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**DIGNIFYING RIGHTS: A COMMENT ON JEREMY WALDRON’S DIGNITY, RIGHTS, AND RESPONSIBILITIES**

Katherine Franke*

In *Dignity, Rights, and Responsibilities*¹ Jeremy Waldron offers a characteristically thoughtful and elegant account of rights, or as he calls it, responsibility-rights. As Waldron rightfully acknowledges, rights understood as a form of responsibility are not meant to capture every species of rights, but to provide us with a new analytic resource for better understanding a particular subset of rights that curiously entail a form of responsibility on the part of the rights holder. The link between rights and responsibility, Waldron argues, is built upon a strong foundational commitment to human dignity. The most compelling contribution of Waldron’s paper is his careful unbraiding of the complex relationship of rights, responsibility, and a liberal conception of human dignity.

This new work on responsibility-rights should be seen as a part with Waldron’s other recent writing elaborating a robust conception of human dignity based not on the inherent moral worth of each human person, but rather on a notion of status or rank. “[T]he modern notion of human dignity involves an upwards equalization of rank,”² Waldron tells us in his 2009 Tanner Lecture, “[W]e now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.”³ In this new Shoen Lecture, Waldron urges us to consider how rights are either founded upon or expressive of the value of human dignity.

My aim in this response-essay is to consider more deeply the implications of an account of rights that is premised upon an aristocratic conception of human dignity.⁴ Specifically, I am interested in the way in which responsibility is not merely a symptom or correlate of a certain set of

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3. Id.
4. Waldron describes dignity as a “quintessentially aristocratic virtue.” Id. at 43.
rights understood as responsibility-rights, but in how behaving responsibly is expected of those who aim to have their rights claims recognized by others. In this sense, possessing dignity is not inherent in one’s identity as human, but rather takes work, a kind of work that Waldron describes as “the voluntary self-application of norms.” That work can be understood as preparatory for a scene then to follow. Only once others, dignified others, recognize that this virtuous work has been done, can one “be dignified,” just as one might “be beatified.” Dignity in this sense is not something one simply has, but rather is earned through hard work on the self, and is fully settled only once it has been recognized by another.

It is these two aspects of the responsibility-dignity-rights loop that I want to press in this essay: First, dignity is an accomplishment, a normative practice which requires work. It is something you can, indeed must, earn and can risk losing. There is a self-mastery implicit in, yet essential to an entitlement to the dignity, rank, and expectation of respect that were formerly accorded only to nobility. This first step I’ll call recognizability. It precedes the second essential component, without which, neither dignity nor the rights claims that are its expression, can come off: recognition. The emergence of dignity is always given over to others to recognize dignity in another. In this sense, dignity is accomplished more relationally than ontologically, according to a set of norms that facilitate that recognition, and are administered by a range of social, legal, and political institutions.

The claims of same-sex couples to a right to civil marriage offer a cogent example of how this two-step process works. The lesbian and gay community understood that it had reputational work to do to ready itself for the successful presentation of rights claim to legislatures and courts. In this sense, recognizability preceded recognition. Yet this example also teaches us how notions of dignity and responsibility-rights come at a price. At least in this context, they provide a less than satisfactory predicate for legal-citizenship.

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Waldron’s elegant account of human dignity, upon which his notion of responsibility-rights derives, seeks to steer clear of anchorage in the wholly theological, as does Robert George or Pope John Paul II, or in the more general notion of the sacred, as does Kant. Instead he prefers a more liberal,

