Sexual Orientation, Rank, and Status

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Abstract

Dignity retains its ancient focus on rank and status. This Article, therefore, rejects the idea that we now live in the age of equal dignity, meaning equal rank and status for everyone. Rank underscores numbering, placement, and position in a predetermined hierarchy, and status underscores the power and privileges associated with each rank. Rank permits human beings to identify their preassigned location in the hierarchy, and status justifies assertions of rank since status governs the ancestral privileges, powers, and responsibilities attached to each rank.

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The Article relies on two constitutional cases, one before "dignity" and the other after. In 1986, the Supreme Court of the United States held in Bowers v. Hardwick *that the Federal Constitution did not recognize a right to privacy preventing a state from criminalizing consensual intimacy between persons of the same sex in the sanctity of the bedroom. Only a dissenting opinion in* Bowers v. Hardwick *mentioned dignity. Seventeen years later,* Lawrence v. Texas *overruled* Bowers v. Hardwick *and referred to dignity in an opinion holding that consensual same-sex intimacy was constitutionally protected in the privacy of the bedroom.* Lawrence v. Texas, *while appearing to announce the arrival of equal dignity, implicitly affirmed the importance of rank and status in discussions of dignity and opened the door to constitutional negotiation regarding dignity's traditional parameters.*

Affirmations that dignity is about inestimable and ineffable inherent worth notwithstanding, this Article argues that since dignity remains tethered to traditional concerns about rank and status, "dignity" is a term best reserved for such ancient evocations of rank and status. To discuss life beyond rank and status, the notion of the "sacred" is more helpful because the sacred arises from within and beyond the human being, while dignity remains an evaluation and imposition from without. Indeed, there is reason to believe that landmark understandings of dignity exclude sexual minorities (and others) from their assertions of inherent dignity.

I. AFTER DIGNITY[1]

A. Theory

Bowers v. Hardwick[2] is a landmark case in which the United States Supreme Court held that Michael Hardwick, a gay man, did not have a Substantive Due Process right to privacy under the Fourteenth Amendment to the Federal Constitution permitting him to engage in consensual oral sex in his bedroom with a human being of the same sex without state interference.[3] Consider the three statements below from *Hardwick*. The first statement is from the Court's opinion, the second from a concurring opinion, and the third from a dissenting opinion.

> No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.[4]

> Homosexual sodomy was a capital crime under Roman law.[5]

1. In this Article, I cite (and build upon) insights and sources explored in my other Articles dealing with dignity. *See* Duane Rudolph, *Play in the States*, 28 TEX. J. C.L. & C.R. 169 (2023); Duane Rudolph, *We Have the Right to Play*, 26 U. PA. J. L. & SOC. CHANGE 369 (2023); Duane Rudolph, *Dignity. Reverence. Desecration.*, 53 SETON HALL L. REV. 1173 (2023); Duane Rudolph, *Dignity and the Promise of Conscience*, 71 CLEV. ST. L. REV. 305 (2023); Duane Rudolph, *Climate Discrimination*, 72 CATH. U. L. REV. 1 (2023); Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126 (2017); Duane Rudolph, *Of Moral Outrage in Judicial Opinions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 335 (2020). I also rely on insights gathered in the writing of my dissertation. *See* Duane Rudolph, The Dystopian Renaissance: Lucian's Lies in Sixteenth Century France (2005) (Ph.D. dissertation, Cornell University) (ProQuest).

2. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

3. *Hardwick*, 478 U.S. at 188–89, 196. For brevity's sake, going forward, I refer to the United States Supreme Court as either "the Supreme Court" or "the Court."

4. *Id.* at 191 (majority opinion).

5. *Id.* at 196 (Burger, C.J., concurring).

> Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.[6]

Consider, next, the statements below from another landmark case, *Lawrence v. Texas*.[7] *Lawrence* held that the arrest, charging, and conviction of John Geddes Lawrence and Tyron Garner for engaging in a consensual sexual act in the privacy of Mr. Geddes' Texas bedroom violated the Fourteenth Amendment's Due Process Clause.[8] To arrive at that conclusion, the Court overruled *Hardwick*.[9]

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.[10]

> The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.[11]

> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home.[12]

Hardwick and *Lawrence* have been compared to landmark constitutional cases dealing with race. In his work engaging with watershed race and sexual-orientation cases, Professor Michael J. Klarman has indicated that "[i]t may not be too much longer before *Bowers* comes to resemble *Plessy v. Ferguson*—one of the most

6. *Id.* at 217 (Stevens, J., dissenting).
7. Lawrence v. Texas, 539 U.S. 558 (2003).
8. *Id.* at 562–63, 578–79 (majority opinion).
9. *Id.* at 578.
10. *Id.* at 567.
11. *Id.* at 581 (O'Connor, J., concurring).
12. *Id.* at 602 (Scalia, J., dissenting).

vilified decisions in the Court's history—and *Lawrence* evolves into the *Brown* [*v. Board of Education*] of the twenty-first century."[13] In an article documenting his role in *Hardwick* and exploring *Lawrence*'s possible afterlife given *Brown* and its trajectory, Professor Laurence H. Tribe has indicated that "when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America."[14]

The six statements above permit preliminary insights regarding dignity. *Hardwick* implicitly rejected the idea that a sexually active gay man possessed dignity, and only the dissenting opinion endorsed the notion.[15] From the *Hardwick* Court's perspective, that was at least in part because concerns regarding "family, marriage, or procreation" were preeminent—the traditional preserve of the heterosexual.[16] So indignant appeared Chief Justice Burger at the thought of constitutional rights for sexually active gay men that he reminded the Court in his concurrence that there was Roman precedent for the execution of gay people.[17] *Hardwick* held, then, that states could prevent gay people from arriving, or succeeding, as human beings possessed of heterosexual dignity. As Michael Hardwick indicated in response to the *Hardwick* decision, "[w]e're second-class citizens."[18]

13. Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 489 (2005). *See generally* Plessy v. Ferguson, 163 U.S. 537, 540, 542 (1896) (holding that Louisiana's Separate Car Act of 1890, "providing for separate railway carriages for the white and colored races" was constitutional under the Fourteenth Amendment); Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 495 (1954) (overturning *Plessy* and holding that the Fourteenth Amendment prohibited segregation in public schools on the basis of race).

14. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004).

15. *See* Bowers v. Hardwick, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

16. *Hardwick*, 478 U.S. at 190–91 (majority opinion).

17. *Id.* at 196 (Burger, C.J., concurring) (stating that "[h]omosexual sodomy was a capital crime under Roman law.").

18. PETER H. IRONS, THE COURAGE OF THEIR CONVICTIONS 403 (1988). I am grateful to Professor William E. Eskridge, Jr.'s work for bringing this source to my attention. *See* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003 233 n.10 (2008) [hereinafter ESKRIDGE, DISHONORABLE PASSIONS].

In *Lawrence*, conversely, the presumption of dignity as solely reserved for the heterosexual was jettisoned.[19] In *Lawrence*, those who had sex with other members of their sex "retain[ed] their dignity as free persons."[20] The Court aligned dignity with equality, liberty, and privacy.[21] *Lawrence*, thus, raised the bedroom of a gay person to the same constitutional standing as a heterosexual's, and those who refused to uphold the privacy of gay people were relegated to a dissenting opinion.[22] From there, the dissenting justices protested that they acted consistent with the interests of those who "view[ed] this [moral disapproval] as protecting themselves and their families from a lifestyle that they believe[d] to be immoral and destructive."[23] Although not a marriage-equality case, *Lawrence* can be read as having held that gay people had constitutionally arrived.[24]

Elsewhere, I have engaged with *Hardwick* and *Lawrence*.[25] After identifying roughly two dozen meanings of "dignity" in American law, my work focused on dignity's additional meanings in cases from the Supreme Court dealing with sexual and gender minorities.[26] Dignity was about status.[27] Those espousing traditional views of masculinity and heterosexuality traditionally possessed superior or supreme status.[28] Flowing from their supreme status, they

19. *See* Lawrence v. Texas, 539 U.S. 558, 567, 574, 575 (2003); Tribe, *supra* note 14, at 1895.

20. *Lawrence*, 539 U.S. at 567; Tribe, *supra* note 14, at 1895.

21. *Lawrence*, 539 U.S. at 567, 575.

22. *See Lawrence*, 539 U.S. at 574 (stating that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.") (Scalia, J., dissenting); *see also id.* at 586–606.

23. *Id.* at 602 (Scalia, J., dissenting).

24. *See generally id.* at 567 (finding that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.").

25. *See* Rudolph, *We Have the Right to Play*, *supra* note 1, at 401; Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1175, 1183; Rudolph, *Dignity and the Promise of Conscience*, *supra* note 1, at 309, 318–19.

26. *See, e.g.*, Rudolph, *Play in the States*, *supra* note 1, at 170–71.

27. *See, e.g.*, *id.*

28. Rudolph, *Play in the States*, *supra* note 1, at 172; Rudolph, *We Have the Right to Play*, *supra* note 1, at 373; Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1177; Rudolph, *Dignity and the Promise of Conscience*, *supra* note 1, at 312, 317–18.

required reverence for their beliefs and desires, often deploying the language of the sacred and the profane.[29] Such a requirement of reverence meant that sexual and gender minorities had to display veneration and deference for what the majority held sacred.[30] While sexual and gender minorities might be deferred to in cases like *Lawrence*, we could never be venerated since a court, which could enforce veneration, could never confer it.[31] Sexual minorities, thus, would never be revered, and we were subject to desecration—the marking of human beings from minority communities as unsacred and unworthy by permitting our humiliation, denigration, and degradation, as in *Hardwick*.[32] Further, a key aspect of the supreme dignity traditionally enjoyed by heterosexuals was the liberty to play, which the Supreme Court had long upheld for heterosexuals only.[33]

This Article carries those insights further. Dignity is indeed about status. It is about reverence and desecration. It encompasses the liberty to play. And yet, an exploration of dignity, beginning with a discussion of the centrality of rank, remains warranted. Although a crude sorting mechanism, rank keeps people in line. Individuals might express revulsion at the rank assigned to them, but rank effectively assigns them to their predetermined social, political, and legal position. Of course, saying that dignity is about rank is nothing new; commentators have remarked that rank, historically, is the foundation upon which understandings of dignity have often been predicated.[34]

29. Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1174–1211.

30. *See id.* at 1177, 1183–86.

31. *See id.* at 1185 ("That is because, while deference can be judicially conferred through the judicial recounting and upholding of the stories of the oppressed, veneration, which, by its nature, deals with what is 'exalted, hallowed, or sacred,' cannot.").

32. *Id.* at 1195.

33. The idea of play embodies both liberty and creativity. *See generally* Rudolph, *We Have the Right to Play*, *supra* note 1, at 372; Rudolph, *Play in the States*, *supra* note 1, at 170.

34. *E.g.*, Frederick Mark Gedicks, *Christian Dignity and the Overlapping Consensus*, 46 B.Y.U. L. REV. 1245, 1249 *passim* (2021); GEORGE KATEB, HUMAN DIGNITY 6–7 *passim* (2014); MICHAEL ROSEN: DIGNITY: ITS HISTORY AND MEANING 114 (2018); SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS 32 (2015); JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 114 (2012); Stéphanie Hennette-Vauchez, *A human* dignitas? *Remnants of the ancient legal concept in contemporary dignity*, 9 INT'L J. CONST. L. 32 *passim* (2011).

But commentators have tended to reject rank as a current understanding of dignity in American law. Indeed, my own work has paid insufficient attention to the continuing potency of rank in our legal system even as that work has deepened our understanding of human dignity.[35]

Some might ask why it matters that dignity historically referred to rank. Has Immanuel Kant's (1724-1804) understanding of dignity not eclipsed "ancient" understandings of the concept?[36] Kant's categorical imperative is an unconditional requirement that each rational being act consistently with a maxim, which might become a universal law if imposed on others.[37] Under an initial formulation of the imperative, each person should "act only in accordance with that maxim through which you can at the same time will that it become a universal law."[38] Under a second formulation, "we should never act in such a way that we treat humanity, whether in ourselves or others, as a means only but always as an end in itself. This is often seen as introducing the idea of 'respect' for persons, for whatever it is that is essential to our humanity."[39] Under a third formulation of the categorical imperative, "we are required . . . to conform our behavior to principles that express this autonomy of the rational will—its status as a source of the very universal laws that obligate it."[40]

Kant's categorical imperative helps us understand human dignity.[41] It permits us to grasp the universal ambition of Kant's moral mandate even during the philosopher's lifetime. Under Kant's

35. *See generally* Rudolph, *supra* note 1.

36. *See generally* Gedicks, *supra* note 34, at 1256, 1257, 1262 (stating that "Kant decentered dignity-as-rank"; "Kant and Enlightenment notwithstanding, dignity-as-rank persisted in Catholic Christianity into the twentieth century."; "Dignity-as-rank began to crumble after World War II."; "A signal achievement of Western democracy is equality of rights—the idea that fundamental rights, privileges, and immunities are held by all, regardless of social rank or status.").

37. *See* Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 21, 2022), https://plato.stanford.edu/entries/kant-moral [https://perma.cc/49EM-QNRT] (providing an overview of Kant's works in moral philosophy); MANFRED KUEHN, KANT: A BIOGRAPHY 286 (2001) (distinguishing between Kant's three formulations of the categorical imperative).

