Dignity. Reverence. Desecration.

*Duane Rudolph**

*This Article focuses on two cases from the Supreme Court of the United States dealing with sexual orientation—*Bowers v. Hardwick *(1989) and* Boutilier v. Immigration and Naturalization Service *(1967).* Hardwick *held that the Federal Constitution did not recognize a right to consensual intimacy among human beings of the same sex, and states could regulate the issue.* Boutilier *held that the federal government could order the deportation of non-heterosexual applicants for citizenship since they were deemed to have a "psychopathic personality, sexual deviate," and their treatment as such did not offend the Federal Constitution.*

The argument is that human dignity, as represented in Hardwick, Boutilier*, and other landmark cases, is not only about the status of specific individuals and communities, but also about the reverence required by individuals and communities holding superior or supreme status. Those holding such status identify individuals and objects they revere and for whom (and which) they mandate reverence. Reverence, in this context, has two meanings—veneration and deference. Veneration and deference are selectively bestowed upon specific individuals, communities, and objects, and they are denied to others, especially those associated with the most vulnerable communities.*

The absence or failure of dignity is not, as commentators often argue, humiliation, demeaning, or degradation of a human being, but desecration.

*Assistant Professor of Law, Peking University School of Transnational Law, Shenzhen, China. I began thinking of this project while serving as the Reginald F. Lewis Fellow for Law Teaching at Harvard Law School (2015-2017). Conversations with Jennifer Wriggins, Henry Smith, Aziz Rana, Todd Rakoff, Gerald L. Neuman, Randall Kennedy, Jessica Feinberg, Christine Desan, and Mary L. Bonauto influenced this work. Others, preferring anonymity, have also had a hand in shaping this work. I received research funding from Peking University School of Transnational Law to conduct research at Harvard Library in the summer of 2022. Peking University Library and Harvard Library granted me access to so many of the materials on which I rely in this work. M.H.P., as ever, has been generous, kind, and thoughtful; my love and thanks. Luca Provenzano and the editors of *The Seton Hall Law Review* have been a pleasure to work with, and I thank them. I dedicate this work to Jennifer Wriggins and Mary L. Bonauto. All errors are mine.

Desecration is an experience, an attitude, and a response, which includes humiliation, demeaning, and degradation. Desecration is the unacceptable experience, by those holding superior or supreme status, of a perceived lack of reverence for hallowed individuals, objects, and ideals. Desecration is, further, an attitude and a response. As an attitude, desecration is the intuitive act of resistance by those assigned inferior status simply by being themselves. And as a response, desecration is what those possessing superior or supreme status do to those who, simply by existing as themselves, are deemed inferior.

I. DIGNITY, THE SACRED, AND THE PROFANE 1174
A. On Reverence 1183
1. Veneration as Reverence 1183
2. Deference as Reverence 1193
B. On Desecration 1195
1. Reverence and Fear 1195
2. Reverence and Desecration 1200
II. DEITIES AND SACRED TRADITIONS 1211

I. DIGNITY, THE SACRED, AND THE PROFANE[1]

Consider the following extracts from the case law of the Supreme Court of the United States, and consider, too, the insights they allow about the meaning of human dignity:[2]

> 1. [T]he proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization . . . 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.'[3]

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[1] In this Article, I rely on insights and sources articulated in other Articles I have drafted. Those articles are as follows: Duane Rudolph, *Dignity and the Promise of Conscience*, 71 CLEV. ST. L. REV. (forthcoming spring 2023); Duane Rudolph, *Of Moral Outrage in Judicial Opinions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 335 (2020); Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126 (2017); and Duane Rudolph, *How Violence Killed an American Labor Union*, 67 RUTGERS U. L. REV. 1407 (2015).

[2] Going forward I refer to the Supreme Court of the United States as either the "Supreme Court" or the "Court."

[3] Bowers v. Hardwick, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring) (alteration in original), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

> 2. Congress commanded that homosexuals not be allowed to enter. The petitioner was found to have that characteristic and was ordered deported. The basis of the deportation order was his affliction for a long period of time prior to entry, i.e., six and one-half years before his entry.[4]

The first case, *Bowers v. Hardwick*, held that the Federal Constitution did not recognize a right to consensual sexual intimacy among human beings of the same sex, and that states could regulate the issue.[5] The second, *Boutilier v. Immigration and Naturalization Service*, held that the federal government could order the deportation of non-heterosexual applicants for citizenship deemed afflicted with "psychopathic personality, sexual deviate," and their treatment as such did not offend the Federal Constitution.[6] Both cases identified threats to the established order—a non-heterosexual in control of his sexual expression in the privacy of his home and a non-heterosexual individual permitted to enter the nation's borders.[7] In response, the opinions invoked a revered entity.[8] The revered entity permitted the neutralization of the threat to what was held sacred—the government's prerogative to identify which bodies can enter, live, and engage in sexual acts in the United States.[9] Indeed, human dignity is implicit in both extracts because the status of a vulnerable constituency—the LGBTQ community—is undermined.

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[4] Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 124 (1967), *superseded by statute*, Immigration Act of 1990, Pub. L. No. 1011–649, § 601, 104 Stat. 4978, 5067.

[5] *Hardwick*, 478 U.S. at 189, 196.

[6] *Boutilier*, 387 U.S. at 119, 120, 125.

[7] While Mr. Boutilier identified as "homosexual," he also had sex with women, suggesting that he may have been bisexual. *See* Boutilier v. Immigr. & Naturalization Serv., 363 F.2d 488, 499 (2d Cir. 1966) (Moore, J., dissenting) (stating that "[w]hile [Mr. Boutilier] had engaged in homosexual acts from the age of 16 to the age of 21, he had also had sexual relations with women three or four times during this period"), *aff'd*, 387 U.S. 118 (1967); WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 132 (2009) (stating that "[i]n *Boutilier v. INS* (1967), the Supreme Court not only interpreted 'psychopathic personality' to be a code word for 'homosexual,' but also extended the exclusion to an apparent bisexual who was undisputedly functional").

[8] *See Boutilier*, 363 F.2d at 492 (revering Congress by stating that "[t]he function served by deportation in cases where the petitioner was excludable is to furnish a backstop or check designed to intercept those whom Congress believed should not have been admitted into the United States in the first instance"); *Hardwick*, 478 U.S. at 192 (revering the "ancient roots" of state criminalization of same-sex intimacy).

[9] *See supra* note 4 and accompanying text.

It makes sense to focus on the human dignity of the vulnerable. In *United States v. Windsor* and *Obergefell v. Hodges*, writing for the Court, Justice Kennedy focused on the human dignity of members of the LGBTQ community, and he paid attention to the community's humiliation.[10] At the international level, while the Universal Declaration of Human Rights indicates that human dignity inheres in all human beings, the document is particularly attentive to the concept's violation among the vulnerable as the document observes that attacks on human dignity have led to outraged consciences.[11] In other words, the human dignity to which legal sources often attend is that of those at risk—and with reason.

Commentators have identified almost two dozen overlapping understandings of human dignity.[12] Those meanings are as follows: (1) status; (2) equality; (3) respect; (4) intrinsic worth; (5) liberty; (6) honor; (7) autonomy; (8) collective virtue; (9) personal integrity; (10) concern for the other; (11) conducting one's self in a certain manner; (12) recognition; (13) an umbrella term; (14) a substitute for other concepts; (15) a contextually determined concept; (16) an expressive concept; (17) a background legal norm; (18) a substantive right; (19) a requirement that we treat others as ends; (20) a requirement that we hear people; and (21) a concept inflected by particular religious understandings[13] The opposite of human dignity, commentators tell

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[10] *See* United States v. Windsor, 570 U.S. 744, 768–70, 772, 775 (2013); *see also* Obergefell v. Hodges, 576 U.S. 644, 666, 668, 678 (2015).

[11] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 Preamble (1948).

[12] *See generally* Rudolph, *Dignity and the Promise of Conscience*, *supra* note 1 (enumerating over twenty overlapping understandings of human dignity in American Law).

[13] The ordering of the terms is my own. While some commentators argue that status, for example, is dignity's most important meaning, there is significant disagreement about the meaning of human dignity. *See, e.g.*, JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 17–18 (2012) (status); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 190 (2011) (collective virtue, equality, liberty, personal integrity, status); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 188 (2011) (inherent worth, conducting oneself in a certain manner, recognition, and respect); Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463, 469 (2017) (respect); Steven Pinker, The Stupidity of Dignity, NEW REPUBLIC (May 28, 2008), https://newrepublic.com/article/64674/the-stupidity-dignity (umbrella term possessing many attributes); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 71–72 (2011) (background legal norm, expressive concept, substantive right, substitute for other rights); David Luban, Human Rights Pragmatism and Human Dignity, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS

us, is (22) humiliation, or (23) degradation and demeaning of a human being.[14]

Relying on such insights, I have argued elsewhere that American law and its precursors have upheld the human dignity of those holding superior or supreme status, and they have purported to raise the vulnerable—like members of the LGBTQ community—to the same status.[15] In this Article, I take the argument further and argue that by focusing on the status of the people our legal system has venerated and those to whom it has deferred over time, we gain access to additional understandings of human dignity. When we think of the human dignity of those our legal system has traditionally revered, we are not being asked to grant them what they already possess and enjoy—status, equality, respect, intrinsic worth, liberty, honor, autonomy, and so on. Instead, since they already possess these attributes as a matter of law, we are being asked to revere their dignity, which means maintaining their status.[16] Their dignity, thus, requires veneration, deference, and abstention from any act of desecration of what they consider hallowed or sacred. All human dignities are not the same, and all do not pursue the same ends in our legal system.[17]

That is why focusing on reverence and desecration is helpful. Those who uphold their own dignity or that of a chosen constituency

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263, 276 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015) (contextually determined); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 542 (2006) (Kantian understandings of dignity); Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 46 (2016) (same); Jerry L. Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Matthews v. Eldridge: *Two Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28, 46, 49–50 (1976) (right to be heard); THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES (Marcus Düwell, Jens Braarvig, Roger Brownsword & Dietmar Mieth eds., (2014)) (religious and cultural understandings of dignity).

[14] *See, e.g.*, Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 527 (2020) (humiliation); BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 138 (2014) (same); Kenji Yoshino, *The Meaning of the Civil Rights Revolution: The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3092 (2014) (same); David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It),* 2005 U. ILL. L. REV. 815, 839 (2005) (same); AVISHAI MARGALIT, THE DECENT SOCIETY 9 (1996) (same); Deborah Hellman, *Equal Protection in the Key of Respect,* 123 YALE L.J. 3038, 3046–47 (2014) (degradation, demeaning).