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5. Id. at 47.
6. In the Second Tanner Lecture Waldron tells us that “[i]f I were to give a name the status I have in mind, the high rank or dignity attributed to every member of the community and associated with their fundamental rights, I might choose the term ‘legal citizenship.’” Id. at 56
though oddly aristocratic, notion of rank or status to capture the “special something” that is human dignity. Grounding the analysis, at first, in etymology, Waldron traces the term dignity back to its Roman then early English roots. The genealogy teaches us that early uses of the term dignitas “embodied the idea of the honor, the privileges and the deference due to rank or office.” Modernizing the notion in liberal terms, Waldron preserves the dignity that derives from rank or status while flattening out the hierarchies among humans sorted traditionally by rank, nobility, or royalty. All humans, as a consequence of this move, enjoy an upwards equalization of rank akin to the status enjoyed by those who formally sat atop the human ladder. He finds inspiration for this move in the underappreciated work of Gregory Vlastos: “[W]e organize ourselves not like a society without nobility or rank, but like an aristocratic society which has just one rank (and a pretty high rank at that) for all of us.”

Reading this, I am struck by a number of puzzles: How, one might wonder, can rank that does no meaningful sorting (since it is “rank” among equals) retain the “special something” that inheres in dignity, a virtue that was previously awarded only to those with the highest status, thereby setting them apart from their depraved and sorry inferiors? Doesn’t the idea of rank or status depend upon things to be ranked or sorted according to some standard of value? Rank survives as the structure or container, if you will, for human dignity, but how so? How can the virtue/value that was distributed on the basis of ranking in pre-modern, non-liberal societies retain value once we have announced that all comparison or differentiation among humans must end?

Waldron, I believe, addresses these questions by preserving hierarchy not among humans, but between humans and other animals. While the point is not fully developed or defended in the Shoen or the Tanner Lectures, it is quite clear that Waldron regards humans of the highest moral order, capable of reason, self-control, voluntary conformance to a norm, and willful uprightness of bearing. This “uprightness of bearing” Waldron cleverly terms “a sort of moral orthopedics associated with rights,” but it could just as easily be understood as evolutionary in nature, gesturing in the direction of a differentiation between man and ape, human and animal. This idea is

7. Waldron, supra note 1, at 11.
8. Id.
9. Id. at 12 (emphasis omitted) (citing Gregory Vlastos, Justice and Equality, in Theories of Rights 41 (Jeremy Waldron ed., 1984) (1962)).
10. Id. at 18.
11. Giorgio Agamben would offer a different contrast, that of the dignified human and the Muselmänner—the walking dead of the camps. “The Muselmann is not only or not so much a limit between life and death; rather, he marks the threshold between the human and the
one of the principle aims in the closing lines of the Tanner Lectures, wherein he defends an aristocratic, albeit egalitarian, conception of rank that is to be distinguished from being treated like an animal:

This is what reactionaries always say: if we abolish distinctions of rank, we will end up treating everyone like an animal, “and an animal not of the highest order.” But the ethos of human dignity reminds us that there is an alternative: we can flatten out the scale of status and rank and leave Marie Antoinette more or less where she is. Everyone can eat cake . . . .

In this way, rank is able to retain its elevating virtue insofar as the capacity for dignity is something that sets humans apart from and above other inferior species of animals.

The anthro-centric and aristocratic roots of the Waldronian account of dignity as rank are not where I want to dwell. Instead, I prefer to press elsewhere: on the relation of dignity to role. For Waldron, dignity emerges or is revealed in one’s performance of a role:

[O]ne might speak of the dignity of a clergyman, such as a bishop, in terms of his responsibility for the administration of a diocese, or even . . . the dignity of a rector, in terms of his elementary right to administer the sacraments (or direct their administration) in a particular parish.

Extending the clerical analogy to the rest of us, it seems that dignity isn’t something that one simply has by virtue of being a human (and not an animal or a dilapidated house) but is something one earns, or better yet, inhuman,” Agamben writes. GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE 55 (Daniel Heller-Roazen trans., Zone Books 2008) (1999). “The Muselmann has . . . moved into a zone of the human where not only help but also dignity and self-respect have become useless.” Id. at 63. Relying on Primo Levi’s account of life in the camps in The Drowned and the Saved (1988), the Muselmänner are characterized by their stooped manner and their absence of walking upright. Id. at 157. Their enstoopification and degradation are accomplished by the biopolitical project of the camps, resulting in the complete evacuation of their humanity and their dignity, characterized by, as Agamben calls it, a bare life. Id. at 69. Curiously, Agamben connects humanity to responsibility, but to different effect than does Waldron, “[the survivor] knows that humanity and responsibility are something that the deportee had to abandon when entering the camp.” Id. at 59–60.

