional jurisprudence concerning abortion.<sup>21</sup> 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,<sup>22</sup> initially making no express reference to dignity. In the United States, movements seeking to liberalize 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

<sup>19</sup> “Anche in Italia ‘autodenunce’ per l’aborto,” *LIBERAZIONE NOTIZIE*, August 4, 1971, reprinted at Even in Italy “autoenunce” for abortion, available at [http://old.radicali.it/search\\_view.php?id=44852&lang=&cms=](http://old.radicali.it/search_view.php?id=44852&lang=&cms=). See HERZOG, *supra* note 4, at 159, n. 24; Marina Calloni, *Debates and Controversies on Abortion in Italy*, in *ABORTION POLITICS*, *supra* note 4, at 181, 187 (describing the Italian feminist movement’s use of the self-incrimination tactic).

<sup>20</sup> Barbaralee D. Diamondstein, *We Have Had Abortions*, Ms., 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, *Roe’s Roots*, *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).

<sup>21</sup> For abortion decisions that reason from dignity, see, for example, Tribunal Constitucional. Acórdão no 75/2010, Processos nº 733/07 e 1186/07 26 de Março de 2010, *Diário da República* vol. 60, at 15566 (Port.), available at <http://dre.pt/pdf2sdip/2010/03/060000000/1556615605.pdf>; Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/2006, *Gaceta de la Corte Constitucional* [G.C.C.] (Colom.) (partial translation is available in *WOMEN’S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT’S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (2007)*, available at [http://www.womenslinkworldwide.org/pdf\\_pubs/\\_pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/_pub_c3552006.pdf)) [hereinafter Decision No. C-355/2006]; Conseil constitutionnel [CC] [Constitutional Court] decision no. 2001-446DC, June 27, 2001, Rec. 74 (Fr.), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a2001446dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2001446dc.pdf); *Christian Lawyers Association of South Africa & others v. Minister of Health & others* 1998 (4) SA 113 (T), 1998 (11) BCLR 1434 (T); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.), available at <http://scc.lexum.org/en/1988/1988scr1-30/1988scr1-30.html>; Alkotmánybíróság (AB) [Constitutional Court], Decision 48/1998 (XI. 23.), *Official Gazette (Magyar Közlöny) MK 1998/105 (Hung.)*, available at [www.mkab.hu/admin/data/file/710\\_48\\_1998.pdf](http://www.mkab.hu/admin/data/file/710_48_1998.pdf); Corte Constitucional, STC 53/1985, 11 de Abril de 1985, 1985-49 *Boletín de Jurisprudencia Constitucional* 515 (Spain), available at [http://www.boe.es/aeboe/consultas/bases\\_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053](http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053).

<sup>22</sup> See *supra* note 5.

legislative reform in many states.<sup>23</sup> By the early 1970s, the feminist movement was not only advocating legislative reform; movement lawyers filed numerous suits challenging the constitutionality of abortion restrictions.<sup>24</sup> In 1973, as the Catholic Church mounted significant opposition to reform,<sup>25</sup> the United States Supreme Court held in *Roe v. Wade*<sup>26</sup> that the 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.<sup>27</sup> While the appellant's brief in *Roe* argued that the Texas law banning abortion "severely impinges [a woman's] dignity, her life plan and often her marital relationship,"<sup>28</sup> the *Roe* decision focused much more clearly on the *doctor's* autonomy than on his patients.<sup>29</sup>

In the Federal Republic of Germany, movements seeking the decriminalization of abortion won an even more decisive victory, securing the decriminalization of abortion through legislation; but the Federal Constitutional Court interpreted the Basic Law to prohibit the new legislation—expressly repudiating the dignity claims of the German women's movement. Through this conflict the West German court became the first to constitutionalize abortion with a focus on dignity.

For much of the twentieth century, paragraph 218 of the German Penal Code banned abortion without exception, although in practice judges regularly read into the statute an exception to save a woman's life/health.<sup>30</sup> 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.<sup>31</sup> Reformers joined the cause for a variety of reasons, but feminist claims remained audible throughout. As the Federal Parliament was considering liberalizing the abortion law, the *New York Times* reported that "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.'"<sup>32</sup>

<sup>23</sup> Greenhouse & Siegel, *Before (and After) Roe v. Wade*, *supra* note 7, at 2035–2046.

<sup>24</sup> See Siegel, *Roe's Roots*, *supra* note 4, at 1884–1894.