[15] Rudolph, *Dignity and the Promise of Conscience, supra* note 1 (manuscript at 20).

[16] On dignity as status, see WALDRON, *supra* note 13, at 17.

[17] *See* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 32. (2017) (showing "how the Court prioritizes protection of white dignity in equal protection doctrine.").

require reverence for that dignity and its meanings. They may even couch such dignity in terms that revere an idealized past, and they may make the perpetuation of that dignity a rallying cry.[18] They may experience any attempt to expand that particular understanding of human dignity as an unacceptable dismantling of the sacred architecture of American law and life.[19] They experience such attempts at expansion, then, as desecrations of the traditions they value.[20] In so doing, they often fail to revere the human dignity of those they disparage, and they, in turn, desecrate everything of substance to those they deem inferior. In sum, reverence and desecration speak to this hour in American legal, political, and social life.[21]

I acknowledge that reverence seems like an inapposite term because it is religious, and the argument might be that we should maintain the barrier between the sacred and the profane in our legal system. It might even be said that we should always respect (and revere) the separation between things associated with the church and those with the state. Why use "reverence" when a different term, say, "respect," could be just as helpful? Respect has many qualities to recommend it. "Respect" is not an overtly religious term, it can be applied to religion, is tied to the capacity to reason, implicitly captures the meaning of reverence by encompassing both the admiration and deference, and respect has been evoked in the civil rights context.[22] Respect is also germane to a discussion of human dignity because respect has been isolated as one of the many meanings of human

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[18] *See generally* Michael J. Klarman, *Foreword: The Degradation of American Democracy-and the Court*, 134 HARV. L. REV. 1, 121 (2020) (mentioning President "Trump's campaign slogan, 'Make America Great Again,' [which] signaled to supporters that he 'would turn back the clock to a time when white people enjoyed a dominant position in American society' and, by extension, people of color knew their place").

[19] *See infra* Part I.A.2.

[20] *See infra* Part I.A.2.

[21] *See infra* Part I.A.2.

[22] *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 450. (1997) (respect, reason, civil rights); *see also* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1603 (2020) (respect, individuality, autonomy); Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 SAN DIEGO L. REV. 935, 936 (2010) (respect and toleration for religious liberty); MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS LIBERTY 23 (2010) (respect for different expressions of religious conscience).

dignity in American law.[23] Why, then, add another word to the multitude of meanings already generated by human dignity?

In this textualist hour, dictionaries might help us understand, even in a non-statutory context, how reverence helps us to more powerfully grasp the shadow cast by human dignity over time.[24] Reverence captures what we owe a person or thing whose status is said to surpass our own.[25] Reverence is tied to status, which is what human dignity means in our legal system.[26] Reverence is a posture we adopt (or are required to adopt) when faced with a person or thing to whom we owe deference by virtue of that person's or thing's superior status.[27] Reverence situates us in a relationship with an external object or person, and that person or object is said to be above or beyond us for some reason, mandating our recognition of our subordinate position when faced with that person's or object's superiority.[28] Reverence is deeper than respect in that reverence is tinged with a measure of

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[23] *See supra note* 13 and accompanying text; NUSSBAUM, *supra* note 22, at 226 (observing that "[d]ignity and respect are a pair, to be understood together; dignity probably cannot be defined altogether independently of respect").

[24] On dictionary use in textualism, see generally Kevin Tobia, *Dueling Dictionaries and Clashing Corpora*, 71 DUKE L.J. ONLINE 146 (2022); *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92 (2006); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 437 (2005); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 277 (1998); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994).

[25] *See Reverence,* OXFORD ENGLISH DICTIONARY (3d ed. 2022) (defining "reverence" as "[d]eep or due respect felt or shown towards a person on account of his or her position, status, or relationship to oneself; deference. Now rare," and noting that the word's origins are in French and Latin), https://www-oed-com.azp1.lib.harvard.edu/view/Entry/164755?rskey=OmVAKb&result=1&isAdvanced=false#eid; *Revere*, THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 763 (C.T. Onions et al. eds., (1995)) (defining "revere" as "regard with deep respect [having roots in French and Latin] "feel awe of, fear."); *Révérence*, 4 DICTIONNAIRE DE LA LANGUE FRANÇAISE 1708 (E. LITTRÉ, ED. 1708 (1881)) (defining "reverence" as "[g]reat respect mixed with a kind of fear") ("Grand respect mêlé d'une sorte crainte.") (translation mine); *Reuerentia,* II OXFORD LATIN DICTIONARY (P. G. W. Glare, ed. 1814 (2012) (defining "*reuerentia*" as "a feeling of restraint in the presence of a superior etc., awe, deference, respect."); *Reueror*, *id.* at 1815 (defining "*reueror*" as "(esp. in a neg. context) to feel abashed before a superior, or other person who exercises a restraining influence, have regard for, stand in awe of; (also things). (more positively) to treat with deference, revere, venerate").

[26] On reverence as an incident of status, see *supra* note 25 and accompanying text. On dignity as status, see *supra* note 13 and accompanying text.

[27] *See generally supra* note 25 and accompanying text.

[28] *See generally supra* note 25 and accompanying text.

sanctity, which tells us something about the veneration required for (and deference owed to) something or someone whose sanctity is considered inviolably greater than our own.[29]

Reverence is also apposite because it invokes fear.[30] That fear is required by—or is said to be owed to—the object or person whose status is said to be beyond our own.[31] 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.[32] Fear anticipates the consequences facing those who do not obey, and fear is the servant of status.[33] Status is, ultimately, as Professor Jeremy Waldron's work shows, what human dignity means in American law.[34] In sum, the innovation of this Article is that it shows that in cases like *Hardwick* and *Boutilier* (and others), the human dignity of select communities and human beings requires displays of reverence for the people, traditions, and objects about which they care. A failure to revere objects and people deemed sacred incurs the threat and reality of desecration, which counts humiliation, demeaning, and denigration among the weapons it deploys, which generates fear.[35]

As striking as this Article's use of the language associated with the sacred may appear, our legal system already applies sacred language to many profane objects. American law talks of reverence for the tradition of amateur sports, for the attorney-client privilege, for a bankruptcy treatise, for copyright law, for freedom of speech, for the right to counsel, for the Federal Constitution as a written document, for the dead, for a deity, for "the right to an impartial jury," for Magna Carta, for private property rights, for those who are older, "for the Stars and Stripes," and it also talks of reverence for a word, among other things.[36] It applies the language of desecration to many objects. A

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[29] *See infra* Part I.A.1.

[30] *See generally supra* note 25 and accompanying text.

[31] *See generally supra* note 25 and accompanying text.

[32] *See infra* Part I B.1.

[33] *See infra* Part I.B.1.

[34] *See* WALDRON, *supra* note 13 and accompanying text.

[35] *See infra* Part I.A.2 and Part I.B.1. 1. Reverence and Fear

[36] *See, e.g.*, Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 500 (E.D. Pa. 2021) (amateur sports); Commonwealth v. Lehman, 275 A.3d 513, 523 (Pa. Super. 2022) (citation and quotation marks omitted) (attorney-client privilege); Hume Lake Christian Camps, Inc. v. Sawyer, No. 19 MISC 000386 (DRR), 2022 WL 1256666, at *12 (Mass. Land Ct. Apr. 27, 2022) (deity); People v. Moon, 2022 IL 125959, ¶ 32 ("right to an impartial jury"); *In re* Sangha, No. 6:13-AP-01171-MH, 2022 WL 987421, at *10 (Bankr. C.D. Cal. Mar. 31, 2022) (referring to 4 COLLIERS ON BANKRUPTCY (16th ed.

burial place; a flag; the Capitol; "a patriotic or religious symbol"; a religious building; a sacred text; and a corpse are all objects that can be desecrated.[37] And while our legal system applies both reverence and desecration to objects and people, it does not often use both terms together, but when it does, it is either talking about the flag or the dead.[38] Thus, courts already deploy the language of the sacred to identify people and things possessing a sacred quality, and this, without compunction.

While other commentators have mentioned dignity and reverence, or reverence and desecration, this Article is the first to focus on how reverence and desecration add to our understanding of human dignity and why we should focus on both terms at this hour.[39] This is

2019) as "[a] revered bankruptcy treatise"); State v. Amador, No. 54594-2-II, 2022 WL 842539, at *2 (Wash. Ct. App. Mar. 22, 2022) (people who are older); Semidey v. Evergreens Cemetery Pres. Found. Inc., 75 Misc. 3d 302, 166 N.Y.S.3d 111, 117 (N.Y. Sup. Ct. 2022) (the dead); Arwood v. AW Site Servs., LLC, No. CV 2019-0904-JRS, 2022 WL 705841, at *25 (Del. Ch. Mar. 9, 2022), *reargument granted*, No. CV 2019-0904-JRS, 2022 WL 973441 (Del. Ch. Mar. 31, 2022) (a word); DiCillo v. Geauga Cnty. Bd. of Comm'rs, No. 2020-G-0263, 2022 WL 351791, at *4 (Ct. App. Ohio Feb. 7, 2022) (private property rights); Johnson v. Israel, 576 F. Supp. 3d 1231, 1256 (S.D. Fla. 2021) (freedom of speech); Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 206 (3d Cir. 2002) ("copyright protection"); *In re* Schrape, 217 F. 142, 145–46 (W.D. Wash. 1914) ("Stars and Stripes"); Young v. Hawaii, 992 F.3d 765, 815 (9th Cir. 2021) ("written constitutions"); Olajide v. Newsome, No. C 19-08048 WHA, 2020 WL 1171127, at *1 (N.D. Cal. Mar. 11, 2020) (Magna Carta); Jackson v. State, No. 01-12-00656-CR, 2013 WL 3155935, at *2 (Tex. App. June 20, 2013) (right to counsel).

[37] *See* Bailey v. City of Leeds, 304 So. 3d 719, 721. (Ala. Civ. App. 2020) (burial place); State v. Johnson, 475 S.W.3d 860, 862. (Tex. Crim. App. 2015) (flag); Trump v. Thompson, 20 F.4th 10, 19 (D.C. Cir. 2021) (the Capitol), *cert. denied*, 142 S. Ct. 1350 (2022); Ark. Code Ann. § 5-71-207 (West) (2022) ("a patriotic or religious symbol"); United States v. Two Juvs., 886 F. Supp. 934, 937 (D. Mass. 1995) (synagogue); Le Bourgeois v. Wolf, No. 17-C-1375, 2020 WL 1158553, at *9 (E.D. Wis. Mar. 10, 2020) (sacred text); Neal v. State, 15 So. 3d 388, 394 (Miss. 2009) (corpse).