12. Waldron, supra note 4, at 33. Elsewhere he tells us in connection with the law of torture: “People . . . will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated . . . . [Legal] force and coercion do not work by reducing [persons] to a quivering mass of bestial, desperate terror.” Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 COLUM. L. REV. 1681, 1726–27 (2005) (internal quotation marks omitted).


14. Waldron uses this term in the Tanner Lecture. See Waldron, supra note 2, at 45.
works at. We are to be treated like a Duke not by dint of letters patent or hereditary entitlement but because of individual desert. As such, responsibility doesn’t come into the picture once rights have been recognized (such as the right to parental custody and control of a child entailing a duty to exercise that control responsibility); rather dignity is to be found in the responsible performance of one’s role, as parent, as citizen, as clergy, or as soldier. Waldron illustrates this notion by reference to Max Weber’s conception of politics as vocation, that the politician or statesman assumes a “personal responsibility for what he does, a responsibility he cannot and must not reject or transfer.”15 What is true for the public servant and political leader, Waldron argues, holds equally true for the ordinary citizen.16 Rights entail responsibilities, but more than that I want to suggest, a rights claim will not be seriously entertained if one has not comported oneself in a responsible manner as an antecedent to asserting the claim itself. This may even be understood as a rule of standing: Those who are irresponsible, undignified, (or dare I say beastly?), have no standing to make rights claims.

The notion that dignity entails a convincing performance of responsibility is in evidence when Waldron tells us:

> When we hear the claim that someone has dignity, what comes to mind are ideas such as: having a certain sort of presence; uprightness of bearing; self-possession and self-control; self-presentation as someone to be reckoned with; not being abject, pitiable, distressed or overly submissive in circumstances of adversity.17

As we can see from this description, this work is thickly norm-driven and, at bottom, social in nature. In a sense, the body is “exposed to social crafting and form,” and is “exposed to socially and politically articulated forces as well as to the claims of sociality—including language, work and desire.”18 This last notion, desire, is particularly intriguing insofar as it is worth considering how the performance I am describing is motivated, in significant part, by a desire to enact, or better yet, embody a social norm.

The performative nature of dignity, that it requires work, is the first point that I want to press in this essay, and I will return to it in due course when I

17. Id. at 11.
18. JUDITH BUTLER, FRAMES OF WAR: WHEN IS LIFE GRIEVABLE? 3 (2009). Butler offers this analysis in connection with the conditions of human precariousness, but they are useful in illuminating the nature of structure of dignity as well.
situate the critique in the same-sex marriage cases. My second point has to do with the relational rather than ontological nature of dignity. On this I may get no disagreement from Waldron, but the point deserves greater elaboration than he was able to give in his Shoen lecture. For Hegel, particularly according to Kojève’s reading,\textsuperscript{19} dignity, indeed the notion of the human itself, is an intersubjective enterprise. It does not arise intrinsically in the nature of the human being, or out of some mystical form of elevation or lifting up, nor is the performance of role in a dignified manner self-executing.\textsuperscript{20} Rather, human dignity is accomplished, if you will, in the moment of recognition of the self by others. Hegel’s focus is on the bondsman’s recognition of the master, but the productive potential of the act of intersubjective recognition applies to all subjects, regardless of their rank or status relative to one another.\textsuperscript{21}