38. Johnson & Cureton, *supra* note 37; KUEHN, *supra* note 37, at 145–49, 286.

39. Johnson & Cureton, *supra* note 37; *see also* KUEHN, *supra* note 37, at 286.

40. Johnson & Cureton, *supra* note 37.

41. *Id.*

approach, a monarch's rank or status did not absolve that monarch, if rational, from abiding by the same moral imperative binding those of subordinate rank.[42] Of course, Kant did not speak in such terms, admitting in a letter, Professor Georg Cavallar tells us, that "[a]lthough [Kant was] absolutely convinced of the many things that [he would] never have the courage to say, [he would] never say anything [he did] not believe."[43] The categorical imperative would have all rational human beings, including monarchs, uphold a universally applicable maxim in their conduct.[44]

While Kant appears not to have done so, this Article treats the categorical imperative as utopian—an anticipation of better times, a possibility of becoming, but possibly only for some.[45] The Kantian mandate is utopian since it offers a response to a status quo it rejects, and it proposes instead an ideal alternative to overcome the deficiencies of an imperfect status quo.[46] Professor Cavallar has indicated that Kant's "ultimate goal [was] the 'perfect' republic, 'governed by principles of justice' which is identical with representative democracy."[47] Similarly, Professor Ingo Cornils has observed, "German utopian thought has played a vital role in shaping utopian discourse . . . . Immanuel Kant was instrumental in conceptualizing the idea of human progress, and he applied his moral philosophy to politics,

42. *See generally* Georg Cavallar, *Kant's Judgment on Frederick's Enlightened Absolutism*, 14 HIST. POL. THOUGHT 103 (1993).

43. *Id.* at 103 n.3.

44. *See id.* at 131 (stating that "[a]ccording to the standards of the categorical imperative, [the monarch] had no right to dispose of himself 'as a mere means to an arbitrary end,' as this would mean 'to abase humanity in one's own person.'").

45. *Compare* Thom Brooks, *Corlett on Kant, Hegel, and Retribution*, 76 PHIL. 561, 569, 572 (2001) (aligning "the moral law" with the categorical imperative and stating that "[t]he moral law is not some utopian ideal we might aspire to, yet never fulfil [*sic*]. Instead, the significance given to the moral law via reason is that 'the moral law is solely practical,' its realization by human beings is a true possibility and not a product of wishful thinking."), *with* Cavallar, *supra* note 42, at 108 (who, before discussing the categorical imperative and Kant's political beliefs states that "Kant's hope for progress is, above all, a hope for legal progress through continuing improvement of political constitutions.").

46. *See generally* INGO CORNILS, BEYOND TOMORROW: GERMAN SCIENCE FICTION AND UTOPIAN THOUGHT IN THE 20TH AND 21ST CENTURIES 17–20 (2020) (defining utopia).

47. Cavallar, *supra* note 42, at 132.

noting that states would eventually have to adhere to reason and maxims that follow the categorical imperative."[48]

Another seminal thinker provides reasons to consider Kant's insight idealistic. Sigmund Freud's significant patriarchal aberrances notwithstanding, his attention to rationality is germane as it has led commentators to note similarities between Freud and Kant.[49] Theodor W. Adorno, for example, observed that Freud and Kant, though opposed to each other in one key aspect—both focus on rationality.[50] This was so because for Freud, the civilizing project required reason to triumph over instinct, and, for Kant, to the extent that it served the self-preservation of the human being, "the rational behaviour of human beings [was] rational . . . ."[51]

Other commentators have observed similarities between Kant and Freud. While acknowledging the apparent differences between the two, Professor James DiCenso has more recently argued, relying on Theodor Adorno's insight, that "Freud advances Kantian and Enlightenment thinking in certain important respects; his work offers a more somatically, socially, and historically grounded approach to the formation of rational and ethical capacities, and hence makes it more compatible with contemporary orientations that eschew the pitfalls of idealist orientations."[52] And while he does not evoke Freud, Professor Cavallar, for his part, implicitly points to the similarity between Kant

48. CORNILS, *supra* note 46, at 21. Of course, historically, the idea of utopia can be traced to Thomas More's *Utopia* (1516), a satire, but that is not the sense in which the term is deployed in this Article. *See generally* Warren W. Wooden, *Anti-Scholastic Satire in Sir Thomas More's* Utopia, 8 SIXTEENTH CENTURY J. 29, 29–45 (1977); Walter M. Gordon, *Thomas More's* Utopia: *Preface to Reformation*, 21 RENAISSANCE AND REFORMATION / RENAISSANCE ET RÉFORME 63, 65 (1997).

49. *See* Jane Gallop, *Introduction: Envy*, 34 WOMEN'S STUD. Q. 12, 12–18 (2006) (providing an overview of important objections to Freud's treatment of women and women's sexuality).

50. THEODOR W. ADORNO, PROBLEMS OF MORAL PHILOSOPHY 137 (2000) (mentioning "the extreme anti-psychological ethics of Kant and the extreme psychological, or, if you like, psychologistical doctrine of Freud"). I am grateful to DiCenso's work for bringing the Adorno insight to my attention. *See* DiCenso, *infra* note 52.

51. ADORNO, *supra* note 50, at 137.

52. James DiCenso, *Kant, Freud, and the Ethical Critique of Religion*, 61 INT'L J. FOR PHIL. RELIGION 161, 162 (2007).

and Freud when he indicates that "Kant's philosophy of history" was an attempt at overcoming the vicissitudes of the human condition.[53]

Recall that for Freud, when it comes to universal maxims that promote the civilizing project, civilization has had to contend with the fact that "instinctual passions are stronger than reasonable interests."[54] The maxim that the individual should love the neighbor as the self, while noble in its civilizing impetus, is implicitly utopian since Freud observes that "men are not gentle creatures who want to be loved, and who at the most can defend themselves if they are attacked; they are, on the contrary, creatures among whose instinctual endowments is to be reckoned a powerful share of aggressiveness."[55] Even inherently utopian proposals regarding the eradication of private property to achieve equality among all human beings do not adequately account for irrational impulses that threaten to upend the civilizing process.[56] Such irrational impulses would persist in the absence of private property.[57] The civilized individual, says Freud, "has exchanged a portion of his possibilities of happiness for a portion of security."[58]

Kant, Professor Dmitri N. Shalin shows, likely fell short of the dignitarian anticipations he had in mind. "What his legal opinions show is that, for all his bold theoretical statements, Kant could not escape the hermeneutical horizons of his time, that he shared the prejudices of his age which drove him to pragmatic judgments inconsistent with his theoretical views."[59]

> What makes one cringe, however, is the cruelty ingrained in specific legal opinions he ventured at the time. For the

53. Cavallar, *supra* note 42, at 126.

54. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 112 (James Strachey trans. 2024) (1961).

55. *Id.* at 111; *accord* Cavallar, *supra* note 42, at 126 (framing the questions to which "Kant's philosophy of history" responds as follows: "How can we expect any kind of progress in history if human beings in general, and rulers in particular, are ruthless and selfish? Is there any reason for hope if history 'is made up of folly and childish vanity, and often of childish malice and destructiveness'?").

56. FREUD, *supra* note 54, at 113–14.

57. *Id*.

58. *Id.* at 115.

59. Dmitri N. Shalin, *Legal Pragmatism, an Ideal Speech Situation, and the Fully Embodied Democratic Process*, 5 NEV. L.J. 433, 439 (2004).

> very man who theorized human dignity enthusiastically endorsed the death penalty . . . ranted about 'the disgrace of an illegitimate child . . . [who] has crept surreptitiously into the commonwealth (much like prohibited wares [contraband]), so that its existence as well as its destruction can be ignored.' Equally troubling are his ravings against crimen carnis contra naturam, which cover among other things homosexuality and masturbation, two crimes against nature Kant went to a great length to expose, condemning the former as a disgrace to the human race and the latter as an abomination worse than suicide.[60]

In other words, while the philosopher envisioned a better way of living, he appears to have believed that some human beings, including those we would call sexual minorities, were guilty of crimes against nature. That is, they were inferior.

Indeed, this is why this Article argues that utopian understandings of dignity still compete with the continuing power of irrational ancient impetuses to the contrary—meaning, for example, rank and status.[61] As cases like *Hardwick* and *Lawrence* show, rank is omnipresent, especially when the place of sexual minorities in the legal order is evoked. Of course, rank has had to contend with powerful utopian counterarguments flattening rank's hierarchical gloss. But rank still governs dignity's new arrivals, which I explore in Part II.[62] Part II shows that status—rank embodied as power—deploys reverence and desecration to underscore the inferiority of sexual minorities even

60. *Id.*

61. *See generally* Rudolph, *Play in the States*, *supra* note 1, at 170 (discussing the importance of dignity, rank, and status among vulnerable communities); Rudolph, *We Have the Right to Play*, *supra* note 1, at 392 (discussing how dignity, status, and play extend the reach of heterosexual dominance and harm vulnerable individuals); Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1173–212 (examining how dignity is aligned with reverence for those holding superior power and with desecration of vulnerable communities); Rudolph, *Dignity and the Promise of Conscience*, *supra* note 1, at 307–61 (discussing the three invocations of dignity in American law and how they relate to status, which implies subservience to the sovereign and the court).

62. *See* discussion *infra* Part II.DIGNITY'S NEW ARRIVALS.

after the arrival of dignity.[63] Part III explores how *Hardwick* and *Lawrence* construct the status of sexual minorities. In its engagement with dignity, Part III shows, *Lawrence* opens the door to constitutional negotiation of such terms. In other words, the arrival of dignity does not undermine the ancient primacy of rank and status. Instead, it reaffirms but opens it to contestation. Part III argues that the path beyond rank and status involves valuing the sacred nature of consensual intimate self-expression.[64] While it may seem redundant to argue that the sacred values the inherent (since dignity is already said to value what is inherent), Part IV argues that since dignity retains its traditional focus on rank and status, notions of the sacred are able to transcend determinations of rank and status in ways dignity is not.[65] My conclusion follows.

B. Definitions

Isabel Wilkerson's magnificent work, *Caste: The Origin of Our Discontents* (2020), facilitates an understanding of rank's enduring appeal in the United States.[66] *Caste* mainly focuses on racial injustice in the United States to found its comparative analysis of a ranking system in the United States, India, and Germany.[67] Caste, we learn, is an expression of rank.[68] But caste amounts to "more than rank."[69] Caste is visible in the motivation to rank.[70] It is discernible in the impetus to create a ranking order or structure.[71] It is a commitment to a hierarchy in which human beings are assigned a rank they may not escape.[72] For Wilkerson, thus, caste amounts to the structural totality binding the entirety of a life. Caste envisages, structures, and executes a hierarchy in which human beings are sorted based on arbitrary

63. *See* discussion *infra* Part III. III.Dignity's Limitations.
64. *See* discussion *infra* Part IV.BEYOND RANK AND STATUS.
65. *See* discussion *infra* Part IV. BEYOND RANK AND STATUS.
66. *See* ISABEL WILKERSON, CASTE: THE ORIGIN OF OUR DISCONTENTS (2020).
67. *See id.* at 40 *passim.*
68. *Id.* at 39.
69. *Id.* at 333.
70. *Cf. id.*
71. *Id.*
72. WILKERSON, *supra* note 66, at 98.

conditions over which they have no control.[73] These conditions, no matter how capricious, are enforced by those imposing and enforcing a hierarchical system.[74]

Professor Jeremy Waldron's book, *Dignity, Rank, and Rights*, helps us understand the continuing vitality of rank.[75] *Dignity, Rank, and Rights* focuses on equal rank and status when it argues that "the modern notion of human dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility."[76] *Dignity, Rank, and Rights* is about "a dignitarian society being, these days, a single-status society."[77] The work aligns equal dignity with status when it states that "dignity is a normative status and that many human rights may be understood as incidents of that status."[78] The work aligns equal status with equal rank when it states that "[h]istorically law has done all sorts of things to protect and vindicate dignity in the sense of rank or high status."[79] The work aligns both equal rank and status with caste by citing Professor Gregory Vlastos.[80] Additionally, it equates equal rank with equal status when it states, "[t]hat is what [it is] trying to do with an account of dignity as a high-ranking status, comparable to a rank of nobility—only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man."[81] The work often refers to "ranking status."[82]

To appreciate the importance of "rank" in a discussion of dignity, etymology is helpful. "Rank" comes from Anglo-Norman, Old

73. *See id.* at 40.

74. *See id.* at 222–23.

75. *See* WALDRON, *supra* note 34. Waldron's work has informed my scholarship. *See, e.g.*, Rudolph, *Play in the States*, *supra* note 1, at 174, 188; Rudolph, *We Have the Right to Play*, *supra* note 1, at 373; Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1176 n.13 *passim*; Rudolph, *Dignity and the Promise of Conscience*, *supra* note 1, at 308 n.13 *passim*.

76. WALDRON, *supra* note 34, at 33.

77. *Id.* at 58.

78. *Id.* at 18.

79. *Id.* at 47.

80. *Id.* at 34.

81. *Id.* at 22.

82. *Id.* at 24, 27, 31, 47, 59.

French, and Middle French.[83] To rank means to place in "line" or "a row."[84] "Rank" encompasses "[a] row, line, or series of things."[85] Rank also encompasses "[a] distinct level in a social hierarchy, or the people who constitute this; a class, station, order."[86] The word thus identifies the precise location where someone or something belongs in a sorting mechanism, implying a taxonomic distinction based on rules and principles.[87] The etymon for the French *rang*, which gives us the English "rank," means a line or row of warriors.[88] As for "caste," it arrived in English four centuries after rank.[89] "Caste" implies "rank" since the etymons of "caste" (the Spanish *casta* and the Portuguese *casta*) imply the sorting of animals according to rules or principles—"breed or species of animal" and "class of people, lineage."[90] Caste is group rank solidified. This is not to deny the noxiousness of caste. It is, instead, to found discussions of dignity, at least in the United States, on rank.

To make the link between rank and dignity, consider the history and meanings of another word associated with dignity—"status." "Status" entered English after "caste," meaning that "rank" precedes "status" and "caste" by roughly two centuries.[91] Status initially

83. *Rank*, OXFORD ENGLISH DICTIONARY (3d ed. 2022), https://www.oed.com/dictionary/rank_n1 [https://perma.cc/H8CS-PQRJ] (last visited July 28, 2024).