[38] *See* Joyce v. United States, 454 F.2d 971, 976 (D.C. Cir. 1971) (flag); Bogner v. Villiger, 796 N.E.2d 679, 686 (Ill. App. Ct. 2003) (the dead).

[39] I ran searches in Westlaw for "dignit* /50 revere*", which returned ninety-four law review articles total. The most responsive results do not deal with dignity and reverence in detail. *See, e.g.*, Daniel L. Shapiro, *The Power of the Civic Mindset: A Conceptual Framework for Overcoming Political Polarization*, 52 CONN. L. REV. 1077, 1088 (2021) (mentioning dignity and reverence in passing); Brandon Hogan, *Derrick Bell's Dilemma*, 20 BERKELEY J. AFR.-AM. L. & POL'Y 1, 12 (2019) (same); Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 GEO. L.J. 73, 77 n.13 (2020) (citing Justice Kennedy's uses of the terms in *Obergefell v. Hodges,* 135 S. Ct. 2584, 2594 (2015)); Jimmy Chia-Shin Hsu, *Does Communicative Retributivism Necessarily Negate Capital Punishment?,* 9 CRIM. L. & PHIL. 603, 615–16 (2015) (referring to a first understanding of dignity as "the revered status of human

the hour in which women have seen a constitutional right stripped from them, in which the LGBTQ community sees its own rights under attack, and in which religion is being injected more powerfully into American life with the Supreme Court's blessing.[40] It is helpful, then, to think of the relationship between human dignity, reverence, and desecration. Whom and what do we revere? Whom are we willing to sacrifice to placate what we believe our traditions and sacred objects require of us? What does this teach us about the meaning of human dignity?

Part I.A shows that from status flows the requirement of reverence. Reverence is required for certain communities and individuals (living or not), whose status is said to be superior or supreme. In the cases highlighted in this Article, reverence is expressed either as veneration for hallowed values and individuals or as deference toward certain entities and individuals that uphold an exclusive and exclusionary vision of American law that serves those holding superior or supreme status. Reverence includes both veneration and deference, and while deference can be granted to vulnerable constituencies, veneration cannot.

Part I.B shows that reverence is linked to the fear that sacred communities, individuals, or traditions are not receiving the hallowed treatment due to them. Fear is not only a motivation, but also a disciplinary response to the perceived desecration of sacred values, people, and traditions. Desecration is, further, an act of resistance by those said to possess inferior status. The law responds to their resistance with desecration of what they hold sacred—control of their bodies and sexual expression, among other responses—to impose reverence. Part II closes with an evaluation of how desecration includes humiliation, denigration, and demeaning of a human being, which are treated in the literature as antonyms of human dignity.

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kind," which, second, requires respect for human beings and is consistent with the death penalty); George P. Fletcher, *Searching for the Rule of Law in the Wake of Communism*, 1992 B.Y.U. L. REV. 145, 161 (1992) (same). I also ran searches in Westlaw for "revere* /255 desecrat*", which returned thirteen law review articles total, with the most recent law review article being from 2012. *See* Steven G. Gey, *Deconceptualizing Artists' Rights*, 49 SAN DIEGO L. REV. 37, 71, 72 (2012) (mentioning reverence and desecration in passing); Martha Norton Mullins, *That 'Burning' Flag Issue: Is It Finally Resolved in* Texas v. Johnson*?'*, 16 OHIO N.U. L. REV. 103, 110 (1989) (same). A search for "dignit* /255 revere* /255 desecrat*" returned no results.

[40] On the revocation of women's constitutional rights, see *infra* Part 1.B. On the assault on LGBTQ rights, see *infra* Part I.B. On the injection of religion into public education, see Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022).

The conclusion follows, and it draws attention to the destructive aspects of desecration.

A. *On Reverence*

Precedent from the Supreme Court going back to the nineteenth century shows that dignity is about status, and an incident of that status is reverence.[41] Reverence is a posture required for sacred beliefs, expressions, and people—living and dead. It is both a requirement and an imposition, and it appears in two ways—veneration and deference.[42] Veneration upholds what is considered hallowed or sacred, and deference yields to an entity or individual whose status is considered superior or supreme. As this Article shows, the presence of reverence (as veneration and deference) in a case often implies the denial of minority rights. Yet, the requirement of reverence is not inevitable; it is a choice that has been judicially made to praise, uplift, and venerate—even when the objects of such reverence are flawed and injurious in their effect on vulnerable human beings.

1. Veneration as Reverence

At least initially, it might seem like our legal system does not revere select communities, traditions, or human beings, but if it does, then it must revere all human beings and what they hold sacred. As proof, we might rely on cases like *Obergefell v. Hodges* (2016), *United States v. Windsor* (2013), and *Lawrence v. Texas* (2003).[43] We might say

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[41] On the relationship between status and its incidents, see generally WALDRON, *supra* note 13, at 18.

[42] Unless I indicate otherwise, the insights I share in the Article are my own. Here, I ran a search in Westlaw for "revere* /255 venera*" which returned no cases and no literature. A search for "revere* /255 defer*" returned a substantial number of results for "Paul Revere" and "defer" or "deference."

[43] Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (relying on the Fourteenth Amendment's Equal Protection and Due Process clauses to require states to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered into in other states); United States v. Windsor, 570 U.S. 744, 775 (2013) (relying on the Fourteenth Amendment's Equal Protection Clause, applicable to the Federal Government through the Fifth Amendment's Due Process Clause, to invalidate a federal statute excluding same-sex couples from the federal definition of marriage); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (relying on the Fourteenth Amendment's Due Process Clause to invalidate a Texas statute criminalizing same-sex intimacy); *see also* Romer v. Evans, 517 U.S. 620, 635–36 (1996) (relying on the Fourteenth Amendment's Equal Protection Clause to invalidate a state constitutional amendment prohibiting protection for lesbian, gay, and bisexual human beings from discrimination).

that those cases stand for the proposition that, at the dawn of the twenty-first century, the promise of human dignity was finally extended to all human beings since a community whose human dignity had long been rejected as a matter of constitutional law—the LGBTQ community—saw its status raised.[44]

Specifically, in *Obergefell,* the Supreme Court held that the Federal Constitution required states to admit the LGBTQ community to an institution long considered sacred—marriage.[45] In *Windsor,* the Court held that the federal government could not define marriage in a way that excluded members of the LGBTQ community from its benefits, and the Court held in *Lawrence* that the Federal Constitution barred states from reaching into the sanctity of LGBTQ homes and criminalizing sexual expression.[46] If the legal system can confer equal dignity on a long disparaged minority, the argument might go, then it must do so for everyone. And since dignity is really about status, by conferring equal status on members of the LGBTQ community, reverence, an incident of status, was conferred on the community.[47]

That reading would, unfortunately, be incorrect. While status can be conferred, reverence (as both veneration and deference) cannot. The Court's case law points to an interest in status, which specifically goes to deference. *Windsor,* for example, focuses on status when it tells us that when a state recognized same-sex marriages while the Federal Government did not, "the State acted to give [same-sex couples'] lawful conduct a lawful status."[48] *Windsor* is referring to a state's decision to defer to the experience of the LGBTQ community as a matter of law. *Obergefell* similarly refers to status when it indicates that

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[44] On dignity in the three cases, see generally Steve Sanders, *Dignity and Social Meaning:* Obergefell, Windsor, *and* Lawrence *as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2072 (2019) (describing dignity as a process in which majoritarian attitudes are embodied in constitutional law); Ho, *supra* note 13, at 469 (describing dignity as respect); Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 391 (2017) (describing dignity as life, liberty, and equality); Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1122 (2017) (discussing equal dignity); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 439 (2017) (same); Roberta A. Kaplan, *The Dissent That Paved the Way to Equal Dignity: Chief Judge Judith S. Kaye's Dissent in Hernandez*, 92 N.Y.U. L. REV. 56, 61 (2017) (same); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (same); Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CALIF. L. REV. CIRCUIT 117, 118 (2015) (describing dignity as respect).

[45] *Obergefell*, 576 U.S. at 656–57.

[46] *Windsor*, 570 U.S. at 775; *Lawrence*, 539 U.S. at 578.

[47] On dignity as status, see *supra* note 13 and accompanying text.

[48] *Windsor*, 570 U.S. at 769.

"[a]s the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects."[49] *Obergefell* is referring to a state's refusal to defer to the experience of a sexual minority in matters concerning interpersonal intimacy. And *Lawrence* implies that status can be implicit in historical discussions of sexual expression when it observes that certain proscriptions of what was termed "sodomy" were really about "relations between adults implicating disparity in status."[50] *Lawrence* has in mind legal deference to certain kinds of sexual expression.

While these cases imply deference, nothing in them indicates that members of the LGBTQ community should be venerated. 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.[51] That is, the sacred can only be cultivated and upheld over an extended period of time, but it cannot be judicially conferred in an instant. Assume, for the sake of argument, that the conclusion of that horrific nineteenth-century case, *Dred Scott v. Sandford*, had been different.[52] That is, Mr. Scott, as a human being of African descent, could bring suit in federal court, and Congress could ban slavery. While such a holding would amount to deference both to Congress and to a vulnerable human being and his community so that the vulnerable human being and his community might share their experience in federal court, it would not amount to veneration given the inferior status forced upon Mr. Scott and the members of his community before they brought suit.[53]

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[49] *Obergefell*, 576 U.S. at 670.

[50] *Lawrence*, 539 U.S. at 569.

[51] *See Venerate*, OXFORD ENGLISH DICTIONARY (3d ed. 2022), https://www.oed.com/view/Entry/222111 (accessed Feb. 5, 2023); *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (criticizing non-deference to constitutional decisions as a failure to follow the law).

[52] Dred Scott v. Sandford, 60 U.S. 393, 403, 449–52, 457–63 (1857) (Taney, C.J.) (holding that those of African descent are not American citizens, and, they, thus, cannot sue in federal court; that Congress could not prohibit slavery in the territories; and that the Missouri Compromise violated the Due Process Clause of the Fifth Amendment).