We find the fingerprints of Hegel’s interest in recognition in Waldron’s paper, insofar as he acknowledges that dignity is no dignity at all if it is not respected by others, and most importantly not recognized and respected by the law and legal authority. Pushing the argument a bit further, one way to understand what is going on when a person makes a rights claim is that they are making a plea to be recognized by legal authority in a particular way: as a being equal in rank to other dignified humans. What is sought is a kind of solidarity or fraternity entailed in recognition, uplifting, elevating, or even dignifying the disfavored party by announcing that a comparison or differentiation must cease. Dignity results from “a performance of solidarity through the foreclosure of negative valuation.”\textsuperscript{22} What is being recognized in a moment of this sort is the rights-bearing status of the individual so pleading. Thus dignity is conferred as a consequence of, not predicate for, this moment of uptake, this act of intersubjective recognition, which operates according to a set of norms that facilitate and make possible that recognition.

Curiously, in law human dignity is observed most often in the breach.\textsuperscript{23} Rather than extol the qualities of the dignified life in the case of dignified human flourishing, courts more regularly find the opportunity to chart dignity’s contours when it has been lost or diminished in a particular case.

\textsuperscript{20} Id. at 7.
\textsuperscript{21} Id.
\textsuperscript{22} Stephen Riley, Observing the Breach: Dignity and the Limits of Political Theology, 19 Law & Critique 115, 136 (2008).
\textsuperscript{23} Id. at 125.
Thus it is worth noting that in the precincts of law, dignity’s absence is typically more palpable than its presence.

By examining the moments of breach, rather than starting from the point of dignity fulfilled, as does Waldron, one learns different things about the relationship of dignity to responsibility to rights. When the claim for breach is being made the performative nature of human dignity, and the recognition of rights that flows there from, are foregrounded.

Consider gay-rights litigation in the U.S. over the last quarter century. The project at hand has increasingly become redemptive in nature. Only when the disfavored, lower-caste group has been able to convincingly prove that a category mistake has been made, and that indeed they are as responsible as the higher caste, will their claim to rights-bearing status be recognized. This project is not something that can take place overnight. Rather it requires time. What’s more, it requires work. The misunderstood group must mount ritualized, repeated performances of responsibilized citizenship designed, over time, to convince a court, a legislature, the public, and to some degree themselves, that they have put their errant ways behind them and/or that they have been horribly misunderstood. Substantial numbers of lesbian and gay people have had to build lives, indeed lives on view for the rest of the society to witness, characterized by commitment, monogamy, parenting, moderation, and conformance with gender norms. It’s respectability that we’re really talking about here.

Institutional politics take place next. Lawsuits are filed, bills are introduced into state legislatures, and political action campaigns are launched. The testimony in the litigation, the witnesses before the legislatures, and the ad campaigns that run on television try to retell the story of who we are, and of how we have been misunderstood, always through a convincing portrayal of responsibility and respectability.

In these efforts to recount the story of a group’s “true nature,” plot helps. Indeed, emplotment is usually the trick of the trade: boy is bullied by other kids at school, boy tries to conform, boy comes out to himself, then to his parents, who reject him. Boy meets another boy like him, boy falls in love with other boy, boy settles down with other boy, adopts kids with other boy, goes to church, coaches little league, collects stamps. Boy wants to marry other boy but can’t. Boy yearns that when he can finally marry other boy his parents will accept him and so will society. The plot inevitably arcs toward a happy ending, and the project is to keep the story a romance rather than a tragedy, characterized by redemption (sometimes even atonement) rather
than censure or reproof. Thus we see a litigation narrative characterized by “language, work, and desire” as Butler suggested.24

My aim in locating dignity and rights within a narrative, in portraying them as diachronic rather than synchronic in nature, is to illustrate how the foundational relationship between responsibility-rights and dignity as told by Waldron doesn’t work in the same way for all rights-based claims. By this I don’t mean to misunderstand him to be providing an analytic frame for all rights claims, but rather I hope to offer a more complex account of the sub-set of rights claims that are tethered to responsibility and that are in important ways launched by an appeal to human dignity. I’ll unpack this particular concern after walking through the example of the same-sex marriage litigation.