84. *Id.* at II.2.a, II.7.a.

85. *Id.* at I.1.a.

86. *Id.* at II.6.c.

87. *See id.*

88. *Rang*, DICTIONNAIRE DE L'ACADÉMIE FRANÇAISE (9th ed. 2001), https://www.dictionnaire-academie.fr/article/A9R0444 [https://perma.cc/CZ9X-CVMH] (last visited May 23, 2023) (stating that *rang* comes from the "Twelfth-century *reng*, meaning 'a row of warriors.' *Reng* "came from the Frankish **hring* [meaning] 'circle, ring,' then 'assembly arranged in a circle.'") ("XIIe siècle, *reng*, au sens de 'ligne de guerriers.' Issu du francique **hring*, 'cercle, anneau,' puis 'assemblée disposee en cercle.'") (translation mine).

89. *Caste*, OXFORD ENGLISH DICTIONARY (3d ed. 2022), https://www.oed.com/dictionary/caste_n [https://perma.cc/9X4W-MRHZ] (last visited July 28, 2024).

90. *See id.*

91. *Status*, OXFORD ENGLISH DICTIONARY (3d ed. 2022), https://www.oed.com/dictionary/status_n [https://perma.cc/JQ3X-NAZD] (last visited July 28, 2024).

referred to height and, figuratively, to the zenith.[92] In time, status referred to "[t]he fact or position of belonging to a group which is subject to certain legal rights or limitations; the legal classification corresponding to this; a person's legal condition with regard to freedom of movement or action, citizenship, the age of majority, etc."[93] Status also referred to "[s]ocial or professional rank, position, or standing; a person's relative importance; (also) *spec.* high rank or social position."[94]

As "status" is of Roman origin, it is possible to further isolate its relation to rank.[95] In Latin, *status* refers to the position or posture associated with the physical act of standing.[96] The other meanings of *status* encompass figurative positions (moral, intellectual, and so on), as well as "[s]tation in life, rank, standing."[97] *Status* also refers, as it later would in English, to a "[l]egal position (w[ith] respect to rights, obligations, etc.)."[98] While *status* can indeed mean "rank," a Latin word for "rank" is *ordo* (which gives us "order" in English), whose meanings include "[a] line of things placed next to each other, a row (esp[ecially] of trees of plants)"; military rank; "[a] body of people having the same political or social status, an order, class"; and "[c]ivil or social standing, rank, position . . . . [P]osition assigned to a person, etc., in estimation or treatment, footing."[99]

In other words, "rank" (and *ordo*) has a positional aspect. The terms tell us where someone or something is situated in a line, row, or along a continuum. While status overlaps with the idea of rank, status tells us more than rank about the rights and responsibilities accompanying a location or situation. "Rank" essentially pertains to functions, names, positions, and titles, and "status" implies the doctrines, privileges, and perils governing each rank. Rank is descriptive, and status is normative. Rank is denotative, and status is connotative. Rank is placement, and status is privilege. Rank is placement, and status is meaning. Rank identifies, names, and

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Status*, OXFORD LATIN DICTIONARY 1816 (P. G. W. Glare ed., 1968).
97. *Id.*
98. *Id.* at 1817.
99. *Id.* at 1266–67.

numbers. Status patrols, polices, and protects. Rank numbers, and status values. Rank is about acts. Status is about consequences. Rank is about degree, and status is about pedigree. Rank is about division, and status is about distinction. Rank is about degree, and status is about degrees of power.

Of course, there is historical overlap between rank, status, caste, and order.[100] But, as this Article shows, rank and status are not synonyms, even as they may overlap.[101] That we can easily identify someone's rank based on their status or vice versa shows how ingrained the reigning hierarchy is and the extent to which we have been compelled to take its vocabulary for granted so that we produce autonomic responses.[102]

Hardwick and *Lawrence* show that the traditional rank of sexual minorities (below or after that of heterosexuals devoted to "family, marriage, or procreation") implied that gay people were entitled to no constitutional protections (inferior status). From Chief Justice Burger's perspective in his concurring opinion in *Hardwick*, there was even Roman precedent for the execution of gay people (again, inferior status).[103] *Lawrence*, which repudiated *Hardwick*, did not announce

100. *See* RAFAEL DOMINGO, ROMAN LAW: AN INTRODUCTION 18 *passim* (2018); Tristan S. Taylor, *Social Status, Legal Status, and Legal Privilege*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 349, 352 (Paul J. du Plessis, Clifford Ando & Kaius Tuori eds., Oxford University Press 2016); PAUL DU PLESSIS, BORKOWSKI'S TEXTBOOK ON ROMAN LAW 89 (5th ed. 2015); ANDREW M. RIGGSBY, ROMAN LAW AND THE LEGAL WORLD OF THE ROMANS 6 *passim* (2010); Susan Treggiari, *Home and Forum: Cicero Between "Public" and "Private"*, 128 TRANSACTIONS OF THE AM. PHILOLOGICAL ASS'N. 1, 8 (1998).

101. *See generally* DOMINGO, *supra* note 100, at 13 *passim* (referring extensively to status in Rome, permitting the inference that rank is assigned placement in the prevailing hierarchy); RIGGSBY, *supra* note 100 at 58 (distinguishing between rank and status by stating that "[m]ilitary service (with rank dependent on status) was a prerequisite for a political career."). Although Riggsby is referring to military rank in the citation, he also refers to social rank when he states that, "[a]mong free Roman citizens there were a number of distinctions of rank." *Id.* at 105.

102. *See generally* WILKERSON, *supra* note 66, at 213. In the context of a discussion of "deaths of despair" among poor White Americans, "[i]n caste terms, these are the least well off, most precariously situated members of the dominant caste in America. For generations, they could take for granted their inherited rank in the hierarchy and the benefits that accrued from it." *Id.* at 180.

103. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

the arrival of sexual and gender minorities.[104] *Lawrence* significantly improved the lot of the vulnerable, but it only recognized their partial arrival as human beings who were still possessed of inferior rank and status.[105] *Lawrence* permitted a constitutional discussion of dignity's meanings for sexual minorities while affirming heterosexual supremacy.[106]

II. DIGNITY'S NEW ARRIVALS

There is reason to assume that *Lawrence* leveled the legal landscape when it proclaimed the dignity of what Professor Tribe has described as "already misunderstood or despised individuals [sometimes cast] into grossly stereotyped roles, which become the source and justification for treating those individuals less well than others."[107] There is reason to believe that *Lawrence*'s proclamation of dignity lifted the bias enthroned by *Hardwick*.[108] *Lawrence* may even encourage us to believe that it flattened rank.[109] *Lawrence* may further encourage us to believe that it equally distributed the benefits and burdens of status between the members of the majority and the minority and that the shores of equality were broached.[110] Indeed, both *Hardwick* and *Lawrence* may invite us to imagine their possible afterlives in a world without rank.[111]

But *Lawrence* did not flatten rank. It imperfectly declared the equality of sexual minorities.[112] It imperfectly guaranteed the liberty

104. *See infra* Part II.DIGNITY'S NEW ARRIVALS.

105. *See generally* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1418–19 (2004).

106. *See generally id.*

107. Tribe, *supra* note 14, at 1896.

108. *See generally id.* at 1895–955; Klarman, *supra* note 13, at 431–89.

109. *See generally* Tribe, *supra* note 14, at 1895 *passim* (referring to equality); Klarman, *supra* note 13, at 431 *passim* ("shedding light on how Supreme Court . . . decisions influence social reform movements").

110. *See generally* Tribe, *supra* note 14, at 1895 *passim*; Klarman, *supra* note 13, at 431 *passim*.

111. *See generally* Tribe, *supra* note 14, at 1945–55 (anticipating *Lawrence's* afterlife); Klarman, *supra* note 13, at 483–89 (offering tentative predictions, given *Brown's* and *Roe's* trajectories, about *Lawrence's* afterlife).

112. *See generally* Tribe, *supra* note 14, at 1945–51 (discussing *Lawrence's* implications for same-sex marriage).

to play for vulnerable human beings. *Lawrence* provided many reasons to celebrate.[113] Although millions of lives became a little more livable the morning after *Lawrence*'s proclamation of equal dignity, *Lawrence*'s repudiation of *Hardwick* did not announce the arrival of utopia.

This part begins with an analysis of rank in *Hardwick* before evaluating the presence of rank in *Lawrence*.

A. Hardwick *and Rank*

Bowers v. Hardwick (1986) enforced traditional understandings of rank. From its statement of the question presented, *Hardwick* subordinated gay human beings. "The issue presented," declared the *Hardwick* Court, "is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[114] By framing the legal question in this way, "the majority went out of its way to reformulate the issue presented by the case in order to rebuke homosexual—and *only* homosexual—'sodomy.'"[115] As Justice Blackmun observed in his dissent in *Hardwick*, to say that the case was about "a fundamental right to engage in homosexual sodomy" was to obscure the real issue.[116] The case was about the "right to be let alone," which was "the most comprehensive of rights and the right most valued by civilized men . . . ."[117] Indeed, *Hardwick* did not discuss the fact that heterosexuals overwhelmingly engaged in acts of "sodomy."[118] The Court also did not address the fact that Georgia's sodomy statute did not specifically

113. *See generally* Franke, *supra* note 105, at 1425 ("While we celebrate the result in *Lawrence*, we should remain wary of the impulses and desires that are, in part, motivated by Justice Kennedy's reasoning.").

114. Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

115. Thomas B. Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 651 (1987).

116. *See Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting).

117. *Id.*

118. *See* Brief for Am. Psych. Ass'n & Am. Pub. Health Ass'n. as Amici Curiae Supporting Respondents, at *15–16, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); Tribe, *supra* note 14, at 1952.

target gay people.[119] The Court's framing of the issue and its approach to the facts showed that the law had been written by and for heterosexuals, whose rank was supreme.

To uphold the vintage of heterosexual rank, *Hardwick* further relied on the ancestry of such rank. The Court stated, "[p]roscriptions against [homosexuality] have ancient roots."[120] In other words, the age of precedent discriminating against sexual minorities preceded the birth of any person who might someday engage in consensual sex with another person of the same sex. *Hardwick* stated that the history of sodomy statutes from colonial times to 1986 was proof of those ancient roots.[121] "Against this background," the Court proclaimed, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[122] In saying so, the Court conflated "outlawed acts" and "human identities"—same-sex intimacy was tantamount to sodomy, and sodomy was tantamount to same-sex intimacy.[123] But "sodomy," as Professor William N. Eskridge, Jr.'s work shows, has not been static in American law.[124] Even in 1868 when the Fourteenth Amendment was ratified, it would have been "unimaginable" that "the crime against nature" would be associated with same-sex intimacy.[125] *Hardwick*'s approach to the constitutional question, Professor Eskridge has observed, is "beclouded with white lies, ahistorical generalizations, and contestable value choices masquerading as historical analysis."[126] *Hardwick* ranks heterosexual primacy above historical accuracy.

Among the most galling aspects of *Hardwick* is Chief Justice Warren Burger's escapade with the ancestry of inferior "homosexual" rank in his concurring opinion. Launching itself from the Court's evocation of "ancient roots," Chief Justice Burger's concurrence

119. *See Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting).

120. *Id.* at 192 (majority opinion).

121. *Id.* at 192–94.

122. *Id.* at 194.

123. *See* Tribe, *supra* note 14, at 1896.

124. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 18, at 2 (stating that "sodomy's tale reflects the evolution of a culture that has remained ambivalent about the morality of pleasure").

125. *Id.* at 360.

126. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 157 (1999) [hereinafter ESKRIDGE, GAYLAW].

returns to Roman law for the proposition that "[h]omosexual sodomy was a capital crime under Roman law."[127] Of course, that statement could be read to imply both that the entirety of Roman law abhorred "homosexual" sex and that evidence of such a belief is extant from all Roman leaders. Professor John Boswell, however, indicates that Roman emperors like Elagabalus, Hadrian, and Nero had male lovers with whom some were either assumed or known to be sexually passive.[128] While Roman literature deprecates the passive sexual role, it includes evocations of same-sex attraction and desire. Says Professor Boswell:

> Homosexual interest and the activities of the gay minority in Roman society occur everywhere in Latin literature. Large genital endowment among males elicits much more comment among Roman writers than unusual breast development in women, and some of the sexual preferences of prominent citizens which were apparently common knowledge in their own day could not even have been committed to print in the West during most of the twentieth century.[129]

Terms like "homosexual" and "gay" were unknown to the Romans.[130] Both epithets were invented in the nineteenth century and were met with consternation.[131] That is, heterosexuality invented both its own supremacy and the inferiority of homosexuality. Chief Justice Burger overlooked this history.

While the Chief Justice's paean to tradition does indicate that the Court relied on the Theodosian and Justinian codes for its citations to Roman law, Chief Justice Burger was not careful when referring to those sources.[132] The Chief Justice neither provided the dates for the codes (439 C.E. and 529 C.E.), nor did he take care to avoid any implication that Roman civilization was "firmly rooted in Judeao-

127. *Hardwick*, 478 U.S. at 196 (Burger, C.J., concurring).

128. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 75–76, 79, 84–85 (1980).

129. *Id.* at 80.

130. *Id.* at 42–43.

131. *Id.*

132. *See generally Hardwick*, 478 U.S. at 196 (Burger, C.J., concurring).