[53] *See generally* Zanita E. Fenton, *Disarming State Action; Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47, 55 n.64 (2017) (stating that "*Dred Scott* defers to state law in its determination of the citizenship status and the rights held by

Why? Because veneration is something one's community has and is entitled to *before* the legal process intervenes; it is not what one gets *because* of it. As the *Boutilier* Court would put it in the immigration context almost a century after the *Dred Scott* decision, "[t]he petitioner is not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed at the time of his entry. Here, when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality."[54] Or, as *Dred Scott* itself admitted, only those "who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else."[55]

Consider, then, what the following language—also from *Dred Scott*—teaches us about veneration. To show that those having their origins in Africa were inferior, Chief Justice Taney, writing for the *Dred Scott* Court, turned to England, whose practices the Chief Justice both venerated and deferred to:

> [Slaves and their descendants] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.
>
> And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise

blacks, even when that state's law was in conflict with the laws of other states or contrary to federal law. *See* Missouri Compromise 1820.").

[54] Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 123 (1967).

[55] *Dred Scott*, 60 U.S. at 406.

> to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.[56]

While Chief Justice Taney revered "the white race," those having their origins in Africa, he noted elsewhere in his opinion, were part of "the degraded condition of this unhappy race," "[t]he unhappy black race," "them," "that race," that "separate class of persons," "the African race," and those "held in subjection and slavery, and governed at . . . pleasure."[57] The Chief Justice stated that the phrase "all men are created equal" in the Declaration of Independence could not possibly include those of African origin or descent.[58] That conclusion was prompted by "the conduct of the distinguished men who framed the Declaration of Independence," "great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting."[59]

Veneration, then, was a birthright that could be judicially enforced, but it could not—and would not—be conferred. Chief Justice Taney affirmed the ties linking veneration and birthright citizenship by rejecting admission to citizenship for Africans and those of African descent based on the place of their ancestry; the Chief Justice, thus, rejected "the widely accepted principle of *jus soli*."[60] As Professor Gerald L. Neuman has noted, "[i]n the infamous *Dred Scott* decision, Chief Justice Taney read the Constitution as making citizenship too precious to be shared with Americans of African descent."[61] Chief Justice Taney further observed that Native Americans were "under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy."[62]

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[56] *Id.* at 407–08.

[57] *Id.* at 403, 408, 409, 410–11, 414, 420.

[58] *Id.* at 410.

[59] *Id.*

[60] Rose Cuison-Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. 1033, 1052 (2022) (reviewing MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020)).

[61] Gerald L. Neuman, *Back to* Dred Scott?, 24 SAN DIEGO L. REV. 485, 485 (1987) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985)).

[62] *Dred Scott*, 60 U.S. at 404.

From the Chief Justice's perspective, veneration for what he appeared to consider his own people (those having their sole origins in Europe) existed as a matter of their superior birthright and its concomitant supreme legal status because they were part of the "white race" (a phrase the Chief Justice deployed at least seven times).[63] Similar veneration for Native and African Americans was impossible given what the Chief Justice deemed their inherent lack of an equivalent birthright and its accompanying legal status since their ancestry was not traceable to the supremacy of European ancestry. The birthright of Native and African Americans (if any) placed them below both the veneration and deference of those having their sole origins in Europe. Specifically, for Native Americans, their birthright (if any) was to be in a state of "pupilage," and for African Americans, their birthright (if any) was to be sold as "merchandise" by those having their origins in Europe.[64]

That veneration was an offshoot of dignity tied to an ancestral birthright was made clearer in Justice Daniel's concurrence in *Dred Scott*.[65] Justice Daniel's was one of six concurrences in *Dred Scott,* and the Justice focused on sovereignty and citizenship in his concurring opinion.[66] In his discussion of citizenship, Justice Daniel drew an analogy between American and Roman slavery, noting that they bore a "resemblance" to each other.[67] The Romans, said the concurring Justice, did not confer on freed slaves "the *status* or the rights of citizenship."[68] "The proud title of Roman citizen" was to be distinguished from "the condition of conquered subjects or of the lower grades of native domestic residents."[69] Justice Daniel then cited to Edward Gibbon's *Decline and Fall of the Roman Empire* for the proposition that a "degradation" of the strict Roman laws of citizenship under the Emperor Justinian led to erroneous grants of citizenship to all former slaves, which was evidence of "the *decline* of the Roman

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[63] *See id.* at 403, 404, 407, 409, 415, 420.

[64] *See generally* Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. REV. 851, 859 (2008) (observing that "[t]he notion of Native Americans as once sovereign, uncivilized and 'in a state of pupilage' permeates the case law on Native Americans").

[65] *See Dred Scott*, 60 U.S. at 469–493.

[66] *Id.*

[67] *Id.* at 477–78.

[68] *Id.* at 478.

[69] *Id.*

empire."[70] In citing to Gibbon, Justice Daniel lamented that Justinian had despotically, by virtue of his position as emperor, bestowed "the dignity of an ingenuous birth [born free]" on those who never would have held such dignity or status under previous Roman law, and he had raised the status of those whose lives were previously reduced to "obedience and gratitude."[71] Roman citizenship—and, by analogy, American citizenship—was to be venerated, and it was a despotic miscalculation to extend the dignity of such citizenship to those whose birthright was deemed undeserving of it.[72]

That the idea of birthright was hereditary was also made clear by the concurring Justice. Relying on Gibbon, Justice Daniel observed that "[t]he emperor [Justinian] could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors."[73] In other words, try though the emperor might to change things, dignity implied status, which implied reverence, and reverence further implied veneration for those whose hereditary birthright it was to receive the highest esteem from the public because of their "possession of hereditary wealth or the memory of famous ancestors."[74] The reference to illustrious forebears was meaningful in the context of a discussion of Roman law (and Roman dignity) because the Romans relied extensively on ancestral customs (the *mos* or *mores maiorum*), which formed the basis of Roman morality, permitting Romans to express a deep and abiding reverence for their past, which they treated as exemplary.[75] Ancestral custom made that

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[70] *See Dred Scott*, 60 U.S. at 478.

[71] *Id.* at 478–79.

[72] *See id.* at 480.

[73] *Id.* at 478.

[74] *Id.*

[75] *See* Matthew Roller, *The Exemplary Past in Roman Historiography and Culture*, *in* THE CAMBRIDGE COMPANION TO THE ROMAN HISTORIANS 214 (Andrew Feldherr ed., 2009); Thomas Wiedemann, *Reflections of Roman Political Thought in Latin Historical Writing*, *in* THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT 517 (Christopher Rowe, Malcolm Schofield, Simon Harrison & Melissa Lane eds., 2000); Harriet I. Flower, *Spectacle and Political Culture in the Roman Republic*, *in* THE CAMBRIDGE COMPANION TO THE ROMAN REPUBLIC 377 (Harriet I. Flower ed., 2004); Joanna Kenty, *Congenital Virtue:* Mos Maiorum *in Cicero's Orations*, 111 CLASSICAL J. 429, 437 (2016); *see also* SENECA, TO MARCIA ON CONSOLATION, *in* SENECA, MORAL ESSAYS: VOLUME II 4-5 (Jeffrey Henderson ed., John W. Basore trans., 1932) (noting, in a letter to the powerful daughter of a deceased Roman historian, that her father's memory will endure "so long as it shall be worth while [*sic*] to learn the facts of Roman history—so long as there shall be anyone who will wish to hark back to the deeds of our ancestors [*acta maiorum*]") (c. 40 C.E.).

past available to Romans, and it provided them with a normative foundation, which, through repetition, they ratified.[76] For the concurring Justice, a highly selective and (exclusionary) reading of our nation's ancestral past meant that a European birthright was hereditary, and it remained the object of constitutional veneration in the United States.

Given the sacred constitutional raiment bestowed upon those having their origins in Europe in *Dred Scott*, the depth of the veneration they enjoyed in (and as a result of) the case is remarkable. *Dred Scott* helps us understand that veneration for one group of people and their descendants (referred to as a "race") amounts to status beyond status imbued with an element of the divine. It is, first, status because it goes to what Chief Justice Taney called "class" and, also, "*status*."[77] It is beyond status because it represents what appears to be an irrevocable and unbroken chain of self-granted supreme status, whose origins the Chief Justice locates in a European past of which he approves, and which the concurring Justice locates even further in a "proud" Roman past.[78] It is tinged with an element of the divine because it was so omnipotent and omnipresent that it allowed itself, by the Chief Justice's own admission, to exercise dominion over all people and things. Specifically, as the Chief Justice indicated, those whose birthright it had been to possess such supreme status were able to reduce other human beings to subjection, seizure, to recast them as "merchandise," and to foist upon them the yoke of "pupilage."[79] That is, our legal system had an overarching racial preference, which it proudly enforced as a sacred mandate.[80] Veneration has an element of the divine, then, because it has the inevitability of the preordained and transcendent.

In more recent cases dealing with status as well, the ties between veneration and the sacred are present, although the discussion is

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[76] *See* CHARLES ARCH, ROMAN VALUES IN SHAKESPEARE 21 (1992); *see also Jus*, A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 560 (William Smith et al. eds., 3d ed. 1891); Michael L. Satlow, *Tradition: The Power of Constraint*, *in* THE CAMBRIDGE COMPANION TO RELIGIOUS STUDIES 130 (Robert A. Orsi ed., 2012); Kenty, *supra* note 75, at 430.

[77] *Dred Scott*, 60 U.S. at 403, 422.

[78] *Id.* at 408 (Taney, C.J.); *id.* at 477–78 (Daniel, J., concurring).

[79] *Id.* at 404, 408 (Taney, C.J.).

[80] *See generally* Jennifer B. Wriggins, *Tort, Race, and the Value of Injury, 1900-1949*, 49 HOW. L.J. 99, 104 (2005) (stating that "[a] racial caste system excluded blacks from equal participation in the legal system, and its underlying assumptions required social segregation of blacks and whites, at times in combination with gender").

neither about ancestry, race, nor national origin. More recent case law teaches us that in the marriage arena, many believed their marital status sacred and worthy of reverence. State legislators specifically deployed religious language upholding the supremacy of heterosexuals when talking of marriage. A Kentucky legislator believed that "[t]he sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God."[81] In Ohio, the desire was to protect "a divine institution that's been given to us by God," and there was the belief that "males and females coming together in traditional marriage create the basic unit, the building blocks of our society."[82] Indeed, the Supreme Court's own case law has identified marriage as a sacred institution. The Court's precedent highlighted the sacred nature of marriage when it observed that:

> [m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[83]

Veneration, then, can appeal to language associated with the sacred, which has religious origins. The sacred is deployed to preordain the superior or supreme status of one group, which is denied to another deemed legally subordinate and inferior.