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In the summer of 2010, Judge Vaughn Walker in the Northern District of California declared that Proposition 8 was unconstitutional.25 Prop 8, or the California Marriage Protection Act,26 changed the California Constitution to define marriage as a union between one man and one woman, and was intended to undo a ruling from the California Supreme Court that had found that same-sex couples had a constitutional right to marry.27 Judge Walker’s decision signals, to my mind, a rather significant shift in the nature of civil rights claims in this country away from the kinds of reasons that were given when African Americans and women first started winning civil rights cases in the 1950s, 60s, 70s and 80s.

What we see in a number of the same-sex marriage cases around the country, but surely in the Prop 8 case, is a revival of the legal importance of dignity, indeed two different conceptions of dignity. These cases turn, on the one hand, on the inherent dignity of human beings, and on the other, on the dignity of the institution of marriage and the relationships that deserve the blessing of the marital form. Waldron’s notion of dignity, rights, and responsibilities is in many respects consonant with the thinking underlying the wins in the same-sex marriage context.

The tone, the ethical stakes, and the turn to values in these cases is really quite different from what we, as civil rights lawyers, had come to expect from the reasoning in the sex and race cases over the past half century. You’ve got to admit that it’s kind of ironic that morality has come to the

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rescue of homosexuals in the last few years, when morality has been, since Leviticus, the justification for the condemnation, criminalization, stigmatization, and in many cases violence meted out against gay men and lesbians in almost all precincts of the globe.

So let me back up for a moment and sketch out what I understand to have been the ethical frame within which a notion of race and sex-based justice has been spelled out by the Supreme Court in the modern era. Starting with the racial equality cases in the 1950s, for the most part the Supreme Court’s approach to group-based fairness has been Aristotelian in nature. Recall that for Aristotle injustice lay in treating similarly situated classes dissimilarly. The starting point for Aristotle and for the courts in cases where unjust or unequal treatment is alleged is to ask whether the disfavored group is substantially similar to the favored group. For example, are thirsty black people and thirsty white people substantially similar in their desire to quench their thirst from a drinking fountain? If so, then separate drinking fountains violate an Aristotelian norm of treating like things alike. This approach was stated most clearly by Justice John Harlan in 1896 when he said: “Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” He was well ahead of his time when he wrote this in the late nineteenth century, but by the middle of the twentieth century his formulation of legal fairness had been embraced as the dominant view by virtually all U.S. courts.

This approach called “Color-Blind Constitutionalism” came to be applied by the courts in a fairly mechanical or formal way. It’s a simple concept and it went like this: the Constitution prohibits the sorting of people on the basis of their race. Period. The reasons for the sorting are irrelevant, as race-conscious policies are presumptively illegitimate. Imagine the kinds of situations they had in mind in the early to mid twentieth century—mostly Jim Crow policies segregating blacks from whites. All of these were illegal under a color-blind rule because it was assumed that any racial distinction was motivated by a notion of racial inferiority of black people. But what about policies that took race into account in order to address and remediate historical racial injustice, such as affirmative action? Since color-blind constitutionalism was uninterested in benign or good reasons why people were being treated differently on the basis of their race, affirmative action policies have had a hard time in the courts. Taking race into account for any reason was illegitimate—like things must be treated alike. This injunction

against race-based sorting enacts Waldron’s “equal rank” notion of humanity.

As the Court’s jurisprudence on racial equality developed over time, the question of why racial thinking was wrong, or even the immorality of racism itself, garnered very little attention. That sort of thick discussion of morality was not relevant to the legal inquiry. Instead, the question to be considered was whether a formal legal rule requiring color-blindness had been violated.

