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## The Power of Dignity

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## THE POWER OF DIGNITY

*Elizabeth B. Cooper\**

When I was born, in 1961, the American Psychiatric Association (APA) considered homosexuality a mental disorder<sup>1</sup> and the Stonewall Rebellion was eight years away.<sup>2</sup> When I was in college, in the early 1980s, I was informed that as a gay person I might not satisfy the “character and fitness” requirement for admission to the bar.<sup>3</sup> And when I attended my first gay pride march in June 1985, I stood on the sidelines, too fearful to participate.

The Supreme Court only heightened my sense of “otherness” when, at the end of my first year of law school, it handed down *Bowers v. Hardwick*,<sup>4</sup> upholding the constitutionality of sodomy laws, using heinous characterizations of gay people to do so.<sup>5</sup> That year, although I opted to march in the gay pride parade, I was petrified.

My own experience was not that different from my peers. Most gay people I knew at the time were closeted in at least one part of their lives, most often in the workplace or with their families of origin.<sup>6</sup> There were

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\* Associate Professor, Fordham University School of Law. I am indebted to Maurice Aaron Neishlos for his wonderful research assistance and critique. I am very grateful to Clare Huntington and Robin Lenhardt for their thoughtful guidance and to Fordham University School of Law for its scholarship support. Many thanks to Professor Scott Cummings for providing me with a home at UCLA School of Law when life required that I be in Los Angeles, CA.

1. Brief for the Am. Psychiatric Ass’n as Amicus Curiae at 8, 9, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (stating that homosexuality was included in the APA-published Diagnostic and Statistical Manual of Mental Disorders from 1952 until 1973).

2. The Stonewall Rebellion began when transwomen and gay men fought back against a police raid of the Stonewall Inn, a gay bar. Such raids were regular occurrences that threatened arrests that could make patrons’ homosexuality public, place their names on sex offender registers, cause them to be fired from their jobs, and lose their homes. See *Stonewall Riots: The Beginning of the LGBT Movement*, THE LEADERSHIP CONFERENCE (June 22, 2009), <http://www.civilrights.org/archives/2009/06/449-stonewall.html> [http://perma.cc/2F5Y-GXUW].

3. See also Joel Jay Finer, *Gay and Lesbian Applicants to the Bar: Even Lord Devlin Could Not Defend Exclusion, Circa 2000*, 10 COLUM. J. GENDER & L. 231 (2001) (noting that gay and lesbian applicants to the bar may have difficulties satisfying the “good moral character” standard).

4. 478 U.S. 186 (1986).

5. See *infra* notes 28–37 and accompanying text (discussing *Bowers*).

6. The impetus to stay in the closet was no doubt reinforced by the fact that during the 1970s and 1980s, the American disapproval rate of “homosexual behavior” remained steadily high, “peaking at 75% in the 1980’s.” ALAN YANG, POLICY INST. OF THE NAT’L GAY AND LESBIAN TASK FORCE, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 1973–1999 2 (1999), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/1999FromWrongsToRig](http://www.thetaskforce.org/static_html/downloads/reports/reports/1999FromWrongsToRig)

few legal protections,<sup>7</sup> and no laws could shield gay offspring from the wrath of or disownment by their parents, or the shunning by those they thought were their friends. Living in a closet—in even just one part of one’s life—was suffocating. Still, the pressure to stay closeted, for most of us, outweighed the need to break through the closet door.

I have reflected on my own choices to remain partially behind that door. My family, some of whom had struggled with my being gay, all remained loving. I knew my career prospects, as an Ivy League college graduate on my way to getting a law degree from a top law school, were good. I had doubts, though, about whether I could thrive in a work environment where I would have to be closeted; yet, I could not envision coming out.<sup>8</sup> Only years later did I begin to connect scholarly theories about “stigma,” and “spoiled identities,”<sup>9</sup> which I explore in greater detail in Part I, with my own experiences.

Many positive social and political changes occurred over the subsequent decades,<sup>10</sup> reflecting and being led by more LGB individuals coming out,<sup>11</sup> myself included. This growing acceptance of and respect for LGB individuals both contributed to and are reflected in the four Supreme Court

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hts.pdf [http://perma.cc/UJC3-N632]. By the 1990s, however, public opinion fairly consistently opposed discrimination in employment and housing. *See generally id.* at 6–11.

7. In 1982, Wisconsin was the only state that provided protections from discrimination on the basis of sexual orientation. *See Timeline of LGBT Rights: 1980s in LGBT Rights*, EQUALDEX, <http://equaldex.com/timeline/1980s> (last visited Sept. 27, 2015) [http://perma.cc/8YWC-7XRK]. No other state enacted a statute protecting against discrimination until Minnesota in 1993. *See Timeline of LGBT Rights: 1990s in LGBT Rights*, EQUALDEX, <http://equaldex.com/timeline/1990s> (last visited Sept. 27, 2015) [http://perma.cc/HT66-ZWJC].

8. At the time, I knew of few, if any, gay law firm partners, public interest lawyers, or elected officials, all career tracks I had considered pursuing.

9. *See infra* Part I (discussing stigma).

10. Progress, however, was not uniform. President Bill Clinton, who had created deeper alliances with the LGB communities than any other president, Aliyah Frumin, *Timeline: Bill Clinton’s Evolution on Gay Rights*, MSNBC (Sept. 12, 2013, 9:02 AM), <http://www.msnbc.com/hardball/timeline-bill-clintons-evolution-gay-rig> [http://perma.cc/Q9JW-S3DL], also advanced two devastating policies. The first was Don’t Ask, Don’t Tell in 1993, prohibiting gay men and lesbians from serving openly in the military. Dep’t of Defense Directive No. 1304.26, encl. 1, § B(8)(a) (Dec. 21, 1993). The second was the Defense of Marriage Act (DOMA), permitting states to refuse to recognize the otherwise valid marriages of same-sex couples and prohibiting the federal government from legally recognizing such marriages. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

11. The devastating HIV/AIDS epidemic, first reported by the Centers for Disease Control in 1981, also had the inadvertent impact of making gay men more visible and discussions about safe sex and human sexuality a more necessary, and acceptable, part of a national conversation. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, TWENTY-FIVE YEARS OF HIV/AIDS—UNITED STATES, 1981–2006 585 (2006), <http://www.cdc.gov/mmwr/pdf/wk/mm5521.pdf> [http://perma.cc/2U92-Q8S3].

cases<sup>12</sup> that have profoundly altered the trajectory of lesbian and gay rights<sup>13</sup> in this country.

This Essay juxtaposes the historical and judicial equating of homosexuality and stigma with the Court's development of a jurisprudence of dignity for gay men and lesbians, culminating in its decision in *Obergefell v. Hodges*.<sup>14</sup> The language of *Obergefell* reflects an acceptance of and respect for gay men and lesbians that—regardless of one's actual desire to marry or attitudes toward the institution of marriage—will profoundly change not only how the law treats LGB individuals, but also how we are treated by others, as well as how we perceive ourselves. I do not mean to assert that *Obergefell* is without its flaws,<sup>15</sup> or that LGB people are without dignity and self-respect absent *Obergefell*; fundamentally, however, the symbolic and genuine power of the Court's dignity-based reasoning is extraordinary.

Part I of this Essay explores the definition of the term “stigma” and examines its role, particularly with regard to the lives of LGB individuals. It continues by examining how the Court's decision in *Bowers v. Hardwick* served to reify that stigma in law. Part II looks at the concept of “dignity.” It begins with a summary of the Court's expanding recognition of the dignity with which gay men and lesbians do, and ought to, live, as reflected in *Romer v. Evans*,<sup>16</sup> *Lawrence v. Texas*,<sup>17</sup> *United States v. Windsor*,<sup>18</sup> and

12. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). I refer to these cases, all authored by Justice Kennedy, collectively as the “LGB cases.”