Veneration has benefits. *Windsor* tells us that the majority conferred federal advantages upon its own unions, which it denied to sexual minorities.[84] *Lawrence* tells us that the majority decided which forms of sexual expression it rejected, including those engaged in by sexual minorities.[85] That sexual minorities were beneath veneration is implicit in Justice Kennedy's insight that many members of the majority considered members of the LGBTQ community inferior and that, for members of the majority tethered to such a belief, "it would

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[81] Bourke v. Beshear, 996 F. Supp. 2d 542, 551 n.15 (W.D. Ky.), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015).

[82] Brief for National Women's Law Center et al. as Amici Curiae Supporting Plaintiffs-Appellees at 28, DeBoer v. Snyder, 772 F.3d 388, 395 (6th Cir. 2014) (No. 14–3057), 2014 WL 1870428, *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015).

[83] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[84] United States v. Windsor, 570 U.S. 744, 752 (2013).

[85] Lawrence v. Texas, 539 U.S. 558, 563 (2003).

demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman."[86] Veneration, then, is an incident of status, which has practical benefits in our legal system.

Veneration exists outside the law. According to Justice Kennedy, heterosexual marriage was celebrated as a work of art, a philosophical undertaking, a religious endeavor, and a legal institution. This was the case across time, cultures, and civilizations. "There are untold references," said Justice Kennedy, "to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms."[87] As Professor Melissa Murray has observed:

> One cannot help but appreciate the degree to which *Obergefell* idealizes marriage. Marriage is not only the most "profound" union; it shapes destinies, provides fulfillment and care, and prevents loneliness. Marriage's benefits are not reserved for adults. As the majority notes at length, marriage serves "children's best interests." If this rose-colored vision of marriage is at odds with the experiences of those who are divorced, in marriage counseling, or in abusive marriages or families, Justice Kennedy and the majority stubbornly refuse to admit the disjunction.[88]

Marriage's omnipresence reinforced the reverence felt for and owed to it, and such reverence was apparently so ubiquitous that its representation informed so many aspects of human expression.

Indeed, so venerable has the institution been that specific individuals and sources have long been conscripted in its defense. In *Obergefell*, some of those fighting for the maintenance of their monopoly on definitions of marriage cited to the English jurist, William Blackstone, among others, in support of the argument that "[t]he man-woman definition conveys and reinforces that marriage is centered primarily on procreation and children, which man-woman couples are uniquely capable of producing naturally."[89] In *Lawrence*, the state court similarly cited to Blackstone, among others, in support

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[86] *Obergefell*, 576 U.S. at 657.

[87] *Id.*

[88] Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1213–14 (2016).

[89] Brief of Amici Curiae Scholars of Fertility and Marriage in Support of Respondents & Affirmance at 10–11, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

of its belief that "[w]estern civilization has a long history of repressing homosexual behavior by state action."[90] And in *Windsor*, it was Congress that had previously "concluded that [the federal statute in question] expresses both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[91] In other words, venerated sources upheld the bestowal of reverential treatment on a sacred institution.

Reverence-as-veneration implies exclusion, meaning that veneration is both an attitude and an effect. As an attitude, it projects an air of inevitability around its ancestral hold on superior or supreme status, memorialized as binding law. As an effect, veneration embodies a continuing sense of awe for the beliefs and opinions regarding the origins of such superior or supreme status, which are regarded as sacred.

2. Deference as Reverence

Reverence implies deference. To arrive at the conclusion that Georgia's criminalization of same-sex sexual intimacy was constitutionally rational, Justice White, writing for the *Hardwick* Court, explained that "[p]roscriptions against [sodomy] have ancient roots."[92] In his concurrence, Chief Justice Burger explained that such "ancient roots" included religious sources, Blackstone, and Roman law.[93] Deference was due, then, to those sources. But deference can also be to a state. In *Hardwick*, Justice White deferred to Georgia's criminalization of same-sex sexual intimacy, and he applied rational basis review, the most deferential standard in constitutional law.[94] As Professor William N. Eskridge, Jr., has observed, "[d]octrinally, the constitutional baseline or standard of review makes a big difference. *Hardwick's* minimal rationality considers antihomosexual [*sic*] sentiment a sufficient state goal, defers to a longstanding antigay status

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[90] Lawrence v. State, 41 S.W.3d 349, 361 (Tex. App. 2001).

[91] United States v. Windsor, 570 U.S. 744, 771 (2013).

[92] Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

[93] *Id.* at 198 (Burger, C.J., concurring). *But see* William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 671 (1999) (observing that history did not support what the Court said in *Hardwick*. "The 'roots' of Justice White's focus on homosexuality were, instead, the middle-class anxiety about urbanized sexuality and medicalization of sex in the post-Reconstruction period of American history.").

[94] On the application of rational-basis review in cases involving the LGBTQ community, see generally Hutchinson, *supra* note 17, at 40–41.

quo, and tolerates a range of state policies that reflect history-based antigay rules."[95]

Congress, too, can be an object of deference. In *Boutilier*, Clive Michael Boutilier, a Canadian citizen and United States permanent resident, lived with his mother and stepfather in New York City.[96] Mr. Boutilier was one of seven children; five of his siblings lived in the United States.[97] At the age of twenty-five, Mr. Boutilier "was arrested at home on a charge of sodomy under the New York Penal Law."[98] He later applied for citizenship, was required to detail his sexual experiences as part of his application, underwent psychiatric evaluation, and was deported because, as a man who had previously had sex with both men and women, he was considered "a sexual deviate of the homosexual type."[99] Under federal law, Mr. Boutilier was treated as having a "psychopathic personality."[100] The Supreme Court deferred to Congress and upheld Mr. Boutilier's deportation, removing Mr. Boutilier both from his family and the country he called home.[101] As Professor Marc Stein has observed, "[w]hat [*Boutilier*] did was to develop a narrowly framed doctrine that privileged and extended special rights to adult, heterosexual, monogamous, marital, familial, domestic, private, and procreative forms of sexual expression."[102] In other words, *Boutilier* deferred to congressional reverence of heterosexuality.

Reverence, then, implies both veneration and deference. Like veneration, deference is an attitude and an effect. As an attitude, it underscores a legal system's sanctification of select individuals, ideals, or traditions to which it yields. As an effect, deference can also underscore the sense of inevitability that often accompanies the need to yield to an individual or entity whose status is—and has long been—regarded as superior or supreme.

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[95] William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1384 (2000).

[96] Brief for Petitioner at 4, Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118 (1967) (No. 440).

[97] *Id.*

[98] *Id.*

[99] Brief for Respondent at 3, Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118 (1967) (No. 440).

[100] *Boutilier*, 387 U.S. at 118.

[101] *Id.* at 125.

[102] Marc Stein, Boutilier *and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491, 499 (2005); *see also* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 610–11 (1990).

B. *On Desecration*

Desecration is the antonym of reverence, and it has roots in fear. It is fear, ultimately, that is at work in *Hardwick* and *Boutilier* (and other cases). Such fear is in response to perceived attacks on sacred traditions and people, to which the response is desecration of what those vulnerable individuals and constituencies themselves hold sacred. Desecration includes the humiliation, denigration, and demeaning of human beings.

1. Reverence and Fear

Dignity implies status, which implies reverence, which implies fear. Fear originates in anxieties about the maintenance of status and the perpetuation of reverence for cherished traditions. Fear is also tied to anxieties about the endurance of such status well into the future. *Hardwick*, for example, shows how anxious the Court gets about LGBTQ bodies and, specifically, about our sexual expression. Such anxiety, Professor Eskridge notes, has roots in:

> guilt over a secret boom in oral sex among married couples, nostalgia for old-fashioned marriage, and concerns about racial mixing. As Americans became fearful of sexual chain reactions that would destroy the nation's moral fiber and expose them to external as well as internal enemies, the resulting philosophy of containment made homosexuals the universal scapegoat.[103]

As such, *Hardwick* identifies a target onto which it projects its fears about moral contamination. This contamination, Professor Martha Nussbaum indicates, is related to disgust, which goes to anxieties—and fears—about mortality.[104] Professor Nussbaum indicates that disgust gives way to magical thinking about being what we are not, and the projection of fears onto the vulnerable is the result—"target[ing] others for gross harms."[105] The Court in *Hardwick* channeled and projected its fears about certain bodies onto those very bodies and the lives they led.

Boutilier similarly involves fear. Recall Professor Stein's insight, shared above, that "[w]hat [*Boutilier*] did was to develop a narrowly framed doctrine that privileged and extended special rights to adult,

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[103] WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 78 (2008).

[104] MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 14 (2004).

[105] *Id.* at 75, 102, 161.

heterosexual, monogamous, marital, familial, domestic, private, and procreative forms of sexual expression."[106] The fear in *Boutilier*, then, was that the traditional institutions supporting heterosexuality were under assault. Similar leitmotifs motivated the conclusions of both *Boutilier* and *Hardwick*—contamination, tradition, male supremacy, heterosexual supremacy. Cast in the terms of this Article, the reigning fears in *Hardwick* and *Boutilier* are about traditions of male dignity, heterosexual dignity, moral purity, and the traditional reverence owed to each of them.[107]

In response to such fear, both cases impose fear on those deemed insufficiently (or not at all) reverent. *Hardwick* tells members of the LGBTQ community that we may be treated like criminals, and it cites to sources embodying historical hostility to us (for example, Blackstone). Indeed, so great was the apparent threat posed by gay people to the Court's revered traditions and materials that Chief Justice Burger saw fit to indicate, in his *Hardwick* concurrence, that "[h]omosexual sodomy was a capital crime under Roman law."[108] As he agreed with the criminalization of a vulnerable community's sexual expression in *Hardwick*, the Chief Justice reminded members of the LGBTQ community that had we been living in another era, we would have been executed for our sexual expression, which is another example of the imposition of fear to uphold reverence for sacred beliefs.

Boutilier similarly imposes fear. *Boutilier* tells the vulnerable immigrant that no matter how long the United States has been home, no matter the ties to the country, and no matter the desire to formalize the attachment to the country that has become home by joining its citizenry, that human being can be deported as someone deemed mentally defective during the naturalization process because Congress says so. *Boutilier*, Professor Eskridge notes, also affected workers in the country more generally because it told Congress and the states that LGBTQ workers had a mental illness; they could, therefore, lack protections in the workplace.[109]

Fear, then, is the reaction and response to concerns regarding the future of cherished traditions. As more recent case law makes explicit,

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[106] Stein, *supra* note 102 and accompanying text.

[107] On morality and religion in *Hardwick*, see generally Ruth Colker, *An Embodied Bisexual Perspective*, 7 YALE J.L. & HUMAN. 163, 179 (1995).

[108] Bowers v. Hardwick, 478 U.S. 186, 198 (1986) (Burger, C.J., concurring).