In the 1970s, the women’s rights movement turned to the courts to challenge policies that disfavored women. To succeed they echoed the kinds of reasoning that had been adopted in the race cases.29 Legal formalism dominated the Court’s jurisprudence in the sex discrimination cases just as it had in the race discrimination cases. The argument went like this: women were, for the most part, similarly situated to men and could not be legally treated differently from men. A kind of sex-blind constitutionalism was quickly brought to bear on the sex discrimination claims of this period. Ruth Bader Ginsburg, a women’s rights lawyer with the ACLU in the 1970s, was the primary architect of the sex-blind approach. (Of course pregnancy poses a difficult problem for this line of thinking, but I’ll leave that issue for another essay.)

Just as in the race cases, over the last half century the Supreme Court has largely committed itself to a mechanical approach to fairness in the race and sex cases. When the Virginia Military Institute, a men’s military college, was sued by several young women who were denied admission, Ruth Bader Ginsburg, then a Justice of the Supreme Court, noted that VMI’s mission was to produce “citizen soldiers . . . imbued with love of learning, confident in the functions and attitudes of leadership, [and who wanted to be] advocates of the American democracy and free enterprise system, . . . ready to defend their country in time of national peril.”30 She found for the Court that men and women were similarly situated and equally qualified to achieve this goal:

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth’s great goal is not substantially advanced by women’s categorical exclusion, in

29. See, e.g., Reed v. Reed, 404 U.S. 71 (1971).
Thus the Supreme Court has opted to ground its reasoning in the race and sex cases in a kind of dispassion toward the matter, instead of offering strong moral condemnation of racism, sexism, and the like. To the extent that there is a value at stake, it is the value of neutrality. As a moral ambition, it’s pretty hard to get all riled up about neutrality.

But when it comes to the rights of gay people, the Supreme Court has had no trouble getting all moral and all riled up. Moralizing did almost all the work in the Court’s first significant engagement with gay rights in 1986. The case, Bowers v. Hardwick, was a challenge to the Georgia sodomy law. An Atlanta Police officer had come to Michael Hardwick’s house to serve a summons on him for throwing out a beer bottle in the wrong bin outside of a bar. The officer was let into the house by a roommate and found Hardwick in his bedroom in the embraces of another man. He arrested Hardwick then and there for violating the Georgia sodomy law.

The ACLU had been waiting for years for a case like this to raise the privacy rights of gay men and lesbians, and these facts seemed perfect.

But the Supreme Court did not see it the same way as the ACLU. Justice Byron White, who wrote the majority opinion, treated the case as no different from an arrest for viewing child pornography—the conduct is deplorable and the fact that it took place in a private home should make no difference when it comes to the legitimacy of a law that makes it criminal. He wrote for the Court: “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious. . . . Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home.” In his view, the Constitution creates no grounds to invalidate laws based in public morality, and if the people of Georgia think homosexuality is immoral it is within their right to criminalize it. Chief Justice Burger went even further, writing that the condemnation of homosexuality is firmly rooted in Judeo-Christian moral traditions.

31. Id. at 545–46.
36. Id. at 194–95.
and ethical teaching. After all, he noted, the Romans punished homosexuals with the death penalty, and legal codes during the English Reformation described sodomy as a “crime against nature,” and an “offense of deeper malignity” than rape. The act was considered so heinous that “the very mention of it was a disgrace to human nature.”

Michael Hardwick lost his case in the Supreme Court partly because a majority of the Court viewed homosexuality with disgust. Court observers at the time were also quick to point out that more than the rights of gay people were at stake in the case. Then, as now, whenever a constitutional right to privacy was in play, Roe v. Wade and the issue of abortion were not far from people’s minds. The Court’s treatment of Hardwick’s privacy claim signaled a reluctance to recognize a general constitutional right to privacy or to extend such a right any further than they already had. For this reason Justice White insisted in his opinion in Bowers:

[W]e think it evident that none of the rights announced in the [reproductive rights] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.

The Bowers decision was a devastating blow to the young gay rights movement. I remember the day it was announced. I had just graduated from law school and was sitting in my kitchen in San Francisco studying for the California bar when I heard the news come in on the radio. I wondered what profession I was about to enter where the Chief Justice of our highest court thought the very mention of homosexuality was a disgrace to human kind.