<sup>25</sup> See Greenhouse & Siegel, *Before (and After) Roe v. Wade*, *supra* note 7, at 2047–2052.

<sup>26</sup> GREENHOUSE & SIEGEL, *BEFORE ROE V. WADE*, *supra* note 6, at 256–258.

<sup>27</sup> See Siegel, *Roe's Roots*, *supra* note 4, at 12 (analyzing the ways *Roe* responds to, and effaces, feminist abortion rights claims of the era).

<sup>28</sup> Brief for Appellants, *Roe v. Wade* 410 U.S. 113 (1973), (No. 70-18) 1971 WL 128054, *reprinted in* *BEFORE ROE V. WADE*, *supra* note 6, at 230, 234.

<sup>29</sup> Siegel, *Roe's Roots*, *supra* note 4, at 1897, 1899–1900.

<sup>30</sup> See Donald P. Kommers, *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).

<sup>31</sup> 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. *Id.* (describing campaigns for legalization).

<sup>32</sup> Craig R. Whitney, *Bonn Parliament Is Due To Act on Bills To Legalize Abortion*, N.Y. TIMES, April 22, 1974, at 14.

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

The conference of German Catholic Bishops had called for a suit challenging the abortion reform legislation if enacted.<sup>38</sup> Once the legislation was enacted, five CDU/CSU state governments and nearly 200 hundred conservative members of the Federal Parliament petitioned the Federal Constitutional Court for a ruling that the Reform Act violated the Basic Law.<sup>39</sup> 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.”<sup>40</sup>

<sup>33</sup> On the role of the Catholic Church in opposing liberalization of abortion law in the 1970s, see Greenhouse & Siegel, *Before (and After) Roe v. Wade*, *supra* note 7, at 2047–2052 (United States); 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.”); HERMANN TALLEN, *DIE AUSEINANDERSETZUNG ÜBER § 218 StGB* (1977) (chronicling the Catholic Church’s mobilization against the liberalization of § 218 in the 1970s); SIMONE MANTEL, *NEIN UND JA ZUR ABTREIBUNG: DIE EVANGELISCHE KIRCHE IN DER REFORMDEBATTE UM § 218 StGB* (1970–6), 50–52, 135–136, 182–187, 227–234, 529–533 (2004) (same); MANFRIED SPIEKER, *KIRCHE UND ABTREIBUNG IN DEUTSCHLAND* 21–37 (2d ed. 2008) (same).

<sup>34</sup> For examples, see HERZOG, *supra* note 31, at 225; EDINGER, *supra* note 33, at 281.

<sup>35</sup> EDINGER, *supra* note 33, at 282. The Christian Democratic Union and Christian Social Union were and are identified with the Catholic Church. Jack D. Dowell, *The Politics of Accommodation: German Social Democracy and the Catholic Church*, 7 *J. OF CHURCH & STATE* 78, 79–80 (1965); Hans-Georg Betz, *The Evolution and Transformation of the German Party System*, in *TRANSFORMATION OF THE GERMAN POLITICAL PARTY SYSTEM* 30, 40–43 (Christopher S. Allen ed., 1999); Judy Dempsey, *Victory Brings Risk of Conflict with Merkel’s Allies*, *N.Y. TIMES*, Sept. 27, 2009, available at <http://www.nytimes.com/2009/09/28/world/europe/28berlin.html>.

<sup>36</sup> Kommers, *Abortion and the Constitution*, *supra* note 30, at 89.

<sup>37</sup> Michael G. Mattern, *German Abortion Law: The Unwanted Child of Reunification*, 13 *LOY. L.A. INT’L & COMP. L. REV.* 643, 658–660 (1991); Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 *J. CONTEMP. HEALTH L. & POL’Y* 1, 6 (1994).

<sup>38</sup> EDINGER, *supra* note 33, at 282.

<sup>39</sup> Kommers, *The Constitutional Law of Abortion in Germany*, *supra* note 37, at 5. Five German states challenged the law: Baden-Württemberg, Bavaria, Rhineland-Palatinate, Saarland and Schleswig-Holstein. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 1 translated in John D. Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *J. MARSHALL J. PRAC. & PROC.* 551, 608–609 (1976) [hereinafter *Abortion I*].

<sup>40</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], May 23, 1949, Bundesgesetzblatt [BGBl] 1, art. 1.