[109] William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 332–33 (2017).

tradition is of paramount concern in our constitutional framework since recognition of constitutional rights often turns on whether such rights are "deeply rooted in our history and tradition, and whether they are essential to our Nation's scheme of ordered liberty."[110] *Dobbs v. Jackson Women's Health Organization*, which revoked a woman's constitutional right to control her body, implies the presence of fear when it looks back to determine rights now. In denying a woman's right to control her body, *Dobbs* tells us that, as a matter of tradition, "American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions."[111] Justice Alito, writing for the Court in *Dobbs*, tells us that *Roe v. Wade* failed for not "following these [common-law] authorities," and the Justice would have us believe that any recognition of a woman's right to control her body would be anathema to our constitutional framework since such control is not "deeply rooted in this Nation's history and tradition" and in our tradition of ordered liberty.[112]

Much like in the cases on sexual orientation, the revered names that appear in Justice Alito's *Dobbs* opinion are male names—

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[110] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (citations and quotation marks omitted); *see also* Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* (Harv. Pub. L., Working Paper No. 22-14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922.

[111] *Dobbs*, 142 S. Ct. at 2248.

[112] *Id.* at 2254, 2245–57.

"Blackstone, [113] Coke, [114] Hale,[115] and the like."[116] In a case like *Dobbs*, the reigning fear is about the passage of time and what it portends for

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[113] William Blackstone (1723-1780) is mentioned about twenty times by name in *Dobbs*. *See id.* at 2246, 2249, 2250, 2251, 2252, 2254, 2267. The problem with this turn to tradition when it comes to women's rights, as Professor Michele Goodwin has noted in a different context, is that earlier American law adopted Blackstone's view that women's rights were absorbed by their husbands. "Thus, not only were married women powerless in relation to forced sex but also rendered invisible in terms of their identities. Courts claimed that coverture preserved legal and social order and promoted familial harmony." Michele Goodwin, *Women on the Frontlines*, 106 CORNELL L. REV. 851, 888 (2021).

[114] Edward Coke (1552-1634) is mentioned roughly six times by name in *Dobbs*. *See Dobbs*, 142 S. Ct. at 2249, 2254, 2267. The problem with this turn to tradition when it comes to women's rights, as a nineteenth-century book on Coke helps us understand, is that the human being who likely knew Coke best, the human being he married, Lady Elizabeth Hatton, in a letter to the sovereign, called Coke "a base and treacherous fellow" because, she said in her letter, "[i]t was when he had assigned away all my living by my first husband, and sold his daughter, who was left to my trust and care by Sir William Hatton, and afterward he deceived the children he had by me of their inheritance." CUTHBERT WILLIAM JOHNSON, THE LIFE OF SIR EDWARD COKE, LORD CHIEF JUSTICE OF ENGLAND IN THE REIGN OF JAMES I 62–66 (2d ed. 1845). The same commentator notes that Coke married their daughter, Frances, off at the age of fourteen to a man twice her age, who apparently thought nothing of her, "merely to promote the interest of the Coke family." *Id.* at 68. The commentator notes that "[i]t was a regular bargain and sale, of Frances Coke, on the part of Sir Edward Coke, and of Villiers on the part of his brother. The money of Coke was exchanged for the smiles of royalty, and for these base considerations two persons were thoughtlessly sacrificed." *Id.* So estranged appeared Coke's idealized vision of marriage from the reality of his daughter's adolescent marriage that the same commentator notes that Coke's ideas about marriage "partook of the elegant refinements of the days of feudalism, and of the description of them which he found in his law books." *Id.* at 69. *See also* John T. Noonan, Jr., *Educ., Intel., and Character in Judges*, 71 MINN. L. REV. 1119, 1127 (1987) (stating that "Coke was a curmudgeon. His treatment of his wife and daughter Frances marks him as a sexist by modern standards and a domestic tyrant by earlier ones.").

[115] Matthew Hale (1609-76) is mentioned almost fourteen times by name in *Dobbs*. *See Dobbs*, 142 S. Ct. at 2249, 2250, 2251, 2254, 2267. The problem with this turn to tradition when it comes to women's rights, as Professor Jill Elaine Hasday has noted in a different context, is that Hale believed the following:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." The statement included no supporting citations, and this appears not to have been an oversight. Even scholars who believe that ample common law authority already sanctioned the marital rape exemption when Hale wrote, posit that the theory of irretractible consent originated with him.

Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1397 (2000). Hale also had women burned as witches. *See generally* G. Geis, *Lord Hale, Witches, and Rape*, 5 BRIT. J.L. & SOC'Y 26, 26 (1978).

the traditional power exercised by men and those aligned with exercises of male disciplinary authority.[117] It is fear about how bodies deemed defiant challenge the traditional reverence owed to men and those aligned with the perpetuation of views historically formulated—and held—by men, which as Professor Reva Siegel notes, has origins in the nineteenth century.[118] Such fears target women's advancement in society, which, Professors Naomi Chan and June Carbone note, came with the sex revolution and the Supreme Court's recognition of the right to privacy, which made contraception, for example, available.[119]

Reverence, then, is the continuous affirmation of tradition, which is a living memorial to the judgments of the men of the past.[120] As Professor Michele Goodwin has indicated, *Dobbs* itself "demonstrates a selective and opportunistic interpretation of the Constitution and legal history."[121] In other words, in an attempt to uphold tradition as sacred, *Dobbs* rewrites tradition in the name of tradition. And yet, there is nothing sacred about tradition since it "is a heavily edited anthology of

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[116] Henry of Bracton (1210-1268) is mentioned by name roughly five times in *Dobbs*. *See Dobbs*, 142 S. Ct. at 2249, 2254, 2267. The problem with this turn to tradition when it comes to women's rights, as Professor Deborah J. Anthony helps us understand in a different context, is that "Bracton, a thirteenth century legal scholar, entreated women to 'attend to nothing except the care of her house and the rearing and education of her children.'" Deborah J. Anthony, *To Have, to Hold, and to Vanquish: Property and Inheritance in the History of Marriage and Surnames*, 5 BRIT. J. AM. LEGAL STUD. 217, 230 (2016) (citation omitted); *see also* Harry Keyishian, *Henry De Bracton, Renaissance Punishment Theory, and Shakespearean Closure*, 20 L. & LITERATURE 444, 450 (2008) (observing that Bracton believed that women were inferior to men and that men were to be preferred to women when it came to succession).

[117] *See generally* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae in Support of Respondents at 19–20, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (observing that the Mississippi statute in *Dobbs* reflected nineteenth-century "assumptions about women . . . . These well-worn sex-role stereotypes may be archaic, but they are anything but quaint: when these sex-role stereotypes are enforced through a law restricting abortion, they can deprive a woman of her autonomy, her job, her health, and even her life.").

[118] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280 (1992).

[119] Naomi Cahn & June Carbone, *The Blue Family Constitution*, VA. PUB. L. & LEGAL THEORY PAPER SERIES 1, 4–6 (2022).

[120] *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 222 (1993) (observing that "therein lies the tremendous value of tradition. It represents the judgments of earlier generations, revealing choices they have made and values they have adopted.").

[121] Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html.

the past, and much of the past fails to participate in it at all."[122] Tradition is what judges curate and choose to pass from generation to generation so as to bind the present and future generations.[123] In so doing, judges implicitly make choices about which traditions they will not pursue, enforce, and transmit to the next generation. "Confronting the luxuriant growth of a hundred legal traditions, [judges] assert that *this one* is the law and destroy or try to destroy the rest."[124] Tradition, as Professor David Luban has indicated, is "the political counterpart of what individuals experience as nostalgia for lost innocence."[125]

Fear, in sum, is a disciplinary tool that ensures the continued (and even perpetual) sanctification of revered traditions and people. I now focus on the fruit of fear—desecration—as the opposite of reverence.

2. Reverence and Desecration

Fear generates desecration—an experience, an attitude, and a response. Desecration is, first, the unacceptable experience of a perceived lack of veneration of and deference to hallowed traditions. As an attitude, desecration is, second, a form of resistance by those assigned inferior status. As a response, it is, third, the marking for destruction or indifference of what vulnerable individuals and communities themselves hold sacred and worthy of reverence. Desecration includes humiliation, degradation, and demeaning of human beings.

For those holding superior or supreme status, desecration is witnessing the reduction to heretical banality of what they hold sacred. Professor Aziz Rana tells us that, in the United States, the Federal Constitution is an object of "veneration" and "almost religious devotion."[126] Professor Rana identifies key events that have contributed to the conferral of sacred status on the Federal

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[122] David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1046 (1991).

[123] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573, 589 (1987) (observing that "[i]f the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other and future assimilable cases").

[124] Robert M. Cover, *The Supreme Court: 1982 Term – Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 53 (1983).

[125] Luban, *supra* note 122, at 1057.

[126] Aziz Rana, *Why Americans Worship the Constitution,* PUB. SEMINAR (Oct. 11, 2021), https://publicseminar.org/essays/why-americans-worship-the-constitution.

Constitution.[127] Keeping in mind Professor Rana's insights as we think of *Hardwick*, we see that in *Hardwick*, the Georgia attorney general, Michael J. Bowers, urged the Court to "draw a line" and reject constitutional protection for sexual intimacy between two people of the same sex.[128] For the Georgia attorney general, then, the sacred Federal Constitution required traditional veneration of the sacred heterosexual family and traditional deference to that family. Anything beyond that boundary or "line" was unacceptable, a threat to the sacred dignity of the Federal Constitution and to the sacred dignity of an institution the attorney general upheld.

Such sacred dignity had to be protected from an imaginary onslaught of unsacred of threats. For the Georgia attorney general, beyond the sacred enclosure occupied by traditional marriage lay a series of unsacred threats embodied by sodomites, adulterers, fornicators, the incestuous, and those who had sex with animals. The Georgia attorney general had the following to say in his brief to the Supreme Court:

> Our history supports the view that matters involving marriage, family and childbearing should be free from state regulation. But our history does not support any "right to engage in sexual intimacy as such." It does not observe any right to engage in sodomy or sexual intimacies such as adultery, fornication, incest, or bestiality. Respondent may not like these historical facts, and presumably his ideal society would not countenance such regulations, but this is our history.
>
> Although it might please Respondent to extend the right of privacy to all consensual "*sexual* activities and relationships," Respondent's Brief at 12, there comes a time in the development of any constitutional doctrine to draw a line.[129]

The sacred and the traditional, then, distinguished themselves by their moral purity, which was free from the contamination and desecration represented by unsacred threats.