Christian moral and ethical standards."[133] In fact, the Chief Justice structured his concurrence in a manner that does not preclude such an inference. He talked of Judeo-Christian values, followed by a reference to Roman law.[134] After discussing Roman law, Chief Justice Burger relied on a source referring to the "Western Christian Tradition" and to Christianity in Renaissance England.[135]

Unsurprisingly, the Chief Justice's understanding of Roman law has been contested. Relying on Professor Boswell and on a translator of the Theodosian Code, a commentator has questioned the Chief Justice's implication "that gay relationships were not a legitimate facet of our classical western tradition . . . . This implication is simply false."[136] Relying on Professor Boswell's work shortly after *Hardwick* was released, Professor Anne B. Goldstein indicated that Chief Justice Burger's use of Roman law was "somewhat misleading."[137] "Sexual acts between men," the professor noted, "were not prohibited by secular law in the west until A.D. 533, when they became punishable by death, the same penalty imposed for adultery."[138]

Chief Justice Burger's devotion to rank did not arrest itself at Rome, however. The Chief Justice cited Henry VIII (1491–1547), whom he recalled with apparent approval.[139] "During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts," Chief Justice Burger wrote in *Hardwick*, "the first English statute criminalizing sodomy was passed."[140] Having, thus, already cited Christian Roman precedent condemning to death those consensually intimate with other human beings of the same sex, the Chief Justice approved of the laws of an absolute English monarch, whom Professor William N. Eskridge, Jr. indicates had "criminalized, under pain of death, 'the detestable and abominable vice of buggery

133. *See id.* at 196–97.

134. *Id.*

135. *Id.*

136. Scott Turner, Comment, Braschi v. Stahl Assocs. Co.*: In Praise of Family*, 25 NEW ENG. L. REV. 1295, 1317 n.149 (1991).

137. Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L. J. 1073, 1087 n.76 (1988).

138. *Id.*

139. *See Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring).

140. *Id.* (citing 25 Hen. VIII, ch. 6).

committed with mankind or beast.'"[141] In sum, the Chief Justice relied on the age of his preferred precedent and the rank of that precedent's authors to relegate "homosexuals" to inferior positions in the legal, social, and political orders in twentieth-century America.

The Chief Justice then went on to cite Blackstone for the proposition that "'the infamous *crime against nature*' [w]as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"[142] Recall that William Blackstone has been useful to those who have forced subordinate rank upon women.[143] Blackstone was recently resuscitated roughly twenty times by Justice Samuel Alito in *Dobbs v. Jackson Women's Health Organization* (2022) to help the Court, through Justice Alito's pen, deny women their constitutional right to control their bodies.[144] By relying on Blackstone in *Hardwick*, Chief Justice Burger implied the following ranking obtained in Anglo-American law: (1) male heterosexuals having procreative marital sex were implicitly "fit to be named."[145] So "fit to be named" was procreative, marital, heterosexual sex that it could be exempted from state regulation unless it involved rape (possibly outside marriage).[146]

Recall that current notions of sexual autonomy and consent were not shared by most men in Blackstone's time (1723–1780).[147] Responding to Blackstone, Susan B. Anthony stated that coverture, the legal subordination of a woman, her body, and her property to the supremacy of her husband, meant that "husband and wife [were] one

141. ESKRIDGE, GAYLAW, *supra* note 126, at 157.

142. *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 W. Blackstone, Commentaries *215).

143. *See* Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1198 n.113 (quoting Michele Goodwin, *Women on the Frontlines*, 106 CORNELL L. REV. 851, 888 (2021)).

144. *Id.*

145. *See Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring).

146. *See generally id.*

147. *See generally* Lisa Forman Cody, *"Marriage is No Protection for Crime": Coverture, Sex, and Marital Rape in Eighteenth-Century England*, 61 J. BRIT. STUD. 809, 812 (2022) ("Before the late twentieth century, there were no laws that protected legally wed wives from their husbands' compelling them to have heterosexual intercourse.").

and that one [was] the husband."[148] In Blackstone's eighteenth-century England, understandings of gender and sexuality may have changed over the course of the century to give married women more rights, thanks to lawsuits by wealthy women.[149] Even with such changes, however, English women remained subject to the supremacy of men and the institutions created by and for men, which did not always provide married women with a remedy against cruel, cunning, licentious, profligate, and violent husbands.[150] Indeed, some men seem to have thought little of infecting their wives—and the children born as a result—with venereal diseases.[151] Even after his entombment in England, Blackstone's specter "was extremely influential throughout the United States."[152] Among those who believed, and those who still believe, in the supreme rank of heterosexual men, Blackstone can still be a potent ally precisely because he helps them assign and enforce inferior rank.[153]

With Blackstone's help, Chief Justice Burger placed two human beings of the same sex who engaged in acts of consensual sexual pleasure below every sexually active heterosexual man, and below heterosexual men who sexually assaulted women ("'deeper malignity' than rape").[154] While it was implicit that the sexual violence of heterosexual men against women could be mentioned ("fit to be named"), the fact of two human beings of the same sex engaging in private acts of consensual sex could not since Blackstone had declared that same-sex intimacy, "'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named,'" warranted moral and

148. ELIZABETH CADY STANTON & SUSAN B. ANTHONY, II THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: AGAINST AN ARISTOCRACY OF SEX 572 (Ann D. Gordon ed., 2000) (1866-1873), *quoted in* Cody, *supra* note 147, at 810.

149. *See* Cody, *supra* note 147, at 812–34.

150. *See id.*; *see also* Rudolph, *Dignity and the Promise of Conscience*, *supra* note 1, at 343–47.

151. *See* Cody, *supra* note 147, at 819–20.

152. Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389 (2000).

153. *See generally* Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1198 n.113.

154. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

legal condemnation.[155] As I have stated elsewhere, *Hardwick* can "be read as a stentorian anthem of heterosexual supremacy, even in the home."[156]

As I conclude this section, it is worth noting that at least some of the Chief Justice's citations for his understanding of the inferior rank of "homosexuals" in 1986 appear to have echoed an especially virulent amicus brief by the Rutherford Institute and the Rutherford Institutes of several states from 1985.[157] In 1985, the organizations identified themselves as "non-profit religious corporations . . . . The Rutherford Institute undertakes to participate in significant cases relating to First Amendment religious freedom and the preservation of the traditional moral values of this society."[158] Professor Sylvia A. Law has observed that the Rutherford Institute was one of "[o]nly two groups [that] filed amicus curiae briefs in support of Georgia's right to impose criminal sanctions on gay and lesbian sexual relations; both relied upon a claimed social need to preserve the privileged position of the heterosexual, monogamous patriarchal family."[159]

It is noteworthy that the Rutherford Institute's 1985 amicus brief included several references to sources appearing to sanction the killing of "homosexuals." This is not to say that the brief adopted or advocated such a posture. It *is* to say, however, that sources advocating the killing of homosexuals figured in the brief's justification for the subordination of "homosexuals." Those sources were cited for the proposition that they either "unequivocably [*sic*] condemn[ed] homosexual sodomy" (quotation 1 below), or they "condemned the practice of sodomy" (quotations 2, 3, and 4 below).[160] The quotations are as follows:

155. *See id.*

156. Rudolph, *We Have the Right to Play*, *supra* note 1, at 405.

157. *See* Brief of Rutherford Inst. & Rutherford Insts. of Ala., Conn., Del., Ga., Minn., Mont., Tenn., Tex., and Va., as Amici Curiae Supporting Petitioner, at *24–26, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Brief of Rutherford Inst.].

158. *Id.* at *5.

159. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 219 (1988).

160. Brief of Rutherford Inst., *supra* note 157, at *24, *25.

> Under the Mosaic Law, it was **a capital offense** for a man to lay [*sic*] with a male as with a female. Leviticus 18:22; 20:13.[161]
>
> Around the end of the 13th Century, two complications, *Britton* and *Fleta*, described sodomy as **a capital offense**. *See* 3 W. Russell, *A Treatise on Crimes and Misdemeanors* 698 (1865 ed.) (1st ed. 1819); Bailey, *supra*, at 145–46.[162]
>
> In the third part of his *Institutes,* Sir Edward Coke stated that sodomy was 'against the ordinance of the Creator and order of nature.' He also stated that **the method of execution should be by hanging**. 3 E. Coke, *Institutes* 58 (1644).[163]
>
> Later, Sir William Blackstone discussed the elements of and **method of execution** for the 'crime against nature' which he characterized as 'of a still deeper malignity than rape.' 4 W. Blackstone, *Commentaries* 215–16.[164]

The amicus brief also cited Justinian, an opinion referring to Henry VIII's laws against sodomy, and it cited the Supreme Court's own precedent for the proposition that the Court had "construed language of the Immigration and Nationality Act barring '[a]liens afflicted with psychopathic personality' to include 'all homosexuals and other sex perverts.'"[165] Given the organization's citations in its 1985 brief, its view at the time appears to have been that the rank of "homosexuals" was below that of heterosexuals. As is implied by his use of citations such as "[h]omosexual sodomy was a capital crime under Roman law," Chief Justice Burger appears to have espoused similar views. [166]

161. *Id.* at *24–*25 (emphasis added).

162. *Id.* at *26–*27 (emphasis added).

163. *Id.* at *27 (emphasis added).

164. *Id.* (emphasis added).

165. *Id.* at *33, *34.

166. Bowers v. Hardwick, 478 U.S. 186, 196 (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

B. Lawrence *and Rank*

Enter *Lawrence*, seventeen years later, to repudiate *Hardwick*. *Lawrence* appears to have equalized the rank of heterosexuals and "homosexual persons" as it expanded the constitutional purview of liberty, a watchword for dignity.[167] To do so, *Lawrence* cited *Griswold v. Connecticut* for its protection of privacy in the "marital bedroom."[168] *Lawrence* then cited *Eisenstadt v. Baird* for its reading of *Griswold* as a case that upheld "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[169] *Lawrence* next relied on *Roe v. Wade* for its extension of liberty to women's constitutional right to control their bodies, which liberty—although not absolute—extended to the places such control was exercised.[170] After *Roe*, *Carey v. Population Services International* extended *Griswold*'s protections to the distribution of contraceptives to those under sixteen.[171]

The *Lawrence* Court criticized *Hardwick* for its reductive reading of the liberty interest.[172] "To say that the issue in [*Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[173] Hence, *Lawrence*'s conclusion, that "homosexual persons" enjoyed the Federal Constitution's liberty protection in the bedroom where "homosexual persons" "retain[ed] their dignity as free persons,"[174] thus, appears to equate the rank of the gay person to that of the heterosexual.

To arrive at such equivalence of rank, Justice Anthony Kennedy, the author of *Lawrence*, rejected *Hardwick*'s reliance on the ancestry of legal references that permitted the *Hardwick* Court to

167. *See generally* Tribe, *supra* note 14, at 1895 *passim* (referring to equality); Klarman, *supra* note 13, at 431 *passim*.

168. Lawrence v. Texas, 539 U.S. 558, 564–65 (2003).

169. *Id.*

170. *Id.*

171. *Id.* at 566.

172. *Id.* at 566–67.

173. *Id.* at 567.

174. *Id.*

relegate "homosexual persons" to the inferior rank.[175] While sodomy laws in the United States disapproved of same-sex intimacy, those laws did not target gay people "but instead sought to prohibit nonprocreative sexual activity more generally."[176] Sodomy laws were gap fillers targeting predation and power imbalances.[177] In 1955, the Model Penal Code recommended decriminalizing sodomy since the conduct did not harm others.[178] Criminalizing sexual intimacy between men resulted in arbitrary enforcement and "thus invited the danger of blackmail."[179] Only in the 1970s did same-sex intimacy become the target of state legislatures, and only nine states "ha[d] done so."[180] The trend in the states was decidedly against targeting gay people in the privacy of the bedroom, even after *Hardwick*.[181] Abroad, the enforcement of European Union law against the United Kingdom in a case about same-sex intimacy undermined the claim in *Hardwick* that protecting same-sex intimacy was incompatible with Western Civilization.[182] In sum, in *Lawrence*, the more recent equalization of rank in Western Civilization trumped ancient understandings of rank.

Justice Kennedy appears to have implied in *Lawrence* that Ancient understandings of rank had permitted the Justices in *Hardwick* to constitutionalize their own "personal predilection[s]" regarding

175. *See id.* at 568–71 (stating that early sodomy laws focused on preventing "nonprocreative sexual activity" among "men and minor girls or minor boys" and "relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals." The *Lawrence* court furthered this by stating that "it [is] difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults.").

176. *Id.* at 568.

177. *Id.* at 569 ("Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, [and] relations between adults implicating disparity in status.").

178. *Id.* at 572.

179. *Id.*

180. *Id.* at 570.

181. *Id.* at 570 ("Post-[*Hardwick*] even some of these states did not adhere to the policy of suppressing homosexual conduct.").

182. *See id.* at 573 ("The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights.").

rank, which, more recent trends and precedent had undermined.[183] Justice Kennedy embraced *Planned Parenthood v. Casey* for the proposition that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[184] The Justice cited *County of Sacramento v. Lewis* for its insight that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[185] Justice Kennedy leaned again on *Casey* for its reference to "personal dignity and autonomy."[186] He relied on *Romer v. Evans*, decided roughly ten years after *Hardwick*, for its evocation of equal treatment.[187] He then held for the Court that *Hardwick*'s "continuance as precedent demeans the lives of homosexual persons."[188] By using the word "demean," *Lawrence* implied that *Hardwick* "lower[ed the] condition, status, reputation, or character" of gay people.[189] *Hardwick* had lowered the rank of gay people at a time when Western Civilization increasingly considered us the legal equals of heterosexuals—at least in some regards.[190]

Finally, Justice Kennedy implicitly rejected Chief Justice Burger's reliance on Blackstone in *Hardwick*, who had implied that the rank of "homosexuals" was below that of heterosexual criminals. Texas' criminalization of same-sex intimacy, Justice Kennedy indicated in *Lawrence*, legally converted gay people into sex offenders required to register as such in some states, which affected employment.[191] Although the Court had to be careful when overturning constitutional precedent like *Hardwick*, the supreme constitutional rank of such precedent did not outweigh concerns regarding the uncertainty

183. Stoddard, *supra* note 115, at 656.

184. *Lawrenc*e, 539 U.S. at 571 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

185. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

186. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

187. *Id.* at 574–75.