The Federal Constitutional Court ruled that the new law, which decriminalized abortion during the first twelve weeks of pregnancy for women provided abortion-dissuasive counseling, violated the dignity of human life.<sup>41</sup> 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.”<sup>42</sup>

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 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.<sup>43</sup>

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 human dignity.”<sup>44</sup> 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.”<sup>45</sup> 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.”<sup>46</sup> 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”<sup>47</sup> 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.<sup>48</sup>

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 recriminalize abortion on the grounds that criminalizing abortion repudiated Germany’s Nazi past:

<sup>41</sup> *Abortion I*, *supra* note 39, at 643 (citing German Federal Parliament, Seventh Election Period, 96th Sess., Stenographic Reports, 6492).

<sup>42</sup> *Id.* at 642.

<sup>43</sup> *Abortion I*, *supra* note 39, at 643 (citing German Federal Parliament, Seventh Election Period, 96th Sess., Stenographic Reports, 6492).

<sup>44</sup> *Id.* at 641.

<sup>45</sup> *Id.* at 644.

<sup>46</sup> *Id.* at 644.

<sup>47</sup> *Id.* at 647.

<sup>48</sup> *Id.* at 624, 647–648. The Court gave the legislature discretion whether to allow abortion on eugenic, rape, and social emergency indications. *Id.*

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 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.<sup>49</sup>

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.<sup>50</sup> 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,<sup>51</sup> noting other European countries did not see liberalized access to abortion as incompatible with the right to life.<sup>52</sup> 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,<sup>53</sup> including sentencing some women who procured abortions to death for “injur[ing] the vitality of the German people.”<sup>54</sup> 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.”<sup>55</sup>

The decision of the Constitutional Court drew strong public reaction. Polls showed widespread disagreement with the court’s ruling,<sup>56</sup> and the feminist movement quickly moved to denounce it. A radical left feminist group bombed the Court and the headquarters of the Federal Doctors’ Association, which had opposed abortion reform.<sup>57</sup> Once again, women’s groups used the tactic of the public speak out, with six

<sup>49</sup> *Abortion I*, *supra* note 39, at 662.

<sup>50</sup> *Id.* at 677–683.

<sup>51</sup> *Id.* at 673 (citing the U.S. Supreme Court’s decision in *Roe v. Wade*).

<sup>52</sup> *Id.* at 683.

<sup>53</sup> *Id.* at 669–670 (Rupp von Brüneck & Simon, JJ., dissenting). *See, generally*, JILL STEPHENSON, *WOMEN IN NAZI GERMANY* 38–40 (2001) (describing Nazi efforts to combat abortion among the “valuable”).

<sup>54</sup> *Abortion I*, *supra* note 39, at 670.

<sup>55</sup> *Id.* 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.

<sup>56</sup> 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.”); Mantei, *supra* note 33, at 448 (citing the results of two mass opinion polls, which, though divergent, both showed that substantial numbers of West Germans disagreed with the Court’s ruling).

<sup>57</sup> MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 31 (1987); J. SMITH & ANDRE MONCOURT, *THE RED ARMY FACTION: A DOCUMENTARY HISTORY, VOLUME I: PROJECTILES FOR THE PEOPLE* 438, 447 (2009); *DIE FRÜCHTE DES ZORNES: TEXTE UND MATERIALIEN ZUR GESCHICHTE DER REVOLUTIONÄREN ZELLEN UND DER ROTEN ZORA* 122–124 (Berlin, ID-Archiv 1993).

thousand women declaring in *Der Stern* that they would continue to seek abortions and help other women to do so.<sup>58</sup>

In 1976, Parliament reformed 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.”<sup>59</sup> Figures differ, but approximately eighty to ninety percent of abortions fell in the last category.<sup>60</sup>

### 3. 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 on abortion illustrate, there are also competing *conceptions* of dignity at play, which I have elsewhere termed: dignity as liberty, dignity as equality, dignity as life.<sup>61</sup>

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.

The German Court interpreted the nation’s postwar 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.<sup>62</sup> 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.<sup>63</sup>

<sup>58</sup> Hildegrad Kawan & Barbara Weber, *Reflections on a Theme: The German Women’s Movement, Then and Now*, 4 *WOMEN’S STUD. INT’L Q.* 421 (1981). Continuing resistance, women’s centers again organized “abortion trips” to Holland. *Id.* at 430.

<sup>59</sup> Myra Marx Ferree & William A. Gamson, *The Gendering of Governance and the Governing of Gender: Abortion Politics in Germany and the US*, in *RECOGNITION STRUGGLES AND SOCIAL MOVEMENTS: CONTESTED IDENTITIES, AGENCY AND POWER* 35, 41 (Barbara Hobson ed., 2003).