As it moves to identify the origin of such threats, desecration draws a line between the preexisting and the recent, the older and the younger. Consider what Judge Kaufman of the Second Circuit said at the beginning of his opinion upholding Mr. Boutilier's deportation:

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[127] *Id.*

[128] Reply Brief for Petitioner at 12, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85–140) [hereinafter "Reply Brief"].

[129] *Id.* at 11.

> Although a relatively young segment of contemporary society prides itself on its readiness to cast off conventional and tested disciplines and to experiment with nonconformance and the unorthodox merely to act out its contempt for traditional values, certain areas of conduct continue to be as controversial in modern and *beau* monde circles as they were in bygone and more staid eras. Homosexual behavior, despite Sigmund Freud and other noted authors, remains such a fervently debated issue that too often emotions on both sides obscure reason.[130]

What likely contributed to Judge Kaufman's treatment of Mr. Boutilier's acts as desecration was the Judge's perception of Mr. Boutilier's conduct as a youthful attack on traditions that predated him in the United States, which made him deportable. That Mr. Boutilier was among those who took pride in casting off the yoke of tradition made him appear both daring and arrogant since he was deemed to view "traditional values" with "contempt." For desecration, the past is hallowed traditional ground on which the new, the young, and the foreign may not trample.

Which is why a yielding *to* and veneration *of* tradition is omnipresent wherever desecration is present. Tradition, it should be remarked, has many qualities to recommend it. Tradition can be the source of stability, predictability, and precedent. "Precedent," says Justice Gorsuch in a citation in *Dobbs* on which Justice Alito relies, "is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."[131] Professor Anthony T. Kronman similarly tells us that "the past is, for lawyers and judges, a repository not just of information but of value, with the power to confer legitimacy on actions in the present, and though its power to do so is not limitless, neither is it nonexistent."[132] Professor Kronman observes that "[a]n argument from precedent asserts that something should be done a certain way now because it was done that way in the past."[133] Responding to Professor Kronman, Professor David Luban states that "[c]ommon law reasoning presupposes the authority of

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[130] Boutilier v. Immigr. & Naturalization Serv., 363 F.2d 488, 489–90 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967).

[131] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022).

[132] Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1032–33 (1990); *see also* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 359 (2006) (responding to Professor Kronman's view of Burkean traditionalism).

[133] Kronman, *supra* note 132, at 1032.

precedent without subjecting it to question."[134] Professor Luban notes that the task of other disciplines, including the humanities, is to submit common-law decisions to rigorous questioning.[135] Tradition, then, finds much to praise and hallow in the past, to which it subordinates both the present and the future—often without subjecting tradition to the rigors of sustained questioning.

Hence the error that desecration makes—it often sacrifices two temporal modes (today and tomorrow) in its yearning for yesterday. Of course, not everything that happened yesterday was bad and worth forgetting, but not everything that happened yesterday was good and worth duplicating, either. Desecration assumes that just because something was sacred yesterday, it is still sacred today, and it will continue to be sacred tomorrow. It assumes that just because something was true and reasonable yesterday, it must still be so today, and it will be so tomorrow. Indeed, desecration assumes that just because it is engaging with the sacredness it ascribes to yesterday, its own reading of yesterday is sacred today, and it will be equally sacred tomorrow. It conflates interpretation with subject, assuming that anything engaging with the sacred is, by default, worthy of reverence. And it assumes that those who fail to agree are committing the sin of desecration, which it can neither accept nor tolerate. As such, the nuance and complexity with which the past, present, and future might otherwise be approached are lost, all in the name of veneration and deference.

The following quotations, the first from Professor Nussbaum and the second from Professor Luban, will help me make my point:

> 1. Today we probably hold some views that are just as mistaken as [those of the past we criticize], but it is difficult to know which views these are, and if we are somewhat merciful with ourselves we might say that if we have made a good faith effort to be reasonably independent critical thinkers, we are not unreasonable for holding such mistaken normative beliefs as we hold. Thus, if a man in ancient Athens believed that women are inferior, we may judge his view to be mistaken but reasonable, or at least not unreasonable, while such a belief in today's America would be both mistaken and unreasonable.[136]
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> 2. Our forebearers were not prophets; they could not be expected to foresee the problems that we now confront or

[134] Luban, *supra* note 122, at 1037.

[135] *Id.*

[136] NUSSBAUM, *supra* note 104, at 34.

> the political configurations that constrain our efforts to solve these problems. We must, therefore, be permitted to shake ourselves free of our heritage as the need arises, just as they shook themselves free of the traditions that their ancestors bequeathed to them. This being so, we must extend to our own children the permission to unmake what we have made, trusting that our legacy will survive in their freedom as well as in their conservatorship. Thus we pass on to them a world of culture along with a space of action, knowing that their freedom from us is no more avoidable than our freedom from our own parents.[137]

With these quotations in mind, desecration fails for several reasons. First, desecration fails to adequately balance the concerns of the past against those of the present and the future. That is, desecration does not grapple with the complexity of reading the past into the present. It also does not struggle with the difficulty of knowing which of our cherished normative positions the future will validate as correct and which of our cherished normative positions the future will condemn as misguided. Desecration overlooks the fact that the present is but a transitional moment between the past and the future.[138]

Desecration foregoes, then, any consideration of its own potential fallibility, insisting all the while on the ancestral and traditional rectitude of its position; the preexisting becomes a substitute for the persuasive, and the sacred becomes a substitute for the sound. Indeed, as *Hardwick* and *Boutilier* show, we hurt human beings deeply by holding on to the nostalgia for a past whose traditions we fear are dying in the present, especially when that past has littered along its avenues the bodies of those it hurt (and even killed) in its paean to reverence for tradition. As Professor Nussbaum indicates, our fears and anxieties can lead us to "target others for gross harms."[139]

Equally significant, *Hardwick* and *Boutilier* also show that, apart from being an experience, desecration is also an attitude of resistance. Recall that Michael Hardwick engaged in consensual oral sex with another man in the privacy of Mr. Hardwick's home.[140] Georgia deemed such an act "sodomy" and allowed its courts to punish him

[137] Luban, *supra* note 122, at 1055.

[138] On the temporal challenges inherent in interpretation, see generally HANS GEORG GADAMER, TRUTH AND METHOD xxix, 165, 336 (Joel Weinshemer & Donald G. Marshall, trans., 2d ed. 2004).

[139] NUSSBAUM, *supra* note 104, at 75.

[140] Bowers v. Hardwick, 478 U.S. 186, 188 (1986).

with up to twenty years imprisonment.[141] Clive Michael Boutilier engaged in consensual sex with both sexes, which federal law treated as a form of mental psychopathy, a condition warranting deportation.[142] On the surface, the human beings in both cases had nothing to do with resistance as a form of desecration. And yet, it is their very existences that amounted to acts of resistance.

The appellate court in *Hardwick* noted that "Hardwick alleges that his arrest resulted from a situation in which he regularly places himself, one that will recur often in the future."[143] The same court also indicated that "Hardwick alleged in his complaint that he is a practicing homosexual who regularly engages in private homosexual acts and will do so in the future."[144] That Mr. Hardwick engaged in sexual intimacy against the backdrop of possible imprisonment for up to two decades of his life—just by being himself—was an act of courageous resistance. Mr. Hardwick was arrested when the police walked in on him in his own home.[145] Similarly, Mr. Boutilier willingly disclosed his sexual encounters to the federal government during the naturalization process, and he admitted that he was "homosexual."[146] Just by assuming, living, and admitting that he was not heterosexual, Mr. Boutilier risked deportation and being torn away from his family and life in the United States just because of who he was. Of course, the goal here is not to append an LGBTQ hagiography to the traditional list of heterosexual men whom our legal system has long revered (Blackstone, Coke, Hale, and Bracton). While doing so would celebrate LGBTQ martyrs and saints, it would risk overlooking their own imperfections and errors, and it would risk establishing yet another list of individuals to venerate and defer to, which, in time, could be used to wound others who are equally or even more vulnerable.

The goal is to show that desecration is an attitude of resistance that arises by simply facing a sacred law as the self and by being no one other than that self, which is a sacred undertaking. Desecration is the inability to yield to impositions from without, meant to break the spirit from within, for the sake of reverence. For the vulnerable in both

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141 *Id.* at 197 (Powell, J., concurring).

142 *See* Boutilier v. Immigr. & Naturalization Serv., 363 F.2d 488, 499 (2d Cir. 1966).

143 Hardwick v. Bowers, 760 F.2d 1202, 1205 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

144 *Id.* at 1204.

145 *Id.*

146 *See Boutilier*, 363 F.2d at 499.

Hardwick and *Boutilier*, just by existing as themselves in a hostile world, they were subject to criminalization and deportation. These were the burdens forced upon the vulnerable, which they had to bear. Two lives were treated as—and shown that they were—not considered sacred. Two lives lived their truths, which made them victims of our legal system. Just by being themselves, Michael Hardwick and Clive Michael Boutilier, like so many others in vulnerable positions, showed that desecration-as-resistance yields to and upholds the self within. The self within is sacred in its incapacity to be anything other than itself, even when that self is cast into inferior status by a legal system that views that self as legally abhorrent.[147]

Desecration, finally, is a response of those holding superior or supreme status to those engaging in unsacred resistance. In this mode, desecration identifies what is most sacred to those perceived as threats, and it targets or is indifferent to their importance. *Hardwick* and *Boutilier* target the sanctity of the home. As a result of both cases, the only safe place for the "homosexual" or "practicing homosexual" was likely the closet since the state could enter the home of such a human being and take him (her or them) away from the individual(s) with whom he or she was intimate, or they were intimate. The state could also take the same human being away from the home shared with heterosexual family members and deport that individual simply for not following traditional requirements if that human being were born outside the United States.

Both cases are indeed about the proverbial closet. As Professor Eve Kosofsky Sedgwick notes in her seminal work, *Epistemology of the Closet*, "[t]he closet [was] the defining structure for gay oppression in [the twentieth] century."[148] Professor Sedgwick's work shows the very trying position in which the mandated secrecy of the closet placed the individual—the same secrecy implicitly required both by *Hardwick* and *Boutilier*.[149] Urvashi Vaid, a civil rights activist, similarly noted that the closet was always an imposition:

> [w]e are at once members of the traditional family—as its children, as siblings, parents, and grandparents—but are

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[147] *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 166–167 (2000) (stating that "even when an immigrant [like Boutilier] is found not guilty of soliciting sodomy, any arrest alerts the INS that the immigrant is homosexual and therefore deportable, whether innocent of any specific allegation of sodomy or not").