13. I use “gay men and lesbians” and “LGB” (lesbians, gay men, and bisexuals) interchangeably. Although all of the Supreme Court's LGB jurisprudence appropriately will be mined for ways in which it might further the legal rights and dignity of trans individuals, I omit “transgender” (or, the “T” in LGBT) as being beyond the scope of both the Court's current jurisprudence and this Essay.

14. 135 S. Ct. 2584 (2015).

15. Many have critiqued the Supreme Court's decision in *Obergefell* for its lofty language concerning dignity and marriage and its lack of legal specificity. See, e.g., Bradley C.S. Watson, *We Need Not, and Must Not, Give in to Obergefell*, NAT'L REV. (July 9, 2015, 4:00 AM), <http://www.nationalreview.com/article/420934/reclaiming-rule-law-after-obergefell-bradley-c-s-watson> (“[T]he Court—asserting no limiting principle to its jurisprudence of dignity—has made further bitter conflict inevitable.”) [<http://perma.cc/2CAK-HLJP>]. Others have criticized it for focusing on substantive due process rather than on equal protection. See Eric Schnurer, *Equality for All*, U.S. NEWS (June 29, 2015, 2:30 PM), <http://www.usnews.com/opinion/blogs/eric-schnurer/2015/06/29/gay-marriage-decision-should-have-been-all-about-constitutional-equality> (“The problem . . . with Kennedy's *Obergefell* opinion is its focus on marriage as a fundamental right rather than on equality.”) [<http://perma.cc/5X2V-DVYX>]. Many commentators also expressed significant frustration that the Court did not use *Obergefell* to clarify the Court's equal protection jurisprudence, particularly regarding tiers of scrutiny. See Richard Epstein, *Hard Questions on Same-Sex Marriage*, HOOVER INSTITUTION (June 19, 2012), <http://www.hoover.org/research/hard-questions-same-sex-marriage> (“[Justice] Kennedy did not bother to articulate what standard of scrutiny, high or low, controls the case.”) [<http://perma.cc/C5MN-BM3P>]. See *infra* note 59 for a critique of Justice Kennedy's enthusiastic embrace of marriage.

16. 517 U.S. 620 (1996).

17. 539 U.S. 558 (2003).

18. 133 S. Ct. 2675 (2013).

*Obergefell v. Hodges*. It then explores how dignity has been used by the Court in earlier eras to expand civil rights and more generally. Finally, Part III considers the potential impact in future litigation of the Court's basing so much of its LGB jurisprudence in the due process (liberty) interest in dignity, rather than in equal protection. This Essay concludes with the observation that, although the future cannot be predicted, the Court's use of "dignity" in the LGB cases carries significant symbolic, if not also practical, weight.

### I. STIGMA

More than any other scholar, Erving Goffman has explained what stigma is and how it operates.<sup>19</sup> He defines the term as "the situation of the individual who is disqualified from full social acceptance,"<sup>20</sup> due to "blemishes of individual character."<sup>21</sup> Perhaps not surprisingly for having been written in 1963, Goffman includes homosexuality as a "correctible failing" in his category of stigmatizing conditions.<sup>22</sup>

Stigma both reflects and reinforces stereotypes. For example, when first meeting a person, even without realizing it, we anticipate what Goffman describes as that person's "virtual social identity,"<sup>23</sup> which typically is how one is perceived. One's "actual social identity" corresponds to an individual's self-perception.<sup>24</sup> Stigma can be reinforced externally, when negatively assessed by others, as well as by oneself, when internalizing a "spoiled" identity.<sup>25</sup>

Evidence of the historical stigma associated with being gay is found in numerous places. The narrative opening of this Essay is one of countless personal histories to relate this experience.<sup>26</sup> Stigma also, however, has been structurally reinforced by the law,<sup>27</sup> perhaps nowhere more so than in

19. See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

20. *Id.* at PREFACE. The term also is "used to refer to an attribute that is deeply discrediting." *Id.* at 3.

21. *Id.* at 4. Goffman identifies two other types of stigma: "physical deformities" and "tribal stigma," which "equally contaminate all members of a family." *Id.* Goffman uses the unfortunate term "the normals" to identify those who do not possess stigma. *Id.* at 5.

22. *Id.* at 4, 9. Goffman also includes "mental disorder, imprisonment, addiction, alcoholism, . . . unemployment, suicidal attempts, and radical political behavior" in the category of "blemishes." *Id.* at 9. It is fair to reason, given the forward nature of Goffman's thinking in general, that he would alter this list were he living today. See generally William Dicke, *Erving Goffman, Sociologist Who Studied Every Day Life*, N.Y. TIMES (Nov. 22, 1982), <http://www.nytimes.com/1982/11/22/obituaries/erving-goffman-sociologist-who-studied-every-day-life.html> (noting that Goffman passed away in 1982) [<http://perma.cc/SMK3-BK92>].

23. GOFFMAN, *supra* note 19, at 2.

24. *Id.* at 3.

25. *Id.* at 19.

26. See, e.g., Conor Friedersdorf, *28 Distinct Takes on Gay Marriage and Stigma*, THE ATLANTIC (Apr. 15, 2014), <http://www.theatlantic.com/politics/archive/2014/04/28-distinct-takes-on-gay-marriage-and-stigma/360654/> (collecting letters from individuals on their experiences with LGB identity and stigma) [<http://perma.cc/73A8-9SKY>].

27. The legal enforcement of stigma against gay people also can be found in the historical power to bring a defamation suit for being falsely "accused" of being gay. See

the Court's 1986 decision in *Bowers v. Hardwick*, which (temporarily) canonized the stigma of being gay.<sup>28</sup> There, the Court held not only that "a practicing homosexual"<sup>29</sup> did not have a right to privacy in his own bedroom, but also that it was, "at best, facetious"<sup>30</sup> for him to ask that such a right be found "implicit in the concept of ordered liberty."<sup>31</sup> In his now infamous concurrence, Chief Justice Burger went on to describe the "ancient roots" of the prohibitions against sodomy, citing "Judaean-Christian moral and ethical standards," Roman law, the English Reformation, and

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Haven Ward, "I'm Not Gay, M'Kay?": *Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 GA. L. REV. 739, 753 (2010) (noting that some courts hold that falsely identifying someone as gay is "slander per se"). The Southern District of New York has held that because of the evolution in social attitudes, it is no longer defamation per se to call someone a homosexual. *Stern v. Cosby*, 645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009).

28. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Bowers* was not the first time the Supreme Court assumed the spoiled identity of gay people. See, e.g., *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (summarily denying an appeal from the Minnesota Supreme Court, which rejected a gay couple's argument that the Constitution required states to allow marriage between two people of the same sex as it did for two people of different races). The Supreme Court, of course, is not the only judicial body that has viewed gay men and lesbians as stigmatized and perpetuated that stigma. See, e.g., *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (holding that a Florida statute prohibiting homosexuals from adopting children is constitutional); *Moricoli v. Schwartz*, 361 N.E.2d 74, 76 (Ill. App. 1977) (discussing the word "fag" in connection with "an adult human being . . . with reference to a homosexual" and holding that describing an individual as such is merely objectionable and does not give rise to a cause of action for defamation); see also *Dean v. District of Columbia*, 653 A.2d 307, 344 (D.C. 1995) *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (listing "denials of occupational licenses, . . . custody of children and visitation rights, . . . national security clearances and . . . the right to enter the country" as limitations associated with discrimination on the basis of an individual's homosexuality).