188. *Id.* at 575.

189. *Demean*, OXFORD ENGLISH DICTIONARY (3d ed. 2022).

190. *Lawrenc*e, 539 U.S. at 573.

191. *Id.* at 575.

left in its wake.[192] Since the facts of *Lawrence* neither involved harm to others nor charges of public immorality, *Hardwick* had to fall.[193]

Justice Kennedy also elevated Justice Stevens' dissenting opinion in *Hardwick* to constitutionally binding authority in *Lawrence*.[194] Justice Stevens' dissent had first noted that just because those holding supreme rank had traditionally abhorred certain conduct did not immunize their belief about their supremacy from constitutional attack.[195] Second, constitutional guarantees of liberty for intimate conduct were not the sole preserve of those traditionally holding supreme rank because "this protection extends to intimate choices by unmarried as well as married persons."[196] Against this background, then, it might be reasonable to conclude that *Lawrence* ushered in the age of "equal dignity"—equal rank.

Remark, however, that while *Lawrence* is indeed a landmark decision, it only held that gay people possessed equal rank when we had sex in the privacy of our bedrooms. As the Supreme Court of Iowa put it a year after *Lawrence* was released, "[i]t is important to observe that last year's landmark United States Supreme Court decision in *Lawrence v. Texas* . . . legalized the practice of homosexuality and in essence made it a protected practice under the Due Process clause of the United States Constitution."[197] The Supreme Court of Iowa's use of the phrase "the practice of homosexuality" may have been a reference to *Hardwick*, in which Michael Hardwick had courageously identified himself as a "practicing homosexual."[198] Hardwick had openly identified himself as such when, as the Washington Post stated

192. *See id.* at 577 ("The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.").

193. *Id.* at 578.

194. *Id.* at 577–78.

195. Bowers v. Hardwick, 478 U.S. 186, 216 (Stevens, J., dissenting) (stating that "[f]irst, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.").

196. *Id.* (Stevens, J., dissenting).

197. McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004) (rejecting a gay father's argument that the magistrate had impermissibly considered the father's sexual orientation in a custody proceeding).

198. *Hardwick*, 478 U.S. at 188.

after interviewing him, he lived "in a Falwellian era of Rambo, Eastwood[,] and AIDS," "the new symbol of gay rights denied in a straight world" who had put his case before a "predictably conservative Reagan court."[199] *Lawrence* implicitly held that Michael Hardwick, had he lived to see it, would have enjoyed the rank that heterosexuals had enjoyed, *but only in the privacy of his bedroom*.

Remark, too, that in its own telling, *Lawrence* did not equalize the rank of gay people to the rank of heterosexuals outside the bedroom. Justice Kennedy explained that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[200] Of course, the Court generally only rules on the issue before it, so it might be unreasonable to expect it to equalize rank in every facet of a gay person's life.[201] It is also true that Justice Antonin Scalia predicted in his dissenting opinion in *Lawrence* that "the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter' . . . . Do not believe it."[202] Indeed, Justice Scalia's fears would be realized in *Obergefell v. Hodges*.[203] As Justices Sotomayor, Kagan, and Breyer wrily observed in their dissent from the *Dobbs* opinion (debasing women's rank as a constitutional matter), in *Lawrence*, Justice Scalia entered into the

199. Art Harris, *The Unintended Battle of Michael Hardwick*, WASHINGTON POST (Aug. 20, 1986), https://www.washingtonpost.com/archive/lifestyle/1986/08/21/the-unintended-battle-of-michael-hardwick/73fb94db-2b0f-4bf8-8220-aa5070e996c6.

200. Lawrence v. Texas, 539 U.S. 558, 578; *see* Tribe, *supra* note 14, at 1945–51 (discussing *Lawrence*'s implications for same-sex marriage); Klarman, *supra* note 13, at 484–86 (same).

201. *See generally* Ernest H. Schopler, Annotation, *What Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised by the Parties*, 42 L. ED. 2D 946 (2012) (providing cases where the Supreme Court would not rule on issues that were not properly raised by the parties).

202. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting); *see* David S. Cohen, *Silence of the Liberals: When Supreme Court Justices Fail to Speak Up for LGBT Rights*, 53 U. RICH. L. REV. 1085, 1113 (2019) (regarding Justice Scalia's evergreen hostility to rights for sexual minorities, stating that "[p]icking up from Chief Justice Burger's inauspicious start, Justice Scalia has since dissented in every single case directly raising the issue of gay rights and used those dissents as a platform for writing antigay broadsides into the *United States Reports*").

203. *See generally* Obergefell v. Hodges, 576 U.S. 644, 713–20 (2015) (Roberts, Scalia, & Thomas, JJ., dissenting).

constitutional "book of prophets" given his prediction regarding where the *Lawrence* Court's logic would lead.[204] And yet, for all that, *Lawrence* did not announce the equal rank of members of the LGBTQI+ community outside the bedroom.

So, what, then, did *Lawrence* declare about the rank of gay people? While proclaiming the equal constitutional rank of same-sex intimacy in the privacy of the bedroom, *Lawrence* did not declare that those attracted to others of the same sex enjoyed the same constitutional rank or status traditionally reserved for heterosexuals outside the bedroom. *Lawrence* implied that dignity was related to freedom and liberty, but, for gay people, such freedom and liberty were constitutionally protected solely when expressed in the privacy of the bedroom.[205] Equal liberty meant equal liberty in the privacy of the bedroom. As Professor Katherine M. Franke has observed, "in *Lawrence* the Court relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly assumed."[206] *Lawrence*'s understanding of liberty is "geographized and domesticated" because "[r]epeatedly, Justice Kennedy territorializes the right at stake as a liberty to engage in certain conduct in private."[207]

Lawrence, thus, did not announce the constitutional equality of rank of heterosexuals and homosexuals. It announced a very particular vision of intimacy, which some courts in *Lawrence*'s wake may have understood "to impose absolutely no check on the legal enforcement of heteronormative preferences."[208] Professor Franke cautions that *Lawrence* may, in fact, encourage deference to a heteronormative default by encouraging people to embrace normative visions for their intimate lives that mirror a heteronormative position that may not authentically be their own.[209] *Lawrence*, Professor Franke warns, "is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo-and hetero-sex/intimacy, while at the same time

204. Dobbs v. Jackson Women's Health Org., 597 U.S. 223, 386–87 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

205. *See Lawrenc*e, 539 U.S. at 565, 567.

206. Franke, *supra* note 105, at 1400.

207. *Id.* at 1400, 1403.

208. *Id.* at 1413.

209. *Id.* at 1418–19.

rendering all other zones more dangerous for nonnormative sex."[210] *Lawrence* may constrict the sexual expression of non-traditional human beings, "regardless of orientation."[211] To apply the language of my argument, *Lawrence* deploys the language of dignity, but its deployment of dignity does not announce the equal constitutional rank of those intimate with others of the same sex in every sphere of their lives. *Lawrence* ranks traditional heteronormative expressions of intimacy above non-traditional ones.

Enter *Obergefell v. Hodges*, more than a decade after *Lawrence*. For all of its sweeping rhetoric about dignity and liberty, *Obergefell* did not declare the equal rank of gay people in every respect.[212] In both *Lawrence*'s and *Obergefell*'s wakes, lower courts acknowledged the decisions while refusing to equalize the rank of gay people in other aspects of American life. Specifically, in 2019, sixteen years after *Lawrence* and four years after *Obergefell*, the Middle District of Pennsylvania cited *Lawrence* for the proposition that "the Supreme Court stated that homosexuals are 'entitled to respect for their private lives . . . still retain their *dignity* as free persons."[213] The district court then concluded, a year before *Bostock v. Clayton County, Ga.*, that an employment-discrimination claim had to be dismissed because the Third Circuit "remain[ed] clear sexual orientation [was] not covered by the protections of Title VII."[214] Further, a 2020 opinion from the Eastern District of California, seventeen years after *Lawrence* and five years after *Obergefell*, appears to have misread *Lawrence* by aligning that landmark case solely with the traditional supreme rank assigned to heterosexuals.[215] The Eastern District of California stated that "the constitutional right to privacy has been recognized to prohibit some

210. *Id.* at 1415.

211. *Id.* at 1416.

212. *See generally* Obergefell v. Hodges, 576 U.S. 644, 656, *passim* (2015) (providing that a State has "no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State").

213. Troutman v. Hydro Extrusion USA, LLC, 388 F. Supp. 3d 400, 404 (M.D. Pa. 2019).

214. *Troutman*, 388 F. Supp 3d at 404. *See* Bostock v. Clayton County, Ga., 590 U.S. 644 (2020) (holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination based on sexuality or gender identity).

215. *See generally* Gleason v. Voong, No. 2:19-cv-0621-WBS-EFB P, 2020 WL 703987, at *2 (E.D. Cal. Feb. 12, 2020).

governmental intrusions into intimate personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education—decisions 'central to personal dignity and autonomy.'"[216]

Indeed, even in *Lawrence*, some of the most audible voices on the Court were committed to the enforcement of inferior rank. They stated with approval in their dissenting opinions that "[s]tates continue[d] to prosecute all sorts of crimes by adults 'in matters pertaining to sex': prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced 'in the past half century,' in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy."[217] In other words, for them, the "homosexual" occupied the same debased and degraded legal rank as the heterosexual who had sexual intercourse with a family member, the unfaithful heterosexual, the person who viewed immoral materials, and the individual who committed heinous crimes against children.

Observe, too, that in mentioning the dignity of the "homosexual person," *Lawrence* tells us very little about the two human beings whose rank it upholds.[218] As such, the case likely embodies what Professor Franke has referred to in a different context as "the palimpsestic presence of *Bowers*."[219] In *Bowers v. Hardwick*, the "practicing homosexual" brought suit when officers walked in on him and his sexual partner engaged in oral sex.[220] The "practicing homosexual" later argued that he was constitutionally entitled to protection.[221] The other man was a married teacher, who is said to have told the officer who walked in on him and the "practicing homosexual," "[p]lease don't tell my wife . . . . I'll lose my teaching job."[222] Neither *Hardwick* nor *Lawrence* (which mentions dignity) helps us understand whether or why a married man is a "homosexual" or a "homosexual person."[223] Neither case helps us understand whether the married man

216. *Id.* at *2.

217. Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

218. *Id.* at 575.

219. Franke, *supra* note 105, at 1401.

220. Bowers v. Hardwick, 478 U.S. 186, 187–88 (1986).

221. *Id.*

222. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 18, at 233.

223. *Lawrence*, 539 U.S. at 575.

fell from the heights of procreative marital supremacy to a rank below that of a male heterosexual rapist because he was sexually involved with a man. Or might it be that only the self-identified "practicing homosexual" is the true "homosexual" because he was in the role traditionally assumed to be a feminine role—the one who pleasured the active (true) male who happened to be married?[224]

Lawrence holds that "homosexual persons" "may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their [constitutional] dignity as free persons."[225] But in "a straight world" that decides cases like *Lawrence* and holds our lives in the balance, at what point does one acquire the rank or (in) dignity of a "homosexual person?"[226] There is a hint in Justice Kennedy's citation to *Romer* that individuals could be identified as "homosexuals, lesbians, or bisexual either by orientation, conduct, practices or relationships . . . ."[227] But that tells us nothing about how *Lawrence* itself defines those epithets since Justice Kennedy is merely reproducing the language of Colorado's constitutional amendment targeting members of the LGBTQI+ community, which Justice Kennedy, writing for the Court, struck down in *Romer*.[228] Justice Kennedy is citing *Romer* for its relevance under the Fourteenth Amendment's Equal Protection Clause.[229]

As *Lawrence* often reads like an allergic reaction to *Hardwick*, *Lawrence* implies that the opposite of *Hardwick* is, in fact, true when it comes to the rank of "homosexual persons."[230] But *Lawrence* leaves many additional questions unanswered about the legal assignment of rank to such "homosexual persons."[231] Does one obtain the legal rank

224. *See generally* ESKRIDGE, GAYLAW, *supra* note 126, at 163.

225. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

226. See Harris, *supra* note 199, for a discussion about Michael Hardwick's story, being named "the new symbol of gay rights denied in a straight world."

227. *Lawrence*, 539 U.S. at 574 (internal citations omitted) (quoting Romer v. Evans, 517 U.S. 620, 624 (1996)).

228. *Romer*, 517 U.S. at 624, 635–36 (majority opinion).

229. *See Lawrence*, 539 U.S. at 574–75 (discussing *Romer* and why the Equal Protection Clause is inapplicable in *Lawrence*); *Romer*, 517 U.S. at 635–36.

230. *See Lawrence*, 539 U.S. at 578 ("[*Hardwick*] was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

231. *Lawrence*, 539 U.S. at 575.

of a "homosexual person" at birth? When one first realizes one's sexual attraction to another person of the same sex? Does one obtain the legal rank of a "homosexual person" before, during, or after one's first sexual encounter with another person of the same sex? Must one publicly identify as a "practicing homosexual?" Must the other partner be a "practicing homosexual" as well? How much should both have practiced? Does either need the official imprimatur of a "heterosexual person" to know that person is really a "homosexual person?" Before giving the official imprimatur, does a "heterosexual person" use their expertise to verify homosexuality? Or is "a practicing homosexual['s]" word accepted without verification because no one would voluntarily assume the rank of a vilified "homosexual" or "homosexual person"—a rank traditionally worse than that of male heterosexual criminals?