The Bowers decision positioned the United States as an outlier among our peers in the developed world. Just as the Supreme Court endorsed the criminalization of homosexuality in such ugly terms, other jurisdictions such as the European Union and South Africa were not only decriminalizing homosexuality but also extending affirmative constitutional protections to gay people. Bowers v. Hardwick quickly became an embarrassment for

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38. Id. at 196–97 (Burger, C.J., concurring).
39. Id. at 197 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).
40. Id.
42. Bowers, 478 U.S. at 190–91.
44. 478 U.S. 186.
the Supreme Court, and Justice Powell, who had been the deciding vote in the case, told a small group of law students shortly thereafter that he wished he had voted with the dissent.45

The defeat that was the Supreme Court decision in Bowers helps us understand something important, and under-explored by Waldron in the Shoen lecture, about the relationship of rights to dignity. If you were a gay or lesbian person living in the United States in 1986, you felt something more than that the Supreme Court had made a terrible mistake. The Court’s decision was not merely something untruthful or unkind being said about us, it actually did something to us. It is hard to imagine a more devastating way in which to have the dignity of a group renounced than to be described as a disgrace to human kind. But it did more than deny us the dignity we sought in bringing the case. It shamed us and it ranked us as something less than heterosexual people. In this sense, the denial of rights was performative, particularly when done as spectacularly as in Bowers. It accomplished a form of degradation, and in so doing pulled off the creation of caste—lower (homo) and higher (hetero) caste.

But sometimes losing a case, and losing it so stunningly, can galvanize political action to take another run at the problem. The night the decision was announced I joined hundreds, likely thousands of protesters on the streets of San Francisco outraged at having been punched in the face by the Supreme Court. We understood that we had work to do. We had not made ourselves recognizable to the public and to legal authority as a community worthy of full constitutional protection and the dignity that recognition would confer.

So that work began. On school boards, on little league fields, at PTA meetings, in churches, in workplaces, grocery stores—everywhere. We set out to demonstrate in fora both quotidian and extraordinary that we were not a perverse Other, that we were respectable citizens, that we were just like you. It is important to understand the turn this work took. The project was not one of sexual liberation, as had been the approach of the early Stonewall activists, of “live and let live,” or “keep your laws off our bodies.” This was not a politics of neutrality or sexual liberty, nor did it echo the liberal kinds of arguments made by H.L.A. Hart in his debates with Lord Patrick Devlin about the legitimacy of criminalizing sodomy.46 Rather

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46. Hart’s view turned on the application of the harm principle: if no one is harmed by the practice the state has no legitimate reason to regulate or criminalize it. H.L.A. Hart, Immorality and Treason, THE LISTENER (BBC), July 3, 1959, at 162–63; LORD PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).
the gay politics of the 1990s took a decidedly normative turn in favor of demonstrating to a skeptical American public that we were normal, respectable, and responsible citizens, not the perverts that Chief Justice Burger had described in Bowers. In short, the shame of Bowers was met with a politics of redemption.

Little by little, this work paid off and the wrongness of Bowers became unbearable to the Court. Seventeen years later (a short period of time in the history of the Supreme Court) the issue returned to the high court in Lawrence v. Texas, raising very similar facts to the Bowers case: two men arrested for having sex in the privacy of their own home.\[47\] This time, Justice Anthony Kennedy, wrote for a slim, one-vote majority and found that indeed there is a constitutional problem with criminalizing sex between consenting adults in private. But he did so in a curious way, by reframing the question not as about a right to sex but as about a right to a relationship with the person of your choosing.