<sup>60</sup> *Id.* at 41.

<sup>61</sup> Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1736 (2008).

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

<sup>63</sup> See *supra* note 18 (manifesto in *Der Stern* demanding “comprehensive sexual education for all and free access to contraception”). These valences of dignity as equality and autonomy gained state recognition in the German Democratic Republic (East Germany) when that country liberalized its abortion law in 1972, some have suggested in response to the *Stern* campaign in the Federal Republic. See ENDE DER SELBSTVERSTÄNDLICHKEIT? DIE ABSCHAFFUNG DES § 218 IN DER DDR: DOKUMENTE 137–138 (Kirsten Thietz, ed. 1992). The Minister of Health introduced the legislation to the Parliament by explaining that women’s equality and their “dignity in a socialist society” required that women should have the right to decide

In ruling that the Basic Law's protections for dignity required the recriminalization of abortion, the Federal Constitutional Court expressly rejected dignity claims of the kind that the women of Aktion 218 asserted.<sup>64</sup> Instead, the Court ruled that the state must act "[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.<sup>65</sup> 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.<sup>66</sup> The Federal 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*.

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.

### 3.1. 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,"<sup>67</sup> the *Roe* decision did not adopt this language, and focused more on the doctor's autonomy than his patients'.<sup>68</sup> 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.<sup>69</sup>

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whether to terminate a pregnancy, *see id.* at 165–166 (quoting the legislative history), and the official newspaper of the ruling Socialist Unity Party announced the reform with the headline "Women's Rights and Dignity Fully Guaranteed." *See Recht und Würde der Frau vollauf garantiert*, NEUES DEUTSCHLAND (Berlin), Mar. 11, 1972, at 1. The law's preamble justified abortion liberalization on the ground that "the equality of women in education, profession, marriage and family requires that a woman be able to decide herself whether to carry a pregnancy to term." Gesetz über die Unterbrechung der Schwangerschaft [Act on the Interruption of Pregnancy], Mar. 9, 1972, GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK I at 89 (G.D.R.).

<sup>64</sup> *See supra* text accompanying notes 45–48.

<sup>65</sup> *See id.*

<sup>66</sup> *See supra* text accompanying notes 50–55 (dissenting opinion).

<sup>67</sup> Brief for Appellants *Roe v. Wade*, *supra* note 28, at 234.

<sup>68</sup> *See Siegel, Roe's Roots*, *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).

<sup>69</sup> For one history of dignity's role in the interpretation of the U.S. Constitution, see Gerald Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 249 (Dieter Simon & Manfred Weiss eds., 2000). *See also* Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221 (2005); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006).

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 Court in *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>70</sup> 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.<sup>71</sup>

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*,<sup>72</sup> 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."<sup>73</sup> *Casey* also invokes dignity in sex-egalitarian 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."<sup>74</sup>

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."<sup>75</sup>

<sup>70</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled by* *Planned Parenthood of SE. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>71</sup> *Thornburgh*, *supra* note 70.

<sup>72</sup> *Casey*, *supra* note 70.

<sup>73</sup> *Id.* at 851 (O'Connor, Kennedy, Souter, JJ., Joint Opinion).

<sup>74</sup> *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.").

<sup>75</sup> *Casey*, *supra* note 70, at 882.

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*.<sup>76</sup> 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."<sup>77</sup> 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 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.<sup>78</sup>

*Carhart* reasons about abortion by appeal to dignity as life rather than dignity as autonomy or dignity as equality. Even so, *Carhart* doesn't interpret the United States Constitution to require the criminalization of abortion, as the German Court insisted. Rather, in *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 *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."<sup>79</sup> The Court presents this form of expressive regulation of abortion as consistent with the *Casey* framework, insisting that respect for the dignity of human life can be vindicated in a framework that *also* respects women's dignity in making decisions about abortion.<sup>80</sup>

### 3.2. 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.<sup>81</sup>

<sup>76</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>77</sup> *Id.* at 157.

<sup>78</sup> *Id.* at 159. For the social movement roots of woman-protective antiabortion arguments, see Siegel, *Dignity and the Politics of Protection*, *supra* note 61. Antiabortion groups throughout the world have adopted the woman-protective argument.

<sup>79</sup> *Carhart*, *supra* note 76, at 157.

<sup>80</sup> For closer analysis of the different roles of dignity in the United States abortion decisions, see Siegel, *Dignity and the Politics of Protection*, *supra* note 61.