[148] EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71 (1990).

[149] *Id.* at 67–74.

> treated as if we are aliens to the family as an institution. We participate daily in every community, culture, profession, and corner of the earth—but we are forced to deny that we exist, to keep silent about our sexual orientation, and to be ashamed of loving members of the same sex.[150]

Desecration, then, is the response to the perceived crumbling of the sacred architecture of the traditional edifice, and it is the requirement that the edifice be propped up at any cost, which burden is placed on the vulnerable. Thus, desecration reaches deep into the home, where it treats as criminal same-sex expressions of intimacy and from which it extracts those it believes do not belong in our nation's homes.

In doing so, desecration ignores or is indifferent to what bodies can bear without breaking. Both *Hardwick* and *Boutilier* involve sodomy statutes, which, as Professor Janet Halley indicates, "place certain people at risk of surveillance, arrest, indictment, conviction and incarceration, while [sodomy statutes] simultaneously provide for certain other people spaces of relative immunity."[151] The Court's approaches in *Hardwick* and *Boutilier* similarly prompt concerns about who can—and wants to—found a traditional family, as well as the medical, psychological, financial, legal, familial, and social considerations accompanying that requirement. Because of the desecration wrought by cases like *Hardwick* and *Boutilier*, lives were ravaged, and family members were ripped from each other. As Professor Courtney G. Joslin has observed, following *Hardwick,* "[i]n the years between Bowers and Lawrence v. Texas, LGBTQ parents lost custody of their children, were fired from their jobs, and were made targets of private discrimination solely because of their sexual orientation."[152]

Let us consider, too, other effects. Let us recall all those denied entry to the United States because they were attracted to human beings of the same sex, all who hid the fact that they were attracted to human beings of the same sex, and of all who did not try to enter the United States because they were attracted to a human being of the same sex.[153]

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[150] URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 4–5 (1995).

[151] Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1722 (1993).

[152] Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 435 (2017).

[153] *See generally* WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 133 (1999) (noting that even after a policy change in the federal immigration agency in 1976, "the INS after 1976 continued to quiz gay applicants

Hardwick and *Boutilier*, further, raise questions about sex as a non-procreative adventure in which pleasure, self-expression, intimacy, privacy, and freedom are preeminent. The cases raise questions about acceptance, belonging, and safety, and the cases touch upon fundamental concerns like earning a living, employment, and where that is both safe and possible for a sexual minority. These questions, which go to the ability of the vulnerable to live and thrive in this world, are sacred because they furnish the very preconditions that enable the vulnerable to flourish in our diverse world. Of course, this is why desecration targets these things or is, at best, indifferent to their importance—because they matter and because the vulnerable hold them sacred and worthy of reverence.

Desecration is, finally, about sacrifice. Recall Chief Justice Burger's chilling remark in *Hardwick* that Rome executed gay people, and recall Justice Clark's remark in *Boutilier* that "Congress commanded that homosexuals not be allowed to enter."[154] Two commandments target sexual minorities. Sexual minorities are told, in one case, that execution has historically been commanded when it came to us; we would have been sacrificed on the altar of reverence had we been living in another era. In the other case, we are told that whenever we look at a map of the world, that map—when it comes to us—has historically excluded the United States of America. And recall, too, Judge Kaufman's remark in *Boutilier* that he is only being neutral in reading the law to require the deportation of a non-heterosexual human applying for citizenship:

> But, the craft of judging requires a personal detachment—as far as it is humanly possible—so that issues which are apt to overwhelm the emotions may be approached in the dispassionate manner fitting for a judicial determination. See Learned Hand, 'Fifty Years of Federal Judicial Service,' published in Handbook for Judges (1961). Our function in this case, therefore, is not to approve or disapprove of the conduct we are examining; nor is it necessary for us to determine the mores of the community. Rather, our duty is simply to interpret a statute and to make the traditional determination as to its application.[155]

Desecration, however, isn't neutral. Neutrality means permitting desecration and sacrifice to go ahead for the sake of the "traditional

intensely about their sex lives and continued to deport gay noncitizens under *Boutilier*").

[154] Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 124 (1967).

[155] Boutilier v. Immigr. & Naturalization Serv., 363 F.2d 488, 490 (2d Cir. 1966).

determination." Neutrality means that *Hardwick* can do damage to LGBTQ individuals (and to others who cannot or will not conform), and neutrality means that *Boutilier* can do damage to non-heterosexual applicants for entry if Congress so chooses (and to others similarly deemed excludable). Choosing a side, the traditional side, which is the reverential side, and then claiming neutrality means hurting vulnerable human beings and washing one's hands of the consequences all in the name of the "traditional determination."

Desecration is an experience, an attitude of resistance, and a response. I close this section with the argument that desecration includes the humiliation, demeaning, and degradation of human beings.

At least initially, it might seem like I unnecessarily complicate things by adding desecration to the language of human dignity. After all, commentators have given considerable thought to how attacks on the human dignity of the vulnerable affect the vulnerable. Commentators have argued that upholding human dignity requires that we not humiliate, demean, or denigrate human beings. Non-humiliation means that we should take each human being's subjective existence seriously, and we should refrain from treating that human being as inferior.[156] It means that we should take seriously the constituent elements of that person's existence in our world, and we should affirm that person's "status in the world."[157] Non-humiliation means that we should refrain from insulting other human beings when we meet them, and we should not provide them with reasons that might make them feel that their "self-respect [has been] injured."[158] And commentators have shown that we should keep in mind that humiliation occurs even in the absence of intent, that humiliation may be useful in some cases to promote justice, and that the demeaning and denigration of human beings goes to an absence of respect and equality.[159]

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[156] David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 839 (2005).

[157] *Id.* at 821.

[158] *See* BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 138 (2014) (offering a definition of humiliation and, thus, implying how we can avoid humiliation, that is, how we might get to non-humiliation); AVISHAI MARGALIT, THE DECENT SOCIETY 9 (1996).

[159] Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3040–53 (2014).

These arguments lay the foundation for compelling readings of *Hardwick* and *Boutilier*. Both cases fail to take each human being's subjectivity—and that of the community to which each human being belongs—seriously; the cases target the very preconditions that would allow both to flourish. Both cases mark a human being and his community as inferior by targeting them based on sexual orientation, not because of the particular acts in which they have engaged since the majority engages in those acts as well.[160] Both *Hardwick* and *Boutilier* debase and denigrate the human being and his community by placing them "at risk of surveillance, arrest, indictment, conviction and incarceration," and both are indifferent to the effects that criminalization and deportation will have on the individual's and his community's self-respect and on how others will treat both, empowered as they now will be by hostile judicial approaches to them.[161] Finally, both cases refuse to hear what members of a sexual minority have to say about our experience (the cases listen, but they do not hear), deferring to a default traditional position in the name of reverence. As such, denigration, demeaning, and humiliation of vulnerable human beings occur in both *Hardwick* and *Boutilier*. Why, then, talk of desecration?

Although humiliation, demeaning, and denigration are helpful, they fail to capture the depth and ancestry of the hostility directed at vulnerable human beings when sacred concerns are preeminent. The presence of sacred concerns can make humiliation, demeaning, and denigration of the vulnerable an overriding imperative, which finds its justification in revered "ancient" sources. The sacred aspect speaks to this moment in American law and life, and it speaks to every other moment in which minorities have been made vulnerable because a sacred imperative has been said to justify mistreatment. Desecration, then, is a powerful term because it accounts for the unsacred experience of humiliation, demeaning, and denigration; it accounts for the unsacred attitude of humiliation, demeaning, and denigration; and it accounts for the sacred response that is humiliation, demeaning, and denigration of vulnerable human beings. Desecration is also the right word in a discussion of human dignity because human dignity

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[160] *See generally* Halley, *supra* note 151, at 1722 (stating that "[s]odomy statutes maintain themselves in part by their equivocal reference to identities *and/or* acts. The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity.").

[161] *See* Halley, *supra* note 151 and accompanying text.

itself has been powerfully inflected by religion.[162] Desecration, then, covers the totality of the acts deployed in the defense of the sacred, the traditional, and the divine, and it includes any acts of violence and predation that may occur in the name of reverence.

Desecration is an experience, an attitude of resistance, and a response. It includes the humiliation, demeaning, and denigration of human beings.

II. DEITIES AND SACRED TRADITIONS

Allow me to conclude with a series of negative insights, which I hope give rise to positive ones.

It is not the existence of deities and sacred traditions that is the problem; many find a powerful sense of community, hope, and solace in their sacred traditions. It is not how long deities and sacred traditions have been deferred to and the reasons for which they continue to be objects of profound veneration that are the problem; many draw deep insight, inspiration, and joy from the ancestry of their sacred beliefs. It is not the existence of many deities and sacred objects in our nation that is the problem; the exuberance of our democratic traditions encourages us to honor our spiritual and religious differences.

The problem is the unilateral imposition of one community's or constituency's traditional experience of fear—experienced and expressed as desecration—on those they deem unsacred. That problem is compounded by the fact that desecration is so dangerously potent that, in its reversion to a single and unitary perspective of the sacred and divine in whose name it marshals a cavalry of traditions, names, and sacred objects, it is wholly punitive and destructive in its effects on those it deems inferior and unsacred.

Desecration neglects and ignores its victims' needs and complexities. Applying the insights of the pathbreaking civil rights attorney, Mary L. Bonauto, desecration ignores the fact that its victims are "real people and real families who asked their government to treat them equally and fairly . . . [they are] partners, parents, Little League coaches, and literacy volunteers."[163] Desecration targets for elimination or indifference the preconditions that permit the vulnerable and their communities to nurture themselves, each other, and others. It prevents them from being accepted, from accepting

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[162] *See generally* SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS 2 (2015).

[163] Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 1–2 (2005).

themselves, from belonging, and from flourishing. It wounds their sense of their own sacredness, their sense of their own veneration and deference, and it turns their lives into monuments to struggle and suffering. Desecration is what those with superior or supreme status often do to the vulnerable, to their communities, homes, families, bodies, thoughts, and to their sense of intimacy. And desecration is what those holding superior or supreme status often do to what the vulnerable consider sacred. Indeed, desecration is what those possessing superior or supreme status often get away with. Desecration, then, is sacred supremacy embossed with impunity.

For the vulnerable, the following insight from Justices Sotomayor, Kagan, and Breyer in *Dobbs* may help capture—even if only in part—their own sacred experience, sorrow, and hope:

> We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.[164]

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[164] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2320 (2022) (Sotomayor, Kagan, & Breyer, J., dissenting).