29. *Bowers*, 478 U.S. at 188. In *Bowers*, the Court referred to lesbian and gay people as "homosexuals"; over time, it has become more appropriate to describe people who are attracted to members of the same sex as gay, lesbian, or bisexual. Because of the clinical history of the word "homosexual," anti-gay critics have used the term to suggest that gays and lesbians are diseased or disordered. See *GLAAD Media Reference Guide—Terms to Avoid*, GLAAD, <http://www.glaad.org/reference/offensive> (last visited Sept. 27, 2015) [<http://perma.cc/ULA4-AQ5X>]; see also Jeremy W. Peters, *The Decline and Fall of the 'H' Word: For Many Gays and Lesbians, the Term 'Homosexual' is Flinch-Worthy*, N.Y. TIMES (Mar. 21, 2014), <http://www.nytimes.com/2014/03/23/fashion/gays-lesbians-the-term-homosexual.html> (noting that it was not until 1987 that the *New York Times* officially permitted use of the terms "gay" or "lesbian," no longer requiring use of the term "homosexual") [<http://perma.cc/LPH7-9Q75>].

30. *Bowers*, 478 U.S. at 194.

31. *Id.* at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court chose to cast the question as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," *id.* at 190, rather than the more appropriate question of whether "petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment," as the Court did in *Lawrence*. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); see also *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (observing that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone'" (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

Blackstone, as well as the law of the colony, and, later, the state of Georgia.<sup>32</sup>

As offensive as the language of the *Bowers* Court was,<sup>33</sup> its greatest harms stemmed from: the ongoing criminalization of gay sex in twenty-four states and the District of Columbia;<sup>34</sup> the harm to “the dignity of the persons charged” with violating such laws;<sup>35</sup> the threat of collateral consequences attendant to conviction under these laws;<sup>36</sup> and the stigma that inherently followed from the existence of such laws, even when they were unenforced.<sup>37</sup>

Beginning with its 1996 decision in *Romer v. Evans*, however, the Court began a different path, one that saw and rejected the legal stigmatization of LGB people, and one that recognized and enhanced our dignity.<sup>38</sup> Part II of this Essay explores this trajectory.

## II. THE ROAD TO DIGNITY

The Court reached a turning point in *Romer*—striking down an amendment to the Colorado constitution that would prohibit “all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians.”<sup>39</sup> Stating that it was applying rational basis review, but in fact applying a form of heightened scrutiny, the Court struck down this popularly approved

32. *Bowers*, 478 U.S. at 196–97 (Burger, J., concurring) (further observing that “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching”). It is worth noting that the *Bowers* Court had been asked to rule on the constitutionality of Georgia’s sodomy law, which banned certain sexual acts in the privacy of one’s home, regardless of the sex of the actors. The Court simply ignored the law as it would apply to heterosexual couples and did not address the attendant equal protection claims. *See id.* at 196 n.8.

33. The harsh tone of *Bowers* helped to propel LGB advocacy: by the time *Lawrence* was decided seventeen years later, twelve of the states that had sodomy laws in existence in 1986 had abolished them. *See Lawrence*, 539 U.S. at 573.

34. *Bowers*, 478 U.S. at 193–94.

35. *Lawrence*, 539 U.S. at 575; *see also id.* (noting that *Bowers*’s “continuance as precedent demeans the lives of homosexual persons”).

36. As noted by Justice Kennedy in *Lawrence*, consequences of a conviction can include having a criminal record, being mandated to register as a sex offender, and being required to disclose the conviction on job applications. *Id.* at 575–76.

37. *See id.* (noting that the non-enforcement of sodomy laws that remain on the books might do little to reduce the stigma created by such laws). Notwithstanding *Bowers*’s relatively short life, it wreaked havoc in the lives of gay men and lesbians for the almost two decades it was in effect. *See* Emily Bazelon, *Why Advancing Gay Rights Is All About Good Timing*, SLATE (Oct. 19, 2012, 5:56 PM) (quoting Elizabeth Sheyn, *The Shot Heard Around the LGBT World: Bowers v. Hardwick As a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE, GENDER & ETHNICITY 2 (2009)), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2012/10/the\\_supreme\\_court\\_s\\_terrible\\_decision\\_in\\_bowers\\_v\\_hardwick\\_was\\_a\\_product.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html) (“*Bowers* was a major blow to the gay rights movement—a sign that the Court, and, by extension, society, did not accept homosexuals.”) [<http://perma.cc/K3VN-TWDH>].

38. *Romer v. Evans*, 517 U.S. 620 (1996).

39. *Id.* at 624 (describing Amendment 2 to the Colorado Constitution).

amendment,<sup>40</sup> expressing disdain for the state’s “imposi[tion of] a broad and undifferentiated disability on a single named group,”<sup>41</sup> as well as for the “animus” reflected in the law.<sup>42</sup>

Although the Court did not use the term “stigma,” it strongly echoed Goffman’s observations about spoiled identity,<sup>43</sup> rejecting the “bare . . . desire to harm a politically unpopular group” (e.g., the stigmatized) as a legitimate governmental interest.<sup>44</sup> For the first time in the Court’s history, it rejected the reification of stigma against gay men and lesbians.

In *Lawrence v. Texas*, four years later, the Court continued on this trajectory, overturning *Bowers* and rejecting the constitutionality of sodomy laws.<sup>45</sup> In this context, for the first time, the Court explicitly recognized the harm created by stigma against LGB people<sup>46</sup> and unambiguously stated that they are entitled to be treated with dignity under the law.<sup>47</sup>

In this due process case,<sup>48</sup> involving both “spatial liberty”<sup>49</sup> and the “liberty of the person,” the Court recognized that gay men and lesbians

40. *Id.* at 632–36. The decision was critiqued less for its outcome, which hardly had been predetermined (as noted by Justice Scalia in his dissent, *Bowers* was still good law at the time, having been decided only ten years earlier, *id.* at 636), but more for the Court’s sleight of hand in stating it was using a rational basis analysis but very clearly employing a more demanding “rational basis with bite” review. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 777–778 (2011) (discussing the impact of *Romer* and how the Court has viewed *Romer* over time); see also Tobias Barrington Wolff, Case Note, *Principled Silence*, 106 YALE L.J. 247, 252 (1996) (criticizing *Romer* for its confusing and contradictory standard of review and stating that the Court employed “rational basis review that would be entirely consistent with a future determination that gay people require heightened judicial protection”).

41. *Romer*, 517 U.S. at 632.

42. *Id.* The Court further stated that it could not permit “classifications [to be] drawn for the purpose of disadvantaging the group burdened by the law.” *Id.* at 633.

43. See *supra* note 25 and accompanying text.

44. *Romer*, 517 U.S. at 634–35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

45. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. [It] should be and now is overruled.”).

46. See *id.* at 575 (explaining that the stigma of the Texas law would remain if the Court were to assess it as a matter of equal protection); see also *id.* at 584 (O’Connor, J., concurring) (describing the Texas sodomy law as “subject[ing] homosexuals to ‘a lifelong penalty and stigma’” and “[a] legislative classification that threatens the creation of an underclass” (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring))).

47. *Id.* at 558 (stating that adults may “choose to enter upon [a private, sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons”).

48. Justice Kennedy’s opinion drew directly from the Court’s due process precedent. *Id.* at 564–66 (citing *Carey v. Population Servs.*, 431 U.S. 678 (1977) (permitting minors to obtain access to contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman’s right, with certain limitations, to obtain an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (nonmarried people have a constitutional right to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (acknowledging the right to privacy in the marital bedroom concerning use of contraceptives); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (affirming a parent’s right to direct the education of their child); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (permitting the teaching of modern foreign languages to children during times of peace)). The Court also relied significantly on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). *Lawrence*, 539 U.S. at 574 (quoting



were entitled to the same “freedom of thought, belief, expression, and certain intimate conduct”<sup>50</sup> in the home that heterosexuals long had expected. The Court’s language and its holding reflected an understanding of and respect for gay men and lesbians never before articulated by the Court.<sup>51</sup>

Ten years later, in *United States v. Windsor*,<sup>52</sup> the Court identified the role of stigma in Congress’s enactment of section 3 of the Defense of Marriage Act<sup>53</sup> (DOMA) and in the enforcement of the law.<sup>54</sup> The Court spoke not only of the dignity to which gay men and lesbians are entitled,<sup>55</sup> but also of the dignity that is found in and should inure to their relationships.<sup>56</sup> Nominally applying rational basis review, the Court found “no legitimate purpose” for DOMA’s “purpose and effect to disparage and to injure”<sup>57</sup> gay and lesbian married couples and, as such, found that the statute constituted a deprivation of liberty grounded in the Due Process Clause of the Fifth Amendment to the Constitution.<sup>58</sup>

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*Casey*’s statement that a person’s “intimate and personal choices” are “central to personal dignity and autonomy” under the Fourteenth Amendment).