<sup>81</sup> Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse, and the Right to Protection in the United States and Germany*, 43 AM. J. OF COMP. L. 273, 273 (1995). See also McCrudden, *supra* note 1, at 717–719.

Reunification of Germany in 1990 required reconciling two bodies of abortion law.<sup>82</sup> Prior to reunification, women in the German Democratic Republic had access to abortion on demand in the first trimester.<sup>83</sup> 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.<sup>84</sup>

Again, the Federal Constitutional Court intervened. In a 1993 decision handed down a year after *Casey*, the Court reaffirmed its 1975 decision requiring that the legislature recriminalize abortion throughout pregnancy, urging "[w]herever human life exists, it should be accorded human dignity."<sup>85</sup> 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.<sup>86</sup> 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."<sup>87</sup> (The dissenting justices argued that decriminalization of abortion was constitutionally permissible, given "an altered understanding of the personality and dignity of the woman."<sup>88</sup>)

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 twelve weeks of pregnancy.<sup>89</sup> Counseling is designed expressly to persuade a woman to continue the pregnancy and to counter any pressure from third parties who might

<sup>82</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 2/90 available at [http://www.bverf.de/entscheidungen/fs19930528\\_2bvf000290en.html](http://www.bverf.de/entscheidungen/fs19930528_2bvf000290en.html) [hereinafter *Abortion II*].

<sup>83</sup> See Dagmar Herzog, *Post coitum triste est . . . ? Sexual politics and cultures in postunification Germany*, 28 GERMAN POL. & SOC'Y 111, 122 (2010); Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93, 96 (Susan H. Williams ed., 2009).

<sup>84</sup> Case, *supra* note 83, at 97.

<sup>85</sup> *Abortion II*, *supra* note 82, ¶ 146 (citations omitted).

<sup>86</sup> *Id.* ¶ 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.* ¶¶ 347–348.

<sup>87</sup> *Id.* ¶ 156.

<sup>88</sup> Compare *id.* ¶ 380 (Mahrenholz and Sommer, JJ., dissenting) with *Abortion I*, *supra* note 82, ¶¶ 669–670, 683.

<sup>89</sup> See Strafgesetzbuch [StGB][Penal Code] Nov. 13, 1998, BGBl. I, at 3322, ¶ 218a available at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGB\\_000P218](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGB_000P218); Case, *supra* note 83, at 98.

be pushing her to end the pregnancy.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup> Despite the dramatically different foundational premises of the two constitutional systems, today the German framework, in which abortion remains criminalized, functions to provide greater access to abortion in many parts of Germany than in the United States.<sup>93</sup>

#### 4. Dignity, sexuality, and life

Why have constitutional courts allowed or imposed restrictions on women’s access to abortion, despite the dignity claims about abortion that women have been asserting

<sup>90</sup> *Abortion II*, at ¶ 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.*

<sup>91</sup> *Id.* ¶¶ 103, 106. See Case, *supra* note 83, at 100 (noting the “paradoxical” nature of this scheme).

<sup>92</sup> The U.S. framework gives expression to federalism, allowing states to regulate abortion within the constitutional framework *Casey* sets forth.

<sup>93</sup> 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 associations, 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. Pro Familia 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), available at <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, *Dignity and the Politics of Protection*, *supra* note 61, at 1707–1712. These vary by state. See GUTTMACHER INSTITUTE, *STATE POLICIES IN BRIEF: MANDATORY COUNSELING AND WAITING PERIODS FOR ABORTION* (June 2011), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](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).



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.

In what follows, I demonstrate that this common explanation of the abortion decisions 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. Conservative claims about respecting the dignity of human life often concern constraints on killing *and* sexuality.

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.<sup>94</sup> 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 other conservative Christian denominations as well.

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."<sup>95</sup> In the 1968 encyclical *Humanae Vitae*, the Church reasserted that both abortion *and* contraception violate the procreative ends of sexual expression.<sup>96</sup>

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

<sup>94</sup> See *supra* text accompanying notes 25, 33–38 and *infra*, text accompanying notes 95–104; see also Julieta LeMaitre, *By Reason Alone: Catholicism, Constitutions, and Sex in the Americas*, 10 INT'L J. CONST. L. (I-CON) 493–511 (2012).

<sup>95</sup> THE CATECHISM OF THE CATHOLIC CHURCH ¶ 2353, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a6.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm).