Justice White in Bowers had rejected any connection between homosexuality and family, marriage or procreation, but Justice Kennedy sutured these domains back together, seeing the rights at issue in Lawrence as analogous to those enjoyed by heterosexual people: all people, regardless of their sexual orientation have a liberty right to form a personal, intimate relationship with another consenting adult, regardless of that person’s sex.\[49\]

If Justice Kennedy had stopped there, Lawrence would have established a kind of “sexual orientation-blind” rule similar to the color-blind rule in the race cases. In fact, that approach is exactly how Justice Sandra Day O’Connor approached the issue in Lawrence in her concurrence in the case.\[50\] But she couldn’t get anyone else on the Court to join her in this reasoning, so she wrote only for herself. Justice Kennedy’s majority, by contrast, rejected a mere neutrality rule when it came to criminalizing certain kinds of sex, and rested the outcome on a strong moral account of the essential worth of people who just happen to be homosexual.\[51\]

He wrote that the Texas statute “demeans the lives of homosexual persons,” they “are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”\[52\] He then repeated soaring language that had been used in an earlier abortion rights case: “At the heart of liberty is

\[48\] Id. at 562–63.
\[49\] Id. at 566.
\[50\] Id. at 578.
\[51\] Id. at 567.
\[52\] Id. at 578.
the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

I have to confess that many of us, in reading the opinion, were surprised that sodomy laws were found to violate the “sweet mystery of life” rule.

The Lawrence case signaled an important and new direction that the courts would take in interpreting the constitutional rights of gay people as compared with African Americans and women. The moralizing of Bowers that left a homosexual minority vulnerable to the disgust and judgment of the majority was not replaced in Lawrence with a rule requiring the equal treatment of similarly situated persons when it comes to their intimate lives. Rather, in Lawrence, Justice Kennedy gave the boot to Justice White’s and Burger’s strong negative moral vision by substituting his own moral reasoning grounded in an almost spiritual reverence for the dignity of the human and a call that the law respect the most intimate choices each person makes about the meaning of their lives. In a somewhat surprising turn of events, the gay rights cases were starting to share a greater similarity with the abortion and reproductive autonomy cases than the cases recognizing the civil rights of African Americans and women.

Part of what made this shift possible was a complete reconceptualization by the Supreme Court of what these cases were about. The Bowers court treated Michael Hardwick’s claim as about a constitutional right to sodomy—a kind of non-normative sex—and found this an easy thing to dismiss. But when the Lawrence Court took up the issue, sex dropped out of the picture entirely. Dignity and respect of intimate relationships took its place. This required that Justice Kennedy frame the facts of the case in terms that were consonant with the larger normative project of respectability, but may not have actually been true. What is important is that the Supreme Court was willing to welcome lesbian and gay people into the community of rights-bearing citizens not because of the sex we have,

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53 Id. at 574 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). Justice Kennedy’s finding in Lawrence that the Texas sodomy law violated a fundamental liberty right was premised upon a story he made up about Lawrence and Gardner being in a relationship in which their interactions allowed them to elaborate their “concept of existence, of meaning, of the universe, and of the mystery of human life.” Dale Carpenter’s work on the backstory of this “relationship” tells a quite different tale. See Dale Carpenter, The Unknown Past of Lawrence v. Texas, 102 MICH. L. REV. 1464 (2004). Carpenter’s description of Lawrence and Garner’s “relationship” is quite different from that portrayed by Kennedy’s opinion. The two men, Lawrence (white) and Garner (black), were not in a relationship, but were more likely occasional sex partners. Id. at 1478. The night of the arrest another sex partner of Garner’s called the police to report that “a black male was going crazy” in Lawrence’s apartment “and he was armed with a gun.” (Carpenter notes that a racial epithet rather than “black man” was probably the term used.) Id. at 1479. The police arrived at the apartment and found Lawrence and Garner having sex. Id. at 1480.
but rather because of the “enduring personal bonds” we seek—bonds that gain constitutional protection for reasons that are not squarely or even obliquely about sex. Criminal sodomy laws could be understood as an affront to “personal dignity and autonomy” because gay people had a