49. *Lawrence*, 539 U.S. at 562 (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”).

50. *Id.*

51. *Lawrence* was, however, criticized by some for its limited scope and application. See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004) (criticizing *Lawrence* for its “domesticated” conception of liberty that failed to present “a robust conception of sexual freedom”).

52. Following the death of her same-sex spouse, Thea Spyer, Edith Windsor challenged the IRS’s denial, based on DOMA, of a marital exemption from paying federal estate tax (\$363,053). *United States v. Windsor*, 133 S. Ct. 2675, 2682–84 (2013).

53. See generally *id.*

54. *Id.* at 2693 (observing that DOMA’s “avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States”). Although the Court used the specific term only once, it repeatedly used analogous language to criticize DOMA as creating “second-class marriages,” *id.* at 2693; deliberately making “a subset of state-sanctioned marriages . . . unequal,” *id.* at 2694; ensuring that “otherwise valid marriages are unworthy of federal recognition,” *id.*; establishing a “second-tier marriage” that “demeans the couple,” *id.*; burdening lives “by reason of government decree, in visible and public ways,” *id.*; and “demean[ing] those persons who are in a lawful same-sex marriage,” *id.* at 2695.

55. *Id.* at 2694 (in relation to marriage, “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person”); see also *id.* at 2696 (concluding that a state that has extended its marriage laws to same-sex couples has acted “to protect [their] personhood and dignity”).

56. *Id.* at 2692 (observing that “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import”); see also *id.* (describing New York State’s recognition of marriages entered into by same-sex couples in other jurisdictions, and the state’s ultimate granting of marriage rights, as acts of dignity); *id.* at 2693 (DOMA constitutes an “interference with the equal dignity of same-sex marriages”); cf. *id.* at 2705 (Scalia, J., dissenting) (acknowledging that marriage carries with it a “concomitant conferral of dignity and status”).

57. See *id.* at 2696.

58. *Id.* at 2695.

Most recently, in *Obergefell v. Hodges*, the Court reiterated its trope on dignity, focusing particularly on the dignity of the institution of marriage.<sup>59</sup> The historical exclusion of same-sex couples from marriage, noted the Court, is insufficient to justify their continued exclusion,<sup>60</sup> observing that such laws “impose stigma and injury of the kind prohibited by our basic charter.”<sup>61</sup>

The Court could not reach this conclusion absent its cogent understanding of the capacity of gay men and lesbians to enter into loving, devoted relationships.<sup>62</sup> Finding that marriage itself is a fundamental right

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59. The Court described the place of marriage in American law, society and culture as one of “transcendent importance,” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015), one providing both “material benefits” and “symbolic recognition.” *Id.* at 2601; *see also id.* at 2590 (stating that, absent the support of marriage, “[s]ame-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives”). The Court reinforces the primacy of marriage throughout the opinion, *see id.* at 2602 (referring to “the transcendent purposes of marriage”); *id.* at 2600 (“The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other.’” (quoting *Windsor*, 133 S. Ct. at 2689)), but perhaps no less so than in its final paragraph:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. [Petitioners’] hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions.

*Id.* at 2608. I join those who have expressed frustration at the Court’s excessive focus on the dignity of marriage, failing to acknowledge that some individuals choose to not, or otherwise do not, couple and that some couples prefer not to marry. *See also* Jeffrey Rosen, *The Dangers of a Constitutional ‘Right to Dignity’*, THE ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/> (criticizing Kennedy’s consistent focus on dignity as potentially inconsistent with the roots of dignity in the Constitution) [<http://perma.cc/J9N8-HMBM>]; NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (reframing the family rights discussion by arguing that people live in a variety of familial configurations (including marriage), all of which deserve merit, dignity, and legal recognition).

60. *See Obergefell*, 135 S. Ct. at 2598 (observing that, although history can guide the Court, it does “not set its outer boundaries”); *id.* at 2602 (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”). The Court noted many aspects of marriage that have “evolved over time.” *Id.* at 2595. For example, although marriage once was “based on political, religious, and financial concerns,” one now chooses one’s own partner. *Id.* at 2595; *see also id.* at 2599 (noting that “decisions concerning marriage are among the most intimate that an individual can make”). Coverture, once a part of marriage, has been abolished. *Id.* at 2595. Further, the Court itself has invalidated bans on interracial marriages, *Loving v. Virginia*, 388 U.S. 1 (1967), determined that owed child support cannot serve as a barrier to marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and ruled that inmates do not lose the right to marry simply due to incarceration, *Turner v. Safley*, 482 U.S. 78 (1987). As noted by the *Obergefell* Court, “[T]he institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential.” *Obergefell*, 135 S. Ct. at 2601. Notably, the Court did not mention the historic exclusion of slaves from the right to marry. For a more thorough exploration of the Court’s handling of issues concerning race, sex and law, see R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53 (2015).

61. *Obergefell*, 135 S. Ct. at 2602.

62. *See id.* (“[E]xclusion [of gays and lesbians] from [marriage] has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society. Same-

found in the liberty guarantees of the Due Process Clause of the Fourteenth Amendment,<sup>63</sup> the Court held that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>64</sup>

The Court’s progression from reinforcing gay-related stigma (*Bowers*), to implicitly acknowledging its destructive role (*Romer*), to explicitly rejecting such stigma and embracing—and therefore enhancing—the dignity of gay men and lesbians (*Lawrence*, *Windsor*, and *Obergefell*), in less than thirty years, has been extraordinary.

The *Obergefell* decision, striking down the stigma of marriage inequality and emphasizing the equal dignity to which gay couples are entitled, has been described as the “*Brown v. Board of Education* of the LGB community.” There is no doubt that in its rhetoric, this is so. What remains to be seen is how well the Court’s language and reasoning—based largely in liberty/dignity and due process, rather than equal protection—can reinforce the rights of individual gay men and lesbians and withstand the test of time. The next part of this Essay begins to explore these questions by looking at how the Court has employed “dignity” in other contexts.

### III. THE ROLE OF DIGNITY

The Court, through Justice Kennedy,<sup>65</sup> has made significant use of “dignity,” particularly in relation to due process liberty jurisprudence and,

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sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”); *id.* at 2599 (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”). The Court also noted that historically, “homosexuals [did not] have dignity in their own distinct identity.” *Id.* at 2596. Finally, the Court observed numerous times that “[t]he nature of injustice is that we may not always see it in our own times.” *Id.* at 2598; *see also, e.g.*, Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1 (2009) (charting the development of race-based jurisprudence in the United States and discussing how evolving concepts of justice and equality have informed the Court’s decisions over time).

63. The Court rested its conclusion that marriage is a fundamental right on four principles: First, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy”; there is an “abiding connection between marriage and liberty.” *Obergefell*, 135 S. Ct. at 2599. Second, marriage “supports a two-person union unlike any other in its importance to the committed individuals.” *Id.* Third, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” *Id.* at 2600. When their parents cannot marry, children suffer a loss of material benefits and experience “the stigma of knowing their families are somehow lesser.” *Id.* Finally, “marriage is a keystone of our social order.” *Id.* at 2601; *see also id.* at 2597 (noting that among the liberties protected by the Due Process Clause of the Fourteenth Amendment are “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”).