Of course, these questions appear irrelevant because no matter their answers, *Hardwick* and *Lawrence* care broadly about classes of "heterosexuals" and "homosexuals" and whether the rank traditionally enjoyed by the former in the bedroom can be extended to the latter without state intrusion.[232] Indeed, while both cases involve gay men, the specific encounters in *Hardwick* and *Lawrence* may amount to a single sexual encounter with another person of the same sex.[233] Given that both cases sharply contrast heterosexuality with homosexuality, they suggest that, even in the absence of a "practicing homosexual's" identification as such, it only takes one act to be assigned the rank of a "homosexual person." Chief Justice Burger's bilious concurrence in *Hardwick*, with its selective appeals to religion and antiquity, may suggest that as much as a single non-heterosexual *thought* carries the sinful whiff of *homosexual* rank. As Michael Hardwick said after *Hardwick* was released, "I just cried—not so much because I had failed

232. *See* Bowers v. Hardwick, 478 U.S. 186, 189 (1986) ("[W]e granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment."); *Lawrence*, 539 U.S. at 562 (stating that "[t]he question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct").

233. *See* IRONS, *supra* note 18, at 395–96 (providing Michael Hardwick's recollection of the events that led to his arrest); *see also* Tribe, *supra* note 14, at 1904 (referencing the *Lawrence* Court questioning "what kind of relationship was it? Apparently, it was quite fleeting, lasting only one night and lacking any semblance of permanence or exclusivity.").

but because to me it was frightening to think that in the year of 1986 our Supreme Court, next to God, could make a decision that was more suitable to the mentality of the Spanish Inquisition."[234]

Finally, one could be forgiven for reading *Lawrence* and thinking that the case has nothing to do with race and rank. The legal issue in *Lawrence* has nothing to do with race, of course, but the facts possess a racial component. In *Lawrence*, Justice Kennedy tells us that Houston police "officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace."[235] Justice Kennedy later reveals that the case involved "anal sex."[236] While irrelevant to the legal question and its analysis, it is relevant to a discussion of rank and status that a White man and an African American man enjoyed "anal sex," one possessing a higher rank than the other.[237]

That Justice Kennedy omitted the men's race and the details of their sexual encounter could be for several reasons.[238] Discussing those details may have risked alienating votes on the Court as well as those in the court of public opinion who, no matter their sexual orientation, did not care to know such details. But gay sex is different from straight sex in at least one aspect—two human beings of the same sex intimately express their attraction to (and, sometimes, love for) each other. And when those two human beings are from different races, their emotional and sexual vulnerability take on an additional hue given the fraught history of interracial sex.[239] That two human beings from

234. IRONS, *supra* note 18, at 400.

235. *Lawrence*, 539 U.S. at 563.

236. *Id.*

237. *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 18, at 300 ("Eubanks was well aware . . . that a complaint that an armed black man was threatening white residents of a gated apartment complex would provoke a prompt police response.").

238. *See, e.g.*, Tribe, *supra* note 14, at 1915 (explaining that in *Lawrence*, the Court's failure to openly discuss gay sex "reflects the Court's recognition that it was not attaching rights to spatial intersections or to configurations of body parts; instead, the Court was protecting the right of adults to define for themselves the borders and contents of deeply personal human relationships.").

239. *See generally* RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 12–13 (2008) ("Under the one-drop rule, any discernible African ancestry stamps a person as 'black.' A principal purpose of this doctrine was to address 'the problem' of children born of interracial sex who would bear a mixture of physical

different races break rank and express their desire (and sometimes love) for each other can be a courageous, self-affirming, and revolutionary act.[240] Again, it could be that race was irrelevant in *Lawrence*. Indeed, if race had been relevant, rank based on race appears to have been flattened as a constitutional matter, possibly making its evocation gratuitous and even inflammatory.[241]

Nevertheless, suppressing a discussion of race and sex in *Lawrence* obscured the complexities of rank among "homosexual persons."[242] Among "homosexual persons," rank is rampant, ravaging parts of the community.[243] Whiteness is often ranked supreme.[244] Men

markers inherited from ancestors situated on different sides of the race line."); RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY 262 (2011) ("[G]iven the obsessions that have surrounded interracial sex and marriage, . . . I'd like to know what [President Obama] thinks about the prospect of his daughters perhaps dating (or marrying) white boys (or girls). Will he be indifferent to the race of their romantic companions? If so, why so? Would he prefer them dating blacks? If not, why not?").

240. See generally Loving v. Virginia, 388 U.S. 1, 12 (1967), for a holding in a case involving Mildred Jeter, an African-American woman, and Richard Loving, a White man, both of whom faced discrimination under a Virginia statute for their interracial marriage, that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."

241. ESKRIDGE, GAYLAW, *supra* note 126, at 163.

242. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

243. *Id.*

244. *See generally* Christopher T. Conner, *How Sexual Racism and Other Discriminatory Behaviors are Rationalized in Online Dating Apps*, 44 DEVIANT BEHAVIOR 126, 126–39 (2022) (examining how racism and heteronormative aesthetic standards prevail in online dating among gay men and how gay men justify these); Lawrence Stacey & TehQuin D. Forbes, *Feeling like a Fetish: Racialized Feelings, Fetishization, and the Contours of Sexual Racism on Gay Dating Apps*, 59 J. SEX RSCH. 372, 374 (2022) (indicating that "both quantitative and qualitative data" show that racism among gay men allows White men to occupy the position "atop the hierarchy of desirability among sexual minority men," and the same data showed that "Black and Asian men were disproportionately rejected relative to White men, who were desired by other White men and racial minorities . . . .").

are often ranked supreme.[245] Masculinity is often ranked supreme.[246] "Penetrative preferences" are often primordial, and partners preferring the "masculine," "active," or "top" role sexually are often ranked supreme.[247] Black men are hypersexualized.[248] Asian men are cast as sex objects.[249] Latinx men similarly face sexual racism.[250] In other words, rank is not only a legal concern, but, it is also more broadly, a social and even political concern.

Finally, rank should be an anodyne affair—a matter of assigning a number or position to facilitate order for people, places, and things.[251] *Hardwick* assigned the highest number or position to heterosexuals, while assigning "homosexuals" the lowest rank, throwing a gulf

245. *See* Lindsey E. Blumell & Nathan Shae Rodriguez, *Ambivalent Sexism and Gay Men in the US and UK*, 24 SEXUALITY AND CULTURE 209, 223 (2020) (stating that "[e]ven if gay men are not as high on the hierarchy as straight men, they attempt to be higher on the hierarchy than women").

246. *See id.* at 213 (stating that "[h]egemonic masculinity manifests in gay men thorough[sic] a process called mascing, where gay men reinforce their own masculinity by policing their rhetoric and actions, as well as maintaining masculine norms by seeking out masculine partners").

247. See Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under* Price Waterhouse, 123 YALE L. J. 714, 717, *passim* (2013), for a discussion on the importance of "penetrative preferences" in same-sex intimacy.

248. *See* Stacey & Forbes, *supra* note 244, at 373 (finding that "Black users and other users of color of these [dating] apps reported instances of feeling fetishized, sought after for the perceived size of their penis, their skin color, or other attributes"); HAN, *infra* note 249, at 45–57 (discussing how men from minority communities are often required to appeal to the sexual fantasies of White gay men based on racist stereotypes).

249. *See generally* Chong-suk Han, *No Fats, Femmes, or Asians: The Utility of Critical Race Theory in Examining the Role of Gay Stock Stories in the Marginalization of Gay Asian Men*, 11 CONTEMP. JUST. REV. 11, 17–21 (2008) (recounting the experience of a gay Asian man who states that "[t]he pain of being a gay Asian, however, is not just the pain of direct discrimination but the pain of being negated again and again by a culture that doesn't acknowledge [his] presence"); C. WINTER HAN, RACIAL EROTICS: GAY MEN OF COLOR, SEXUAL RACISM, AND THE POLITICS OF DESIRE 11 (describing "sexual racism" among gay men, which often compels gay Asian men to conform to gay White men's sexual fantasies regarding them).

250. *See* HAN, *supra* note 249 at 30 *passim* (describing, in part, situations where Latino men have felt "out of place").

251. *See infra* discussion Section III.*A*.

between heterosexuals and "homosexuals."[252] Chief Justice Burger's concurrence implied the existence of derivatives of that supreme position or number. The Chief Justice's concurrence implicitly reserved a derivative position of supreme heterosexual rank for male heterosexual rapists, whom the concurrence ranks above every "homosexual."[253] Rank, in *Hardwick*, is enforced in an astonishing constitutional diatribe against a disfavored minority.[254] *Hardwick* enforces rank as part of a panegyric on the ancientness of supreme heterosexual rank.[255] As it does so, *Hardwick* does not engage in an evenhanded discussion of rank, its origins, and how it displaces the possibility of genuine discussion and understanding.[256] *Hardwick*'s evocation of rank turns an implicit focus on number and position into constitutional arguments regarding power and privilege that are binding.[257] By doing so, *Hardwick* desecrates everyone beneath the supreme rank, all of whom become even more vulnerable the further their assigned rank is from the supreme position or number.[258]

As for *Lawrence*, it engages with *Hardwick* at length and offers a more contemporary understanding of gender, sex, and sexuality to supplant *Hardwick*'s, which would have us believe that the ancient is eternal.[259] There may indeed be something laudable about *Lawrence*'s references to "heterosexual persons" and "homosexual persons," suggesting that rank should attend to "persons," not superiors and

252. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that the majority sentiments regarding the morality of homosexuality should not be declared inadequate).

253. *See id.* at 196–97 (Burger, C.J., concurring) (providing that proscriptions against sodomy have ancient roots in laws that held rapists in higher regard than those practicing homosexuality).

254. *See id.* at 191–96 (majority opinion).

255. *See id.* at 192.

256. *See* Stoddard, *supra* note 115, at 656.

257. *See* Lawrence v. Texas, 539 U.S. 558, 566–79 (2003).

258. *See generally* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 435 (2017) (stating that "[i]n the years between [*Hardwick*] and *Lawrence v. Texas*, LGBT[Q] parents lost custody of their children, were fired from their jobs, and were made targets of private discrimination solely because of their sexual orientation.").

259. *See Lawrence*, 539 U.S. at 569, 574, 575 (providing that, regarding those decisions found to be central to personal dignity, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do").

inferiors.[260] But even as it is the harbinger of a momentous constitutional change, *Lawrence* enforces rank. The case relies on language ("homosexual persons") that, even when the case was decided, was falling out of use except in very particular senses.[261] *Lawrence* also provides a gaunt understanding of the two "homosexual persons" at the heart of the case and at the heart of their constitutional quest for equal rank.[262] *Lawrence* tells us little about the community and communities from which the two human beings who have been desecrated come.[263] *Lawrence* reminds those two human beings that the case only brings equal rank to their bedrooms and to no other place. In other words, they are not protected from the state's heterosexual power outside their bedrooms.

Such displays of power are about status, to which I now turn.

III. DIGNITY'S LIMITATIONS

Part I has shown that dignity's new arrivals face an easier, albeit unequal landscape. Their rank has been deemed equivalent to that of heterosexuals in the bedroom. Chief Justice Burger's concurrence in *Hardwick* implied that heterosexuals were ranked supreme, below them were criminal heterosexuals, and below all heterosexuals of almost every stripe were "homosexuals."[264] Justice Kennedy's *Lawrence* opinion refuted that assertion by implicitly pointing to the misattribution of rank in *Hardwick*, relying on trends in American and

260. *See id.* at 567 (holding that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice").

261. *See generally* Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352 (U.S.), at *50 (mostly reserving "homosexual" for the official names of statutes, statutory definitions, case citations, and academic and scientific materials; otherwise using "gay" or "lesbian" or "bisexual"); Brief for Am. Psych. Ass'n, Am. Psych. Ass'n, Nat'l Ass'n of Soc. Workers & Tex. Chapter Nat'l Ass'n of Soc. Workers Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152338 (U.S.), at *30 (same, but also including more references to "bisexual" and a few to "transgender").

262. *See Lawrence*, 539 U.S. at 562–63 (providing an in-depth summary of the facts and parties involved).

263. See generally Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1173–212, for a discussion on desecration.

264. *See* Bowers v. Hardwick, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

European law. This persuaded the Court that equal rank in the privacy of the bedroom required the Court to reject state regulation of consensual intimacy in that space.[265]

Recall that rank only tells us about functions, names, placements, positions, and titles.[266] It does not tell us about each position's power, privileges, and limitations.[267] It does not tell us why some take their position for granted and are displeased when others want the same for themselves.[268] Rank does not explain why some expend so much energy on maintaining or improving their position.[269] *Hardwick* can be read to state the following about rank: "[w]e are heterosexual. Heterosexuals have always been supreme. We remain supreme." Comparatively, *Lawrence* can be read to state the following: "[w]e are heterosexual. Heterosexuals may have always been supreme. 'Always have been' need not mean 'forever.'" Such statements only indicate that to be heterosexual has been to traditionally exercise a hereditary claim to the first position, the highest number, the prime placement, the supreme title, and the foremost rank. "1. Heterosexual." is, thus, a statement devoid of meaning since the statement does not tell us about the normative power attending heterosexual primacy. "1. Heterosexual." is a statement needing an argument, and that argument is status. Status also explains why dignity continues to retain its traditional meanings. This part begins with an evaluation of status in *Hardwick* followed by an evaluation of status in *Lawrence*.

A. Hardwick *and Status*

Recall that *Hardwick* concludes that heterosexual rank and status are constitutionally inviolable. The case tells Michael Hardwick and the Court of Appeals for the Eleventh Circuit that they erred when relying on precedent governing the following: (1) contraception (*Griswold*, *Eisenstadt*); (2) the education and raising of children (*Carey*, *Pierce*, *Meyer*); (3) familial relationships (*Prince*); (4)

265. *Lawrence*, 539 U.S. at 573–79.

266. *See supra* discussion Section I.*B.*

267. *See supra* discussion Section I.*B.*; *see also* RIGGSBY, *supra* note 100, at 58.

268. *See generally supra* discussion Section I.*B.*; *see also* RIGGSBY, *supra* note 100, at 99 ("Roman society was one in which it could be openly asserted that some people were simply better than others . . . .").