<sup>96</sup> POPE PAUL VI, *HUMANAE VITAE*, Acta Apostolicae Sedis, 60, 481–503 (1968) [HUMAN LIFE, The Pope Speaks, 13 (Fall, 1969), 329–346], ¶ 14, available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html) [hereinafter *HUMANAE VITAE*]. 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.* ¶ 20 (observing that "this endurance enhances man's dignity and confers benefits on human society").

opposed efforts to promote contraception and to legalize abortion,<sup>97</sup> Pope John Paul II issued the encyclical *Evangelium Vitae* (“Gospel of Life”).<sup>98</sup> In the encyclical, which appeals to dignity,<sup>99</sup> 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.”<sup>100</sup>

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].”<sup>101</sup> Thus, he observed, “[t]he close connection which exists, in mentality, between the practice of contraception and that of abortion is becoming increasingly obvious.”<sup>102</sup> On this understanding, Catholic beliefs about respecting the dignity of life entail 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 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.*”<sup>103</sup>

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

<sup>97</sup> 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).

<sup>98</sup> POPE JOHN PAUL II, *EVANGELIUM VITAE [THE GOSPEL OF LIFE]* (1995), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html) [hereinafter *EVANGELIUM VITAE*].

<sup>99</sup> *Evangelium Vitae* appeals specifically to dignity to ground its arguments on abortion and contraception. *Id.* ¶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.”).

<sup>100</sup> *Id.* ¶13.

<sup>101</sup> *Id.* ¶13.

<sup>102</sup> *Id.* ¶13.

<sup>103</sup> Pastoral Letter from Raymond L. Burke, Bishop of La Crosse, to Catholics in La Crosse, WI, 10 (Nov. 23, 2003), available at <http://www.ewtn.com/library/BISHOPS/burkeciv.htm>. (emphasis added). Raymond Burke was once the Archbishop of St. Louis and now serves in Rome. See Biography of Raymond Leo Cardinal Burke, Archdiocese of St. Louis, available at <http://archstl.org/archstl/page/raymond-leo-cardinal-burke>.

the true genius of women in every aspect of the life of society, and overcome all discrimination, violence and exploitation.<sup>104</sup>

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 emerging global alliance “between conservative Christians, Muslims, and, to a lesser extent, Jews,” working internationally to defend and support the “natural family.”<sup>105</sup> 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.<sup>106</sup> Vocal in its absolute opposition to abortion and homosexuality, the Center declares that all “[p]olicy should respect the inherent dignity of human life.”<sup>107</sup>

<sup>104</sup> EVANGELIUM VITAE, *supra* note 98, ¶ 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](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.* ¶ 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 fulfillment,’ but instead will *deform and lose what constitutes their essential richness.*”).

A 1998 address by Pope John Paul II to “pro-life” activists reasons about abortion in this sex-role based framework. Pope John Paul II exhorted the movement to defend the family and noted as an encouraging sign that today “there are many who, *in consideration of the dignity of woman as a person, wife and mother, see permissive abortion laws as a defeat and humiliation for woman and her dignity.*” Pope John Paul II, Address to Members of the Italian Pro-Life Movement (May 22, 1998), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1998/may/documents/hf\\_jp-ii\\_spe\\_19980522\\_movimento-vida\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1998/may/documents/hf_jp-ii_spe_19980522_movimento-vida_en.html) (emphasis added). He made a similar point when attacking family planning policies and the prevalence of abortion in Cuba. Pope John Paul II, Homily at Santa Clara, (Jan. 22, 1998), available at <http://ordendemaltacuba.com/popesantaclara.aspx> (last visited 01 September 2011) (“[m]otherhood is sometimes presented as something backward or as a limitation of women’s freedom, thus distorting its true nature and dignity.”).

<sup>105</sup> DORIS BUSS & DIDI HERMAN, GLOBALIZING FAMILY VALUES: THE CHRISTIAN RIGHT IN INTERNATIONAL POLITICS xiv (2003); JENNIFER S. BUTLER, BORN AGAIN: THE CHRISTIAN RIGHT GLOBALIZED 103–104 (2006); JANE W. MUTHUMBI, PARTICIPATION, REPRESENTATION, AND GLOBAL CIVIL SOCIETY: CHRISTIAN AND ISLAMIC FUNDAMENTALIST ANTI-ABORTION NETWORKS AND UNITED NATIONS CONFERENCES (2010).