64. *Id.* at 2599. To stop at *Lawrence*, said the Court, would not be enough: “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.” *Id.* at 2600. The Court also relied on its earlier reasoning in *Lawrence*, where it held that “same-sex couples have the same right as opposite-sex couples to enjoy intimate association.” *Id.*; *see also Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

65. Justice Kennedy authored all four LGB cases. The Justice sees animus against and reinforces dignity in the lives of LGB individuals; but as others have observed, he is less likely to identify animus, harm, or discrimination in claims alleging discrimination based on race or sex. *See, e.g.*, Russell K. Robinson, *Unequal Protection*, 67 STANFORD L. REV.

quite less so, in relation to equality and the Court's equal protection jurisprudence.<sup>66</sup> Building off of the work of Bruce Ackerman and Kenji Yoshino, Part III.A explores how the Court has used dignity to help expand the scope of civil rights, starting with the reasoning it used in *Brown v. Board of Education*.<sup>67</sup> Then, Part III.B employs Leslie Meltzer Henry's analysis of the five chief ways the Court has used dignity over the ages<sup>68</sup> to discuss the historical antecedents to the LGB line of cases.

#### A. Dignity As a Mechanism for Establishing Civil Rights

Many commentators have criticized the *Obergefell* Court for failing to address directly the claimants' equal protection arguments, with much of this criticism focusing on the Court's sidestepping the question of whether gay men and lesbians should be treated as a protected class.<sup>69</sup> With lower courts holding that heightened scrutiny should be applied to such challenges,<sup>70</sup> many expressed hope that the Court would resolve this issue once and for all. Justice Kennedy, however, took a different tack, harkening back, says Bruce Ackerman, to the Court's approach and language in *Brown*<sup>71</sup> and employed by the Justice in *Windsor*.<sup>72</sup>

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(forthcoming May 2015); Rick Hasen, *Why Does J. Kennedy Leave Affirmative Action, But Not Gay Rights, to the Democratic Process?*, ELECTION LAW BLOG (June 26, 2015, 8:46 AM), <http://electionlawblog.org/?p=73793> [<http://perma.cc/8CFC-Q9Y4>].

66. *Windsor* did not wholly disregard notions of equality. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (observing that the states that already permitted same-sex couples to marry at the time of the *Windsor* decision had “decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons”); *id.* at 2693 (noting “evolving understanding of the meaning of equality” in the context of marriage). Nor did *Obergefell* ignore the importance of equality principles:

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.

*Obergefell*, 135 S. Ct. at 2602–03; see also *id.* at 2603 (“[O]ne Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. . . . This interrelation of the two principles furthers our understanding of what freedom is and must become.”); *id.* (discussing the “synergy between the two protections” and noting that “[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other”).

67. 347 U.S. 483 (1954).

68. See *infra* notes 87–99 and accompanying text.

69. See Schnurer, *supra* note 15.

70. See, e.g., *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978–79 (S.D. Ohio 2013) (intermediate scrutiny), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (rational basis), *cert. granted sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), *rev'd* 135 S. Ct. 2584 (2015).

71. *Brown*, 347 U.S. at 494 (referring to the feelings of inferiority experienced by Black children caused by segregated education).

72. *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (using substantive due process (liberty interest in dignity) to conclude that the Constitution requires that gay couples must be permitted to marry).

Bruce Ackerman, in his work exploring the civil rights cases addressed by the Court in the 1950s and 1960s, identifies this philosophical thread as the “anti-humiliation principle.”<sup>73</sup> By asking the question of whether segregated education worked to humiliate Black children,<sup>74</sup> Ackerman states that Chief Justice Warren could reach no other conclusion but that it “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>75</sup> In turn, the Court unanimously proclaimed that “the doctrine of ‘separate but equal’ has no place” in the American educational system.<sup>76</sup>

Ackerman expresses regret that this groundbreaking<sup>77</sup> “anti-humiliation” line of inquiry largely was abandoned by the Court through the remainder of the civil rights period.<sup>78</sup> He goes on to critique *Loving v. Virginia* and other civil rights cases that have employed a tiered-based equal protection analysis as “technocratic doctrinal formulations” that have replaced anti-humiliation principles<sup>79</sup> and argues that we should see *Loving* “as a supplement to, not a substitute for,” the anti-humiliation principles found in *Brown*.<sup>80</sup>

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73. See 3 BRUCE ACKERMAN, *WE THE PEOPLE* 128 (2014); see also Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 *YALE L.J.* 3076 (2014); cf. Deborah Hellman, *Equal Protection in the Key of Respect*, 123 *YALE L.J.* 3036 (2014) (asserting that “the concept of humiliation doesn’t quite work to capture what makes segregation and other discrimination violate equal protection”).

74. See generally *Brown*, 347 U.S. 483. See also ACKERMAN, *supra* note 73, at 131 (noting that Justice Warren “was insisting that the Constitution called upon the Justices to use [Karl Llewellyn’s concept of ‘situation-sense’] to determine whether segregated schools systematically humiliated black children” (citation omitted)). Ackerman distinguishes between personal humiliation (“a face-to-face insult in which the victim acquiesces in the effort to impugn his standing as a minimally competent actor within a particular sphere of life”), *id.* at 137–40, and the “systematic degradation” of institutionalized humiliation (“social practices that strip an entire group of [the ongoing] presumption [of competence]”), *id.* at 139–40.

75. *Brown*, 347 U.S. at 494; see also ACKERMAN, *supra* note 73, at 132 (observing that “southern-style school segregation was indeed usually interpreted by schoolchildren and their parents as humiliating” and that “[j]udicial situation-sense was enough to vindicate this key conclusion”).

76. *Brown*, 347 U.S. at 495.

77. Ackerman asserts that the “master insight” of *Brown* was “the Court’s emphasis on the distinctive wrongness of institutionalized humiliation.” ACKERMAN, *supra* note 73, at 128.

78. See *id.* at 133 (discussing “*Brown*’s lost logic”); see also *id.* at 134 (noting the “paradox” that, “while Warren’s words inaugurated a great constitutional debate over the next decade, the Court didn’t participate on an ongoing basis”). Ackerman specifically critiques the *Loving* Court for its rights-based, equal protection approach, arguing that the Court should have focused on how “the marriage ban forced interracial couples to present their relationship to the larger community as if it were diseased, disreputable, criminal.” *Id.* at 302. In other words, it should have addressed the stigma of antimiscegenation laws. See Yoshino, *supra* note 73, at 3080.

79. Yoshino, *supra* note 73, at 3078 (discussing ACKERMAN, *supra* note 73); see also ACKERMAN, *supra* note 73, at 291 (observing that the Court in *Loving* shifted “doctrinal attention away from *Brown*’s focus on the real-world humiliations of interracial couples” and focused instead “on the suspect purposes of the legislators who imposed the marriage bans”).

80. ACKERMAN, *supra* note 73, at 291. Ackerman describes *Loving* as adopting “a very conservative doctrinal approach,” *id.* at 295, and goes so far as to “deny that *Loving* deserves a central place in the civil rights canon.” *Id.* at 291; cf. *id.* at 301 (acknowledging that,

Kenji Yoshino makes Ackerman's theory all the more poignant, and relevant to this discussion, with his observation that Ackerman should have further developed the concept of "dignity" (rather than "anti-humiliation"), as the opposite of "humiliation."<sup>81</sup> I agree, and would go further, asserting that humiliation and stigma, at least in the context of the LGB cases, are significantly the same, and that the "opposite" of both terms is dignity.<sup>82</sup>

Yoshino also asserts that the Court revitalized the anti-humiliation/dignity principle in *Lawrence*,<sup>83</sup> rather than *Windsor*, as described by Ackerman.<sup>84</sup> I again would go further, asserting that the *Romer* Court first rehabilitated Ackerman's "anti-humiliation" principle by, for the first time, implicitly recognizing the potential for the law to stigmatize gay men and lesbians.<sup>85</sup> The Court then explicitly discussed and recognized stigma in the lives of LGB individuals in *Lawrence*, developed it further in *Windsor*, and recognized its full potential by establishing marriage equality, based on the liberty interest in dignity, in *Obergefell*.