269. *See generally supra* discussion Section I.*B.*

marriage (*Loving*); (5) procreation (*Skinner*); and (6) women's control of their bodies (*Roe*).[270] Michael Hardwick's error, the Court reasoned, was that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[271] In other words, contraception implicitly was the preserve of the heterosexual, as was procreation, the education and rearing of children, family relationships, marriage, and women's control of their bodies. Heterosexual monopoly on those and other areas of constitutional law meant that the principles those cases embodied—"the right to be let alone" and to hold a "certain private sphere of individual liberty will be kept largely beyond the reach of government"—did not extend to the subordinate status assigned to "homosexual sodomy."[272]

In sum, the Court concluded that Michael Hardwick's status had been predetermined and was binding on him and others like him.[273] Those whose power—whose status—exceeded his own had already determined the uses to which he might pleasurably put his body, and they had exercised their power over him and everyone like him. They had concluded that the state may invade the sanctity of his bedroom, interrupt his sexual pleasure, and imprison him if it so chose. While heterosexuals could use the bedroom for their own pleasure largely undisturbed, apparently in the service of procreation (with contraceptive rights), familial relationships, marriage, as well as the rearing and education of children, among other things, the homosexual presented "at best, [a] facetious" argument by claiming status in the bedroom equivalent to that of the heterosexual.[274] As the *Hardwick* Court held, "[p]recedent aside . . . [Michael Hardwick] would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."[275]

In adopting such a posture, cases like *Hardwick* show that demand for reverence for what is deemed legally sacred flows from

270. Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (majority opinion).

271. *Id.* at 190–91.

272. *Id.* at 199, 203 (Blackmun, J., dissenting).

273. *See generally id.* at 192–96 (majority opinion) ("[T]o claim that a right to engage in [homosexual sodomy] . . . is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

274. *Id.* at 194.

275. *Id.* at 191.

those of "supreme status." Reverence implies both veneration and deference.[276] Veneration flows from an ancient and supreme birthright.[277] It coopts the language of the sacred, and it condemns the profane.[278] It identifies those constitutionally beatified and hallowed.[279] Deference identifies the individuals and entities to which the law will yield.[280] It is thus unsurprising that *Hardwick* commands us to focus on "those liberties that are 'deeply rooted in this Nation's history and tradition.'"[281] It commands us to focus on "those fundamental liberties that are implicit in the concept of ordered liberty."[282] It concludes that "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots."[283] Against this background, as Chief Justice Burger noted in his concurrence, "[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."[284] In other words, Michael Hardwick's debased status, meaning his inferior power, meant that he could not claim the privileges and responsibilities traditionally reserved for heterosexuals.

Observe the sacred objects on which Chief Justice Burger's concurrence relies. They are as follows:

Religion, morality. "Condemnation of [homosexual sodomy] is firmly rooted in Judeao-Christian moral and ethical standards."[285]

Religion, morality, Roman law, Roman history. The Theodosian Code made "homosexual sodomy . . . a capital crime".[286]

276. Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1174–211.
277. *Id.* at 1187.
278. *Id.* at 1201.
279. *Id.* at 1177.
280. *Id.* at 1183.
281. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (majority opinion).
282. *Id.* at 191.
283. *Id.* at 192.
284. *Id.* at 197 (Burger, C.J., concurring).
285. *Id.* at 196 (Burger, C.J., concurring) (alteration in original).
286. *Id.*

Religion, morality, English law, English history. The English Reformation saw the transfer of ecclesiastical powers to King Henry VIII's Courts and the passage of the first statute prohibiting sodomy.[287]

English law, English history, English male jurists. "Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"[288]

English law, Reception of English law, State law in the United States. English common-law prohibitions of sodomy were received as the law of Georgia and other colonies. The statute, in this case, was passed in 1816.[289]

It was these objects that fated the heterosexual to enjoy constitutional supremacy and the same objects that fated the homosexual to slumber in a state of constitutional infamy. Note, though, that none of the objects is self-enforcing. None revives itself and commands its enforcement in our—or any—time. Each object must be recalled, selected, venerated, and deferred to. In other words, each must appeal to the hermeneutic tastes of those who believe "homosexuals" are profane. In sum, "homosexuals" are considered legally unworthy of the reverence traditionally bestowed upon those whose rank and status were "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."[290]

Recall, too, that reverence, etymologically, is tied to fear. Fear is a blunt instrument deployed by those requiring reverence for their sacred objects and people:

> [F]ear is required by—or is said to be owed to—the object or person whose status is said to be beyond our own. Fear helps maintain the status of the revered person or object in our legal system, and it is reinforced in a number of ways that I make clear in this Article. Fear anticipates the consequences facing those who do not obey, and fear is the servant of status.[291]

287. *Id.* at 197

288. *Id.* (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

289. *Id.*

290. *Id.* at 194.

291. Rudolph, *Dignity. Reverence. Desecration.*, *supra* note 1, at 1180.

Chief Justice Burger's concurrence implicitly informs the "practicing homosexual" that his rank and status have been deemed inferior to that of a rapist.[292] The Chief Justice implies in his concurrence that so debased is "homosexual" status, that the "homosexual" could be executed as a historical matter.[293] As for the *Hardwick* majority, it justifies, at least in part, its constitutional holding on the basis that laws constantly have moral bases, and the Court declines to open the floodgates of litigation by declaring that morality cannot furnish a rational basis for such laws.[294] The *Hardwick* Court indicates that while Michael Hardwick does not claim that all laws with moral bases should be invalidated, he "insists that majority sentiments about the morality of homosexuality should be declared inadequate."[295] To this, Justice White replies for the Court "[w]e do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis."[296] In other words, the "practicing homosexual" should remain in awe of the power that heterosexuals have over him; he should revere such power and be afraid because others like him have historically lost their lives solely on the basis of their inferior status.

B. Lawrence *and Status*

While *Hardwick* insists on reverence for heterosexual status, part of *Lawrence*'s appeal resides in its explicit reliance on "dignity" to acknowledge the equivalent private status of "homosexual persons."[297] *Lawrence* concludes as a constitutional matter "that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[298] Professor Eskridge helps us understand that "[b]y the time of *Lawrence* virtually all industrialized countries had decriminalized consensual sodomy, most of them generations earlier. Constitutional

292. *See supra* discussion Section II.*A.*
293. *See supra* discussion Section II.*A.*
294. *Hardwick*, 478 U.S. at 196.
295. *Id.*
296. *Id.* (footnote omitted).
297. Lawrence v. Texas, 539 U.S. 558, 567 (2003).
298. *Id.*

opinions in Europe had invalidated the few remaining consensual sodomy laws on grounds that they violated fundamental rights to privacy and human dignity."[299] In other words, there is much indeed to celebrate in *Lawrence*.[300]

And yet, even as it relaxes the heterosexual monopoly on the private sanctuary that is the bedroom, *Lawrence* reaffirms the prerogative of the heterosexual to determine the status of "homosexual persons" (consistent with the growing practice of other nations in Western Civilization).[301] As Justice Kennedy acknowledged for the *Lawrence* Court, "[a]uthoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in [*Hardwick*] that the claim put forward was insubstantial in our Western civilization."[302] *Lawrence* equalizes the status of the "homosexual person" in the bedroom, but it implicitly reminds that "homosexual person" that the equality conferred is because those whose status is supreme have now deemed it appropriate.

In doing so, the *Lawrence* Court draws a link between dignity and status. Reliance on status, as Justice O'Connor's concurrence in *Lawrence* suggests, empowers some to identify "disfavored" classes of individuals that may be discriminated against.[303] Specifically, Justice O'Connor indicates that "Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law."[304] Supreme dignity—status—had, thus, according to Justice O'Connor, implied the power to mark certain conduct as "sodomy" and to identify only "homosexual persons" who engaged in it as "disfavored" as a matter of constitutional law.

Unfortunately, Justice O'Connor, whose vote also helped make *Hardwick* the law, exemplifies such power, even in *Lawrence*. In *Lawrence*, the Justice agreed that the Texas anti-sodomy statute was unconstitutional but on equal-protection grounds.[305] Justice O'Connor noted that while Texas had relied, in *Lawrence*, on *Hardwick* to argue

299. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 18, at 322.

300. Franke, *supra* note 105 and accompanying text.

301. *See Lawrence*, 539 U.S. at 573.

302. *Id.*

303. *See id.* at 584 (O'Connor, J., concurring).

304. *Id.* (O'Connor, J., concurring) (citation omitted) ("In *Romer v. Evans*, we refused to sanction a law that singled out homosexuals 'for disfavored legal status.'").

305. *See id.* at 579 (O'Connor, J., concurring).

that "the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality," *Hardwick* "did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished."[306] *Hardwick*, the Justice thought, should not be overruled.[307] For Justice O'Connor, just because the Texas statute failed an equal-protection analysis, did "not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."[308] In other words, those holding supreme status in the states might still deploy their status to *distinguish* themselves from homosexuals, and those holding supreme status on the Court might use their own status to uphold such deployments of power as constitutionally *rational*.

Justice Scalia, dissenting in *Lawrence*, similarly exemplified what such supreme status reveres. The Justice rejected the bases on which the Court had just overruled *Hardwick*.[309] The Justice reminded the Court that "[w]e have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition.'"[310] "[H]omosexual sodomy," said the Justice (as he implicitly sanctioned heterosexual sodomy), "[was] not deeply rooted in this Nation's history and tradition," discounting the types of laws that were in place that prohibited homosexuality.[311] "[T]he only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right 'deeply rooted in our Nation's history and tradition.'"[312] In other words, because heterosexuality had always been a supreme object of reverence—including in non-heterosexual bedrooms—it continued to be a constitutional object that should never be desecrated, no matter any "emerging awareness" regarding the equal status of "homosexual sodomy" in the privacy of the bedroom.[313]

306. *Id.* at 582 (internal citation omitted).
307. *Id.* at 579 (O'Connor, J., concurring).
308. *Id.* at 585 (O'Connor, J., concurring).
309. *Id.* at 586–605 (Scalia, J., dissenting).
310. *Id.* at 593 (Scalia, J., dissenting) (internal quotations omitted).
311. *Id.* at 594 (Scalia, J., dissenting).
312. *Id.* at 596 (Scalia, J., dissenting).
313. *Id.* at 570, 572 (majority opinion).

In a rhetorical move recalling Chief Justice Burger's concurrence in *Hardwick*, Justice Scalia then identified what he believed to be the rank and status of those who engaged in "homosexual sodomy." States, intoned the Justice, continued to prosecute many sexual crimes—"prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced 'in the past half century,' in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy."[314] Whereas Chief Justice Burger's concurrence in *Hardwick* placed the "homosexual" beneath the rapist, Justice Scalia aligned consensual intimacy between two human beings of the same sex in the privacy of the bedroom with the acts of those who, for Justice Scalia, viewed child pornography, had incestuous relationships, engaged in adultery, and those who engaged in acts deemed obscene.[315] The litany of moral crimes that Justice Scalia identified, of course, was meant to sweep away everything that did not align with the Justice's understanding of heterosexuality's most venerated traditional beliefs.

What, though, is "heterosexual supremacy"? In an article criticizing the Supreme Court in *Obergefell* for not being bolder when confronting the history of discrimination against members of the LGBT community, Professor Kim Forde-Mazrui compares the Court's approaches in *Obergefell v. Hodges* (same-sex marriage) and *Loving v. Virginia* (interracial marriage).[316] Specifically, with regards to *Obergefell*, which ordered states to license same-sex unions and recognize same-sex marriages entered into in other states, Professor Forde-Mazrui argues that the Court should have criticized "heterosexual supremacy."[317] The definition Professor Forde-Mazrui offers of "heterosexual supremacy" bridges the gap between rank and status. The professor's definition is as follows:

> Heterosexual supremacy refers to the social and legal hierarchy in American society premised on the

314. *Id.* at 598 (Scalia, J., dissenting).

315. *See id.* (discussing "[sodomy,] prostitution, adult incest, adultery, obscenity, and child pornography" as crimes that have always been prosecuted).

316. Kim Forde-Mazrui, *Calling out Heterosexual Supremacy: If* Obergefell *Had Been More Like* Loving *and Less Like* Brown, 25 VA. J. SOC. POL'Y & L. 281, 282 (2018).

317. *Id.*

> superiority of heterosexuality over homosexuality. The hierarchy is maintained structurally by pervasive features of American religious, cultural, intellectual, legal[,] and political life that combine to systematically stigmatize and burden, through law, custom[,] and attitude, the liberty, dignity[,] and opportunities of gays and lesbians. It is the ideology that causes gays and lesbians to keep their sexual orientation private, especially in states with strong opposition to same-sex marriage and other gay rights. It is the ideology responsible for the high rates of violence against gays and lesbians and of suicide by gay and lesbian adolescents.[318]

"Hierarchy" points to rank, with heterosexuality ranked first. That the hierarchy has social, legal, and political effects implies that status may have coopted rank to ensure that heterosexuality remains supreme in every facet of American life.[319] As Professor Forde-Mazrui indicates, "heterosexual supremacy" "is the ideology responsible for the high rates of violence against gays and lesbians and of suicide by gay and lesbian adolescents."[320]

Part I of this Article showed that *Hardwick* assigns primacy of rank to heterosexuals.[321] *Hardwick*'s majority opinion and Chief Justice Burger's concurring opinion imply the subterranean rank of "the practicing homosexual."[322] While *Lawrence* appears to equate the rank of the homosexual to that of the heterosexual, it only does so in the sanctity of the bedroom. Dignity's new arrivals, Part I showed, may enjoy a change in their rank, but only in the limited space that is the bedroom.

Part II has shown that status is rank's dream realized and enforced—or the reverse (rank is status' dream realized and enforced).[323] Status tells us why Justice Scalia writes as he does about

318. *Id.* at 287.