<sup>106</sup> See Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, FAM. AM. (SPECIAL ED.), March 2005, available at <http://www.heartland.org/custom/semodpolicybot/pdf/17267.pdf>. The World Congress of Families lists numerous “partner” organizations from around the world that provide financial support to the Congress organization and conferences. See WORLD CONGRESS OF FAMILIES, <http://www.worldcongress.org/wcfnl/wcfnl.cur.htm>. This pan-Christian transnational network has been described by Doris Buss and Didi Herman. BUSS & HERMAN, *supra* note 105, at x.

<sup>107</sup> *Principles & Purpose & Persuasive Insight*, THE HOWARD CENTER FOR FAMILY, RELIGION & SOCIETY (April 3, 2007), [http://www.profam.org/THC/thc\\_principles.htm](http://www.profam.org/THC/thc_principles.htm).

## 5. 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 concerns about sexuality 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 relations—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?

### 5.1. 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 that “[p]ersons in homosexual relationships may seek autonomy for these purposes [loving sexual relations] just as heterosexual persons do.”<sup>108</sup> 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 discrimination in Canada,<sup>109</sup> South Africa,<sup>110</sup> and India.<sup>111</sup> The European Court of Human Rights is beginning to employ this usage as well.

<sup>108</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

<sup>109</sup> See *Vriend v. Alberta* [1998] 1 S.C.R. 493, ¶ 102 (Can.) (“The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.”).

<sup>110</sup> See *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1998 (6) BCLR 726 (W) ¶ 28 (S. Afr.) (observing that law criminalizing sodomy “gay men degrades and devalues gay men” and so “is a palpable invasion of their dignity”).

<sup>111</sup> See *Naz Found. v. Gov't of NCT of New Delhi*, WP(C) No.7455/2001, ¶¶ 26, 131 (H.C. New Del., 2009) (India) (“Indian constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. . . . it is the recognition of equality which will foster the dignity of every individual.”).

Recently, the Mexico Supreme Court invoked dignity as liberty in recognizing the claim to same-sex marriage.<sup>112</sup> Dignity as equality has figured centrally in judicial decisions recognizing claims to same-sex marriage, in Ontario, Canada<sup>113</sup> 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 South African 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.”<sup>114</sup> 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.’”<sup>115</sup>

## 5.2. 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, as well.

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 the 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

<sup>112</sup> *Acción de inconstitucionalidad 2/2010*, Pleno de la Suprema Corte de Justicia de la Nación, Novena Época, 16 de agosto de 2010 (Mexico) (“263. [ . . . ] This Court [has affirmed] that, from human dignity, as a superior fundamental right [ . . . ], the free development of the personality is derived, that is, the right of every person to choose, in a free and autonomous manner, how to live her life, which implies, among other expressions, the freedom to contract marriage or not to; have children and how many, as well as not to have them; to choose their personal appearance; as well as their free sexual option.”).

<sup>113</sup> *Halpern v. Canada* [2003], 65 O.R. 3d 161, ¶¶ 2, 107 (Can. Ont. C.A.) (“Exclusion [from the institution of marriage] perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships, [hence] offends the dignity of persons in same-sex relationships.”).

<sup>114</sup> *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) ¶ 114 (S. Afr.) (holding that failure of the common law and Marriage Act to provide for same-sex marriage violated the express constitutional guarantee of dignity).

<sup>115</sup> *In re Marriage Cases*, 183 P.3d 384, 400, 402 (Cal. 2008).

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.<sup>116</sup>

*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.<sup>117</sup>

On this view, sex complementarity is required to preserve the dignity of marriage.<sup>118</sup> Although arguing from religion, *Considerations Regarding Proposals to Give 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.”<sup>119</sup> 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 “[w]e 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.”<sup>120</sup> A conservative pan-Christian “Manhattan Declaration,” whose drafters include prominent Catholic spokesperson Robert George and evangelical

<sup>116</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS ¶ 1 (2003), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html).

<sup>117</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS ¶¶ 3, 7 (2003), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html).

<sup>118</sup> 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.” *Id.* ¶ 2333 (emphasis added). Pope Benedict recently observed that the family is based on marriage of a man and a woman and that departure from this understanding threatens human dignity. See “Holy Father’s Annual Address to the Diplomatic Corps, Vatican Information Service,” January 9, 2012, available at <http://visnews-en.blogspot.com/2012/01/holy-fathers-annual-address-to.html> (“[P]ride of place goes to the family, based on the marriage of a man and a woman. This is not a simple social convention, but rather the fundamental cell of every society. Consequently, policies which undermine the family threaten human dignity and the future of humanity itself.”).