With all of this discussion about dignity, however, I have not yet explored its importance as a jurisprudential theory. The next section does just that.

### B. Dignity Is More than One Concept

The concept of dignity is not without its critics. The dissenters in *Lawrence* and *Obergefell* express great disdain for the majority's use of this term. In particular, Justice Thomas's *Obergefell* dissent asserts that "the Constitution contains no 'dignity' Clause" and states that, even if such a

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because of the "southern resistance to desegregation" and the "anxieties over black-white sex," to some, "it was only prudent" that the *Loving* Court "avoid linking its decision too tightly to *Brown*'s emphatic condemnation of the dual school system").

81. Yoshino, *supra* note 73, at 3082 ("This link should be intuitive—what, after all, is the opposite of 'humiliation' but 'dignity'?).

82. Although the *Brown* Court also did not use the term "stigma," it is evident, as Ackerman notes, that it was concerned with "real-world stigma." ACKERMAN, *supra* note 73, at 302; see also *supra* notes 20–21 and accompanying text (discussing Goffman's definition of stigma).

83. Yoshino, *supra* note 73, at 3082–83 ("[T]he Court's invocation of dignity—and Ackerman's anti-humiliation principle—began not with *United States v. Windsor* but with . . . *Lawrence v. Texas*.").

84. See ACKERMAN, *supra* note 73, at 308 ("Justice Kennedy's opinion [in *Windsor*] was simply a restatement of *Brown*'s anti-humiliation principle."). Ackerman goes on to observe the "parallelisms" between *Brown* and *Windsor* when comparing Justice Kennedy's emphasis in *Windsor* on "the 'humiliat[i]ons' DOMA imposed on 'tens of thousands of children now being raised by same-sex couples . . . mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives'" with Justice Warren's statement in *Brown* that school segregation was unacceptable "on the ground that it gives children 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'" *Id.* at 308 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013), and *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

85. See *supra* notes 39–44 and accompanying text (discussing the Colorado Amendment as "imposing a broad and undifferentiated disability on a single named group" and the "animus" reflected in the law, as well as its "bare . . . desire to harm a politically unpopular group").

clause did exist, “the government would be incapable of bestowing dignity.”<sup>86</sup>

Dignity, however, is neither a new nor uniform concept employed by the Court. Leslie Meltzer Henry has conducted a thorough and brilliant interrogation of the Court’s use of dignity,<sup>87</sup> identifying five different conceptions of the term: institutional status as dignity,<sup>88</sup> equality as dignity,<sup>89</sup> liberty as dignity,<sup>90</sup> personal integrity as dignity,<sup>91</sup> and collective virtue as dignity.<sup>92</sup>

Of greatest import to this inquiry are the categories of “equality as dignity” and “liberty as dignity.” The “equality as dignity” approach can be seen in the Court’s antidiscrimination cases, primarily through its equal protection jurisprudence.<sup>93</sup> Fundamentally, Henry writes, the Court uses “equality as dignity to direct attention to the nature of the harm that

86. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting); *see also Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting) (mocking the Court’s reliance on dignity to find for Windsor). The type of liberty described by Justice Thomas in his *Obergefell* dissent is just one type of liberty, one that Leslie Meltzer Henry classifies as “integrity as dignity,” which recognizes each person’s inherent “moral worth and self-respect.” Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 215 (2011). Thus, “[a] slave, who has been deprived of equality and liberty as dignity, can nevertheless possess personal integrity as dignity by expressing his sense of moral worth and self-respect in the face of oppression.” *Id.*

87. Henry, *supra* note 86. Henry takes what she describes as a “Wittgensteinian approach to conceptualizing [dignity],” meaning that it “has multiple meanings that . . . share ‘family resemblances’ to each other,” but which only can be understood properly when viewed in context. *Id.* at 177. She rejects the approach of other theorists who argue that the term is one “in crisis,” “vague,” or otherwise flawed. *See id.* at 174–75.

88. *Id.* at 190–99. The “institutional status as dignity” can be “gained or lost” and is “both inegalitarian and contingent.” *Id.* at 192. The Court has used this iteration of dignity to “bestow respect” on sovereign states and their official representatives. *Id.* at 192–99.

89. *Id.* at 199–205. The three central elements to “equality as dignity” are: (1) “dignity is universal,” (2) “dignity is permanent,” and (3) because dignity is “relational . . . all humans owe respect to, and deserve respect from, each other as beings of equal worth.” *Id.* at 202–03.

90. *Id.* at 206–12; *see infra* notes 95–97 and accompanying text (discussing “liberty as dignity”).

91. Henry, *supra* note 86, at 212–20. Henry describes the category of “personal integrity as dignity” as applying “both to people who convey a constellation of virtuous characteristics and to those who are prevented by circumstance from expressing such characteristics.” *Id.* at 215. Although Henry does not discuss the possibility, I believe this characterization of dignity also could be applied to the LGB cases. *See infra* note 98 and accompanying text (discussing personal integrity as dignity as a philosophical foundation for the Court’s use of dignity in these cases).

92. *See infra* note 99 and accompanying text (discussing “collective virtue as dignity”). Henry raises the concern that the Court already has used the “collective virtue as dignity” to trump “liberty as dignity” in its abortion jurisprudence. Henry, *supra* note 86, at 227–28. More specifically, in *Gonzales v. Carhart*, the Court upheld the Partial-Birth Abortion Ban Act of 2003 on the grounds that it showed “respect for the dignity of human life,” trumping a pregnant woman’s “claims to liberty as dignity, on which prior abortion jurisprudence had largely rested.” Henry, *supra* note 86, at 227 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)).

93. Henry, *supra* note 86, at 203–04 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that the purpose of Title II (public accommodations) of the Civil Rights Act of 1964 “was to ‘vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments’”)).

marginalized individuals or groups experience as the result of differential treatment.”<sup>94</sup>

Henry identifies the roots of “liberty as dignity” as Kantian, built on his belief that “human dignity derives from autonomy.”<sup>95</sup> She observes that this form of dignity has been most useful to the Court when addressing “cases involving personal decisions,” particularly reproductive freedom<sup>96</sup> and same-sex intimacy.<sup>97</sup>

Although Henry does not recognize the role of “integrity as dignity” in the LGB cases, to the extent this category includes those “situations in which a person is only able to present himself as a part of his full self, rather than a unified, composed, or collected whole,”<sup>98</sup> there is merit in considering the relevance of this category of dignity in the context of the LGB cases as well. It is possible, further, that the Court would recognize Henry’s “collective virtue as dignity” in these cases: by treating (LGB) individuals and communities with dignity, our societal virtue is enhanced.<sup>99</sup>

Looking to both Ackerman and Henry’s analyses, then, Justice Kennedy’s drawing on dignity so emphatically throughout the LGB cases seems much less of an outlier than it might originally seem. Ackerman identifies *Brown* as the original case to use “anti-humiliation” (anti-stigma/pro-dignity) principles to secure civil rights.<sup>100</sup> And, Henry reminds us of the rich history of the Court’s use of “dignity.”<sup>101</sup> Drawing from

94. *Id.* at 205.

95. *Id.* at 207 (citing IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (1785)) (“[Dignity requires] not only an obligation to respect people’s free will, but also the concomitant obligation not to abrogate it.”).