319. *See generally supra* note 102 and accompanying text.

320. Forde-Mazrui, *supra* note 316, at 287.

321. *See* discussion *supra* Section I.*B.* (discussing the definition of *rank* as it relates to *dignity*).

322. *See* discussion *supra* Section II.*A.* (discussing the definition of *rank* as it relates to *Hardwick*).

323. *See* discussion *supra* Part II.

a community that faces "high rates of violence against gays and lesbians and of suicide by gay and lesbian adolescents."[324] Of course, Justice Scalia might protest as follows: "[l]et me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means."[325] That the Justice wanted "homosexuals" to make our case to the heterosexual majority and win it over before the Court intervened suggested the Justice's willingness, nonetheless, to witness even more suffering in the community before the Court would uphold the community's rank and status, assuming that it would do so.

IV. BEYOND RANK AND STATUS

This Article has argued that dignity means rank and status. It has argued that those possessing supreme rank and status decide whether those they deem inferior possess the same constitutional rank and status they have long enjoyed. It has argued that dignity implies the pursuit of equal rank and status, but the pursuit is only feasible in a limited sense. This Article has argued that pursuing equal rank and status affirms the power of those already possessing it.

This final part explores the place beyond rank and status. It does so by relying on the amicus brief of religious organizations in *Hardwick*. The goal, here, is to show that the desecration of those assigned inferior rank and status is not ineluctable. Treating those considered inferior as legally possessing equal rank and status but only in the privacy of the home tells us why it is important to talk of dignity's alignment with reverence. Reverence relies on the language of the sacred and the profane, the venerable and the shameful, and it upholds that which cannot desecrated.

In their amicus brief in *Hardwick*, the Presbyterian Church; the Philadelphia Yearly Meeting of the Religious Society of Friends; the American Friends Service Committee; the Unitarian Universalist Association; and the Office for Church and Society of the United Church of Christ countered the argument that "traditional moral values" required the conclusion that a state could invade "the sanctity of the home" and dictate what "homosexual persons" could do in the

324. Forde-Mazrui, *supra* note 316, at 287.

325. Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

bedroom.[326] The religious bodies indicated that "the moral character of unorthodox sexuality is the subject of ongoing controversy, even among the religious groups who presumably define and promote 'traditional moral values.'"[327] That is, the brief anticipated the arguments that were to prevail in *Hardwick*, as well as those that would characterize the dissent in *Lawrence*.[328]

The brief implied that religious views were neither monolithic nor uniform, that such views had evolved over time, and that any attempt to assert something to the contrary would be implicitly false.[329] Implicitly false, thus, was Chief Justice Burger's statement in *Hardwick* that "[c]ondemnation of [homosexual sodomy] is firmly rooted in Judeao-Christian moral and ethical standards."[330] Since the Chief Justice had access to the brief of the religious organizations, his statement implying the inferior rank and status of "homosexual sodomy" appears to have been deliberate.

The brief's evocation of the sacred in a constitutional discussion about a community long considered inferior is noteworthy. The brief implied that the legal rank and status traditionally assigned to gay people might be an error caused by a judicial misperception of the sacred and its requirements. The sacred might be unknown—even to Justices. As the brief stated, "[t]he mystery of our sexuality is the mystery of our need to reach out and embrace others, physically and spiritually. Sexuality expresses God's intention that we find our authentic humanness in relatedness to others."[331] Sexuality, the brief noted, is a manifestation and expression of the "true humanity in personal relationships, the most intimate of which are sexual."[332]

Three points recommend themselves in this Article on rank and status.

326. Brief for the Presbyterian Church & the Philadelphia Yearly Meeting of Friends et. al., as Amici Curiae Supporting Respondent at *4–5, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720447 [hereinafter, Brief for the Churches].

327. *Id.* at *4.

328. *See* discussion *supra* Part II.

329. *See* Brief for the Churches, *supra* note 326, at *4.

330. Bowers v. Hardwick, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

331. Brief for the Churches, *supra* note 326, at *7–8.

332. *Id.* at *7.

The brief helps us understand that when faced with something "unorthodox," whose rank and status have been traditionally denigrated as a moral, religious, and legal matter, the default response may be to classify the unorthodox as an affront to the sacred and, therefore, the constitutional.[333] But the sacred, the brief appears to imply, is not about any Justice's or human being's limited understanding of why human beings express themselves consensually and intimately as they do. The sacred abjures and transcends the urge to rank or attribute status since the sacred reveres a divine entity's expression of its own intention or will, represented in each human being. Such expression becomes a human being's intimate self-expression, which other human beings may be unable to accept or understand, and yet it remains a manifestation of the divine—a "mystery."[334] The mystery, then, is not evidence of a divine failure in attributing rank and status but the failure of the interpreting human being to appropriately apprehend the divine.

With the foregoing in mind, consider the statements the Justices made in both *Lawrence* and *Hardwick* and what they imply regarding the dignity, rank, and status of sexual minorities.

> It suffices for us to acknowledge that adults may choose to enter upon this relationship *in the confines of their homes* and *their own private lives* and still retain their dignity as free persons. (Kennedy, J.)[335]

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. (O'Connor, J., concurring).[336]

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely

333. *See id. passim.*

334. *See* Brief for the Churches, *supra* note 326, at *4–8.

335. Lawrence v. Texas, 539 U.S. 558, 567 (2003) (emphasis added).

336. *Id.* at 585 (O'Connor, J., concurring).

> signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. (Scalia, J., dissenting).[337]
>
> Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. (Scalia, J., dissenting).[338]
>
> And, just like Justice Stewart, I 'can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy,' or as the Court terms it today, the 'liberty of the person both in its spatial and more transcendent dimensions,' *ante,* at [2475]. (Thomas, J., dissenting).[339]

These statements conflict with the brief's expansive evocation of the sacred's ability to transcend rank and status. Instead of revering the inexplicable nature of consensual sexual expression, the foregoing statements display a reductive constitutional legality, which, even in *Lawrence*, defers to the default.[340] True, the brief's vision for "homosexual persons" (whom its appendix appropriately calls "gay persons") is realized in *Lawrence,* but the brief appears to ask for more than realization; it is asking that a Court, which speaks in the name of "traditional moral values," appropriately engage with the sacred as a matter of law, especially when the Court (and its concurring and dissenting members) often rely on such terms.[341]

337. *Id.* at 602 (Scalia, J., dissenting).

338. *Id.* (Scalia, J., dissenting).

339. *Id.* at 605–06 (Thomas, J., dissenting) (internal citation omitted).

340. *See* Franke, *supra* note 105 and accompanying text.

341. *See* Brief for the Churches, *supra* note 326, at *3–8.

Indeed, while the *Hardwick* brief mentions equality several times in its appendix, the spirit of the brief points to something beyond equality. Consider the following sentiments expressed in the brief, some of which I have already cited:

> Because we do not understand the full [sic] mystery of human sexuality, and because we are unwilling to condemn that which we do not understand, we believe as a matter of ethics that characterizing consensual sodomy as immoral is unwise.[342]
>
> The mystery of our sexuality is the mystery of our need to reach out and embrace others, physically and spiritually. Sexuality expresses God's intention that we find our authentic humanness in relatedness to others. [343]
>
> Michael Hardwick, by seeking the freedom to express his sexuality with another like-minded and consenting adult in the privacy of his own home, is not seeking unfettered sexual autonomy. He is invoking the right of one human being to associate intimately with another like-minded human being. [344]

Beyond equality is, thus, the sacred and ineffable existence *within*, which announces the existence of the sacred in every consensual encounter. The brief appears to focus less on the sacredness of heterosexuality than the heterodox expression of gay sexuality. That is likely because heterosexuality has long impressed itself on everyone, compelling itself upon every conscience as a known, studied, protected, and compulsory way of being.[345] *Hardwick* and *Lawrence* require the "unorthodox" human being they identify as a "practicing homosexual"

342. *Id.* at *4.

343. *Id.* at *8.

344. *Id.*

345. *See generally* ESKRIDGE, GAYLAW, *supra* note 126, at 163; Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, *in* POWERS OF DESIRE: THE POWER OF SEXUALITY 177 (Ann Snitow, Christine Stansell & Sharon Thompson, eds. 1983).

and "homosexual person" to live perpetually within a constitutional and moral order characterized by supreme heterosexual rank and status. True, *Lawrence* opens the door for greater constitutional contestation regarding the meanings of dignity, rank, and status, but it, too, defers to a heteronormative default as it does so.[346]

The *Hardwick* brief implies the existence of a space beyond (a "mystery"), and it honors the sacred life within. Such a life does not assume heterosexuality as its default starting position or goal. Heterosexuality is likely as sacred as homosexuality. Indeed, heterosexuality might be just as ineffable as any other consensual expression of human intimacy, and its representation in *Hardwick* and *Lawrence* might be either false or incomplete, or both. The quest for equality thus errs in its prepositional requirement of the word "to" in reference to a fixed external entity deemed superior or supreme—equal *to* heterosexuals, equal *to* men, and so on. Who decides whether equality is merited? Those deemed heterosexual, male, and so on.

In sum, this section has argued that the sacred does not speak in terms of identity or equality but in terms of sufficiency, adequacy, and fullness. As the brief stated, "[b]ecause we do not understand the *full* [sic] *mystery* of human sexuality, and because we are unwilling to condemn that which we do not understand, we believe as a matter of ethics that characterizing consensual sodomy as immoral is unwise."[347] The sacred within is sufficient in, of, and to itself since it embodies something neither morality nor law can sufficiently understand without reducing it to the formalisms of human mundanities and, thereby, injuring it.[348] Rank and status are impositions from without, but sacredness has its origins both within and beyond since it is in conversation with the divine. Indeed, what is remarkable about the sacred is that the designation of something as "sacred" immediately identifies it as an object worthy of reverence—meaning veneration and deference—and ongoing consecration. The sacred, in sum, is the space beyond the injurious constrictions of rank and status.

346. *See* Franke, *supra* note 105 and accompanying text.

347. Brief for the Churches, *supra* note 326, at *4 (emphasis added).

348. *See generally* Brief for the Churches, *supra* note 326.

V. BEYOND WRONGDOING AND RIGHTDOING

This Article has argued that rank and status still characterize the constitutional treatment of human beings in American law. Rank goes to placement within a hierarchy, and status goes to the power and privileges that legitimate and uphold the foundational impetus to institute a ranking system. *Hardwick* tells sexual minorities that our rank and status are inferior to that of every heterosexual, including, according to Chief Justice Burger in his concurring opinion, criminal heterosexuals. Although *Lawrence*, by overturning *Hardwick*, might appear to suggest that sexual minorities have arrived as a constitutional matter, *Lawrence* affirmed the inferior status and rank of the same.

Given both opinions' upholding of rank and status, it is important to conceive of a space beyond rank and status. Beyond rank and status lies the space often assumed to be occupied by dignity. Dignity, we are often told, upholds something inherent, inestimable, and even ineffable. But dignity is still about rank and status. It is about who holds the rank and status to determine who can enjoy similar rank and status and when they may lay claim to such rank and status. As such, for all its normative and legal power and all the landmark changes it made possible and announced, *Lawrence* is quite unremarkable in its engagement with dignity. *Lawrence* holds that those who engage in consensual same-sex intimacy are now permitted to do so in their bedrooms without state interference. In doing so, *Lawrence* indicates that those who have long held supreme dignity have decided that those who have long been denied it now have it—but only in a limited sense.

That's how dignity works. That's how dignity has always worked. Those with supreme dignity decide how much those without it have, when, and why. Those without it, often having long suffered, repeatedly plead and ask for the rank and status denied to them. Those who have long reserved such dignity for themselves may state (as in *Hardwick*): "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[349] They may also cite (as in *Hardwick*) moral, religious, legal, and historical precedents they believe uphold their supreme rank and status and that of everyone like them, which they deem constitutionally inviolable and worthy of

349. Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

reverence.[350] Or they may state (as in *Lawrence*): "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[351]

Dignity is a combination of rank and status. If dignity did indeed mean *equal* rank and status as a practical matter, if it did indeed mean that sexual minorities were constitutionally equal to (and, perhaps, constitutionally indistinguishable from) heterosexuals, if it did indeed mean that heterosexuals were equal to sexual minorities, then those in the majority might feel dignified to receive the treatment that sexual minorities currently receive in our legal system. Since our dignity would be equal, it would neither be an insult nor an inaccuracy to say to someone who was not part of a sexual minority, "[y]ou deserve the dignity reserved for sexual minorities as a constitutional matter. You deserve the moral, religious, historical, and legal rank and status traditionally reserved for 'homosexual persons.'" Of course, that is not the world in which we live, caught as it is between the ancient scars of rank and status and the promise of the sacred. Again, dignity is about rank and status.

All of which suggests the importance of a space beyond dignity. What lies beyond the traditional confines of rank and status is something altogether traditional in its own right, but it serves as a counterweight to dignity—the sacred (and, by implication, the profane). The sacred abjures simple reductions that exclude complex human beings from the privileges and protections of ancient rank and status based on likely misinterpretations of the sacred's mandates. Thus, when *Hardwick* and *Lawrence* engaged with the sacred inherent in each human being and spoke legally in its name, they failed in their engagement. They could have taken us further and farther beyond the confines of the orthodox and the familiar, but they elected not to do so, casting sexual minorities as inhabitants of the land of the profane. That *Hardwick* and *Lawrence* did not take us to the space beyond dignity shows what remains to be accomplished in our constitutional engagement with the sacred nature of consensual human self-expression. In the immortal words of the poet and mystic Rumi, "[o]ut

350. *Id.* at 196–97 (Burger, C.J., concurring).

351. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

beyond ideas of wrongdoing and rightdoing, there is a field. I'll meet you there."[352]

352. JALAL AL-DIN RUMI, THE ESSENTIAL RUMI 36 (HarperCollins Publishers 1995).