<sup>119</sup> Deacon Keith Fournier, *Catholics and Evangelicals: Defense of Marriage and the ‘New Ecumenism*, CATHOLIC ONLINE (Sept. 3, 2009), <http://www.catholic.org/politics/story.php?id=34358>.

<sup>120</sup> Carlson & Mero, *supra* note 106, at 1, 16.

Protestant leader Chuck Colson, condemns abortion and same-sex marriage,<sup>121</sup> repeatedly invoking human dignity within a worldview that depicts procreation in marriage as the only sacred form of sexual expression.<sup>122</sup> 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, 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.”<sup>123</sup>

(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.”<sup>124</sup>)

## 6. 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

<sup>121</sup> For background on the Manhattan Declaration, see Laurie Goodstein, *Christian Leaders Unite on Political Issues*, N.Y. TIMES, Nov. 20, 2009, available at <http://www.nytimes.com/2009/11/20/us/politics/20Alliance.html>; Matthew J. Franck, *In the Gay Marriage Debate, Stop Playing the Hate Card*, WASH. POST, Dec. 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121702528.html>.

<sup>122</sup> See ROBERT GEORGE, TIMOTHY GEORGE, & CHUCK COLSON, MANHATTAN DECLARATION: A CALL OF CHRISTIAN CONSCIENCE (November 20, 2009), available at <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, *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).

<sup>123</sup> See *Sex and the Empire State: Losing Marriage to Sexual Liberalism*, NAT'L REV. (June 28, 2011), available at <http://www.nationalreview.com/articles/270662/sex-and-empire-state-interview> (quoting Professor Robert George).

<sup>124</sup> See DignityUSA, available at <http://www.dignityusa.org/category/site-index-terms/new-york>.

roles rather than through 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."<sup>125</sup> In the cases we have examined, judges are not endeavoring to elide or mask differences in usage.<sup>126</sup> 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.<sup>127</sup> *Both* supporters and opponents greeted New York's enactment of same-sex marriage by appeal to dignity.<sup>128</sup> The association of Catholics who support rights for same-sex couples calls itself DignityUSA.<sup>129</sup> The newly formed conservative "family values" organization monitoring developments in Brussels calls itself European Dignity Watch.<sup>130</sup>

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

<sup>125</sup> See *supra* text accompanying note 1.

<sup>126</sup> For example, in the course of embracing dignity as life, the Federal Republic's 1975 abortion decision was quite clear in repudiating women's claims to dignity as liberty. See *supra* text accompanying notes 41–48.

<sup>127</sup> Leaders of the "family values" movement appeal to the religious roots of dignity in the Universal Declaration of Human Rights, and protest the secular understandings of family and sexuality that have come to shape the concept of dignity with the maturation of the human rights movement. See, e.g., Allan Carlson, The Howard Ctr. for Family, Religion & Soc'y, *Globalizing Family Values, A Talk for the Charismatic Leaders' Fellowship* (Jan. 12, 2004), available at <http://www.profam.org/docs/acc/thc.acc.globalizing.040112.htm>. For recent papal efforts to shape the meaning of dignity in human rights discourse, see, e.g., Pope Benedict XVI, *Address to the General Assembly of the United Nations Organization* (Apr. 18, 2008), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html); Pope Benedict XVI, *Address to the Members of Italy's Pro-Life Movement* (May 12, 2008), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/may/documents/hf\\_ben-xvi\\_spe\\_20080512\\_movimento-vita\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/may/documents/hf_ben-xvi_spe_20080512_movimento-vita_en.html). See also Catholic Family & Human Rights Institute, *International Call for the Rights and Dignity of the Human Person and the Family*, <http://www.c-fam.org/campaigns/lid.2/default.asp> (last visited Aug. 16, 2010) ("Defending Sovereignty and Human Dignity at International Institutions").

<sup>128</sup> See *supra* text accompanying notes 123–124.

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

<sup>130</sup> The newly founded European Dignity Watch monitors developments in Brussels of concern to conservatives. Its mission statement and website suggest an interest in religious conscience claims, abortion, and in preserving the gender-complementary family (i.e. opposing same-sex marriage). See European Dignity Watch Mission Statement, available at <http://www.europeandignitywatch.org/about-us/mission-statement.html>.



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.<sup>131</sup> Today, as in the 1970s, dignity’s meaning is being forged in cross-borders conflict over dignity’s sex.

<sup>131</sup> 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>