96. *Id.* at 209–10 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Thornburgh v. Am. Coll. of Obst. & Gyne.*, 476 U.S. 747 (1986) (Blackmun, J.) (describing a woman’s choice to terminate a pregnancy as among the most “personal and intimate” decisions, “basic to individual dignity and autonomy”), *overruled in part by Casey*, 505 U.S. 833; *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraception for unmarried couples); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (access to contraception for married couples); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (directing the education and rearing of one’s children)). Henry warns, however, that “liberty as dignity, and the women who possess it, are playing an ever smaller role in the Court’s abortion jurisprudence. In their place, the Court proffers collective virtue as dignity to vindicate what it views as our decency and humanity.” Henry, *supra* note 86, at 227–28.

97. Henry, *supra* note 86, at 211 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down the Texas sodomy law)); *see also Lawrence*, 539 U.S. at 567 (stating that “[t]he liberty protected by the Constitution allows homosexual persons the right to make” the choice “to enter upon [a personal relationship] in the confines of their homes and their own private lives”).

98. Henry, *supra* note 86, at 219. Henry, and the Court, however, may be more concerned with “our failure to respect people’s desire to present themselves as dignified, composed, and complete.” *Id.* (citing *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (upholding governmental drug screening program requiring employees to urinate within hearing distance of monitors)).

99. Henry, *supra* note 86, at 221 (“Treating a person in a subhuman manner is wrong not only for the effect it has on that individual, but also for the consequences it has on collective humanity and society.”). *See generally id.* at 220–29. Henry sees a particular role for “collective virtue as dignity” in the Court’s Eighth Amendment jurisprudence. *Id.* at 222–27.

100. *See supra* Part III.A.

101. *See supra* Part III.B.



Henry's analytic categories, there is historical basis for the *Obergefell* approach in equality as dignity and liberty as dignity, as well as perhaps in personal integrity as dignity, and even collective virtue as dignity. Thus, the use of dignity to secure fundamental rights is not as foreign to the Court's jurisprudence as some might assert.

It is not possible to predict where this will lead LGB and other civil rights litigation, but the part that follows considers some possibilities.

#### IV. THE CRYSTAL BALL

Notwithstanding this Essay's focus on liberty and dignity in the LGB cases generally and in *Obergefell* in particular, Justice Kennedy did not leave equal protection doctrine on the cutting room floor. He notes, in particular, "the synergy" between due process and equal protection, acknowledging their "profound" connection,<sup>102</sup> even though "they set forth independent principles."<sup>103</sup> He powerfully concludes that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment[,] couples of the same-sex may not be deprived of that right and that liberty."<sup>104</sup>

In showing this renewed interest in resuscitating the Due Process Clause of the Fourteenth Amendment, however, the Court has taken further steps away from equal protection jurisprudence and the tiers it has found so troubling.<sup>105</sup> Justice Kennedy's failure to clarify the level of scrutiny that ought to apply to claims brought by LGB litigants<sup>106</sup> has led some to

102. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

103. *Id.* at 2603.

104. *Id.* at 2604. In perhaps a nod to earlier equal protection cases, on more than one occasion in *Obergefell*, Justice Kennedy notes the "immutable nature" of sexual orientation. *See, e.g., id.* at 2594.

105. *See* Yoshino, *supra* note 40, at 748 ("[T]he Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments." (citations omitted)); *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (discussing the complexity of traditional equal protection analysis); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (discussing the Court's expansion of the doctrine of substantive due process and recognition of the role of the Court as more than strictly interpreting the text of the Constitution).

106. *See, e.g.,* Jonathan Turley, Opinion, *The Trouble with the 'Dignity' of Same-Sex Marriage*, WASH. POST (July 2, 2015), [https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55\\_story.html](https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55_story.html) (noting that Justice Kennedy's ambiguity fails to clarify the standard of review to be used in other areas of discrimination faced by LGB individuals) [<http://perma.cc/YA6C-8AGM>]; *see also* Arthur S. Leonard, *Supreme Court Issues Historic Marriage Equality Ruling*, ART LEONARD OBSERVATIONS (June 26, 2015), <http://www.artleonardobservations.com/supreme-court-issues-historic-marriage-equality-ruling/> (noting that Kennedy "avoided any explicit pronouncement about whether sexual orientation discrimination claims should be subject to heightened scrutiny") [<http://perma.cc/6NXH-WK89>]; *cf.* Andrew Hamm, *Justice Ginsburg Discusses the Just-Ended Term*, SCOTUSBLOG (Aug. 3, 2015, 1:25 PM), <http://www.scotusblog.com/2015/08/230798/> (summarizing Justice Ginsburg's view that she would have preferred an expanded discussion

express concern that efforts to secure protections against discrimination in employment, housing, and public accommodations will be stymied.<sup>107</sup> Thus, the most trenchant concern is that liberty and dignity, while appealing on a philosophical level, will not be helpful in a pragmatic sense.<sup>108</sup>

Further, although there is a certain beauty in the Court's resting its reasoning on the anti-humiliation approach first used in *Brown*,<sup>109</sup> this foundation may prove shaky. *Brown* and the civil rights cases have not achieved the goal of eliminating de facto segregation or other forms of institutional humiliation. One need only examine the abundant disparities between whites and people of color in high school and college graduation rates,<sup>110</sup> experiences of employment discrimination,<sup>111</sup> or measures of wealth accumulation<sup>112</sup> to witness our ongoing inheritance of slavery and racism.<sup>113</sup>

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of equal protection in *Obergefell* but declined to draft a concurrence "because it was more powerful to have a single opinion" [<http://perma.cc/H786-LNHN>].

107. This concern is not merely hypothetical. See *Ondo v. City of Cleveland*, No. 14-3527, 2015 WL 4604860, at \*1 (6th Cir. Aug. 3, 2015); Arthur S. Leonard, *6th Circuit: Obergefell Decision Irrelevant to Equal Protection Claim*, ART LEONARD OBSERVATIONS (Aug. 5, 2015), <http://www.artleonardobservations.com/6th-circuit-obergefell-decision-irrelevant-to-equal-protection-claim/> (stating that because the Supreme Court did not recognize gay people as a class deserving heightened scrutiny in *Obergefell* or otherwise, gay plaintiffs' equal protection claims against police officers would be assessed using a rational basis standard and holding for the Government) [<http://perma.cc/LCR7-C875>]. But see Arthur S. Leonard, *Nebraska Court Holds Anti-Gay Adoption/Foster Licensing Policy Violates 14th Amendment*, ART LEONARD OBSERVATIONS (Aug. 5, 2015), <http://www.artleonardobservations.com/nebraska-court-holds-anti-gay-adoption-foster-licensing-policy-violates-14th-amendment/> (describing state court ruling that Nebraska's policy of not permitting gay people to be foster parents was unconstitutional pursuant to *Obergefell*) [<http://perma.cc/5MQ9-JZ9C>].

108. See Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges'*, THE NATION (June 29, 2015), <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/> ("Whatever this concept of dignity amounts to in constitutional law, it is a work in progress.") [<http://perma.cc/JH3Q-TC4G>].

109. See *supra* notes 73–78 and accompanying text (discussing Ackerman's anti-humiliation principle in *Brown*).

110. See THE SCHOTT FOUND. FOR PUBLIC EDUC., BLACK LIVES MATTER: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 7 (2015), <http://www.blackboysreport.org/2015-black-boys-report.pdf> (reporting that the gap between four-year graduation rate for Black males and Caucasian males widened nineteen points in the 2009–10 school year to twenty-one points in the 2012–13 year and that, for the 2012–13 school year, the national graduation rate for Black males was 59 percent, compared to 80 percent for Caucasian males for the 2012–13 school year) [<http://perma.cc/54DT-KXVM>].

111. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), <http://www.nber.org/papers/w9873.pdf> [<http://perma.cc/QCT8-DGT5>].

112. See generally THOMAS SHAPIRO ET AL., INST. ON ASSETS & SOC. POL'Y, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 2 (2013) (finding that the total wealth gap between White and African American families nearly triples over the course of twenty-five years, increasing from \$85,000 in 1984 to \$236,500 in 2009), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgap-brief.pdf> [<http://perma.cc/5LVC-G2FF>].

113. See ACKERMAN, *supra* note 73, at 152 (observing that "eliminating humiliation hardly guarantees equal opportunity, let alone equal outcomes").

Although *Brown* named the indignity of, and helped to dismantle, de jure segregation, the decision did not realign the economic and social injustices that existed then and that continue to persist. Indeed, farther down the road, the Supreme Court may again “put the brakes on the anti-humiliation principle,” finding it more challenging to apply in the complex fact-based scenarios that are likely to be litigated.<sup>114</sup>

Unlike *Brown*, however, implementation of *Obergefell* is fairly straightforward: some forms may need to be changed and some marriage bureau clerks educated about their responsibilities. Although there is resistance from some,<sup>115</sup> implementation in the context of marriage is not likely to be a lasting concern.<sup>116</sup>

It is, of course, impossible to predict how the Court’s dignity-based reasoning in *Obergefell*, and the three prior LGB cases—*Romer*, *Lawrence*, and *Windsor*—more generally, will be used in future litigation.<sup>117</sup> It is possible that *Obergefell* and its dignity (anti-humiliation) approach to justice may have lasting power, not just for gay men and lesbians, but also more broadly. Indeed, if courts are inclined to recognize liberty-associated dignity concerns, it will be notably more difficult for defendants to legally justify discrimination. Notwithstanding the Court’s aversion to recognizing new populations entitled to heightened scrutiny,<sup>118</sup> perhaps the Court has given claimants a way to justify lower courts applying more stringent review.<sup>119</sup>

The strength of *Obergefell* will be seen in the challenges to come—the scope of exclusion carved out for those with religious beliefs inconsistent

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114. Yoshino, *supra* note 73, at 3086. Yoshino further observes: “Once de jure restrictions on gay rights are removed, the Court may become blind to second-generation discrimination against gay individuals. If this were the case, the gay-rights jurisprudence would track the race-discrimination jurisprudence. The contemporary jurisprudence around race may be the future of gay constitutional rights, not its past.” *Id.* at 3086–87.

115. See Lyle Denniston, *Contempt Hearing for Kentucky County Clerk*, SCOTUSBLOG (Sept. 1, 2015, 4:14 PM), <http://www.scotusblog.com/2015/09/contempt-hearing-for-kentucky-county-clerk/> (discussing post-*Obergefell* incidents of recalcitrant county clerks who have refused to issue marriage licenses to same-sex couples, citing religious objections) [<http://perma.cc/39AR-9S6S>].

116. See, e.g., Peter Delvecchio, *Freedom to Marry’s Evan Wolfson Cried Tears of Joy Reading the Supreme Court Marriage Ruling*, FRONTIERS MEDIA (June 26, 2015), <https://www.frontiersmedia.com/frontiers-blog/2015/06/26/evan-wolfson-cried-reading-the-supreme-court-marriage-ruling/2/> (quoting Evan Wolfson, Founder and Executive Director of Freedom to Marry, as saying, “I think the overwhelming response now is going to be the public’s embrace of [*Obergefell*], which the public supported even before the courts got there . . . so there will be some grumbling, there will be some acting out, maybe some foot dragging, but . . . I don’t think there’s going to be much, and the reality is the country is ready to embrace the freedom to marry”) [<http://perma.cc/CET9-AXD3>].

117. See ACKERMAN, *supra* note 73, at 291 (asserting that in *Windsor*, Justice Kennedy “is inviting a new generation to restore the original understanding of *Brown* to its central place in the civil rights legacy”).

118. See *id.* at 3080–88.

119. See Tribe, *supra* note 105, at 1937 (“The whole of substantive due process, *Lawrence* teaches us, is larger than, and conceptually different from, the sum of its parts.”).

with the ruling of the Court<sup>120</sup> and the degree to which discrimination against gay men and lesbians no longer will be tolerated in employment, housing, and public accommodations.<sup>121</sup> Indeed, there remains significant work to be done, as seen by the introduction in Congress of the Equality Act,<sup>122</sup> which seeks to amend the Civil Rights Act of 1964 to extend its protections to gay men and lesbians.

#### CONCLUSION

Whether *Obergefell* will bode well for civil rights litigation, as I believe it has the power do, or will further undermine attempts to achieve at least formal equality, we will know only with the passage of time. There is little doubt, however, that the Court—with its recognition of the nefarious and insidious nature of stigma and its extolling of the dignity of gay men and lesbians—has embraced our humanity in a way that leaves the language, outcome, and stigma of *Bowers* forever banished. It is my hope that the Court's actions will help the next generation of LGB individuals grow up fully embracing their dignity, without the pain of stigma experienced by so many LGB people of my and earlier generations.

Indeed, if I had been told in the 1980s that within a short three decades the Supreme Court not only would recognize the stigma imposed on and internalized by so many LGB individuals, but also that it would find that the U.S. Constitution requires that gay couples must be permitted to marry, I do not think I would have believed it.<sup>123</sup> But, here we are. Let us seize this moment and celebrate!

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120. See Samuel A. Marcossou, *After Obergefell: Balancing Religious Accommodation Against the Rights of Others*, AM. CONST. SOC'Y (Apr. 28, 2015), <http://www.acslaw.org/acsblog/after-obergefell-balancing-religious-accommodation-against-the-rights-of-others> [<http://perma.cc/UJW8-LAKN>].

121. See, e.g., Lauren Gambino, *Catholic School Teacher Fired After Parents Learn of Her Same-Sex Marriage*, THE GUARDIAN (July 9, 2015, 1:35 PM), <http://www.theguardian.com/us-news/2015/jul/09/pennsylvania-catholic-school-teacher-fired-same-sex-marriage> [<http://perma.cc/58RJ-97CS>]; Timothy M. Phelps, *New Frontier for Gays is Employment and Housing Discrimination*, L.A. TIMES (June 26, 2015, 7:23 AM), <http://www.latimes.com/nation/la-na-gays-employment-20150626-story.html#page=1> (profiling Katrina Martir, a teacher from Kentucky, who was fired after marrying her same-sex partner because of the school administration's fear of parent backlash over the employment of a lesbian teacher) [<http://perma.cc/6F23-F52Q>].

122. Equality Act, H.R. 3185, 114th Cong. (2015).

123. The relatively rapid pace of change was not a matter of happenstance. As described by Mary Bonuato, Legal Director of Gay and Lesbian Advocates and Defenders (GLAD), and Evan Wolfson, the marriage equality movement was well planned and well executed, incorporating grassroots organizing, legislative advocacy, and litigation strategizing. See *Fresh Air: From DOMA to Marriage Equality: How the Tide Turned for Gay Marriage*, (NPR July 9, 2015), <http://www.npr.org/2015/07/09/421462180/from-doma-to-marriage-equality-how-the-tide-turned-for-gay-marriage> [<http://perma.cc/2V99-GMCA>]. I recognize there are risks of assimilation in this increasing level of legal, political, cultural, and structural acceptance. See, e.g., *The Dignity of Marriage: Gays on the Wrong Side of History*, A PAPER BIRD (JULY 14, 2015), <http://paper-bird.net/2015/07/14/the-dignity-of-marriage> (describing the joy engendered by the *Obergefell* ruling, but rejecting the vehicle of "dignity" to establish marriage equality) [<http://perma.cc/MC5N-6PC9>]; Phoebe Reilly, *New TV Series, New Movie: Just Another Day at the Office with Lily Tomlin*, VULTURE (Aug. 12,

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2015, 8:00 AM), <http://www.vulture.com/2015/08/day-at-the-office-with-lily-tomlin.html> (quoting lesbian comedian and actor Lily Tomlin as saying, “In some ways I yearn for suppression, because the taboo made things more exciting,” quickly adding, “I mean that facetiously. I’m grateful for progress”) [<http://perma.cc/G8F6-JQQ9>]. Yet, these are the risks I readily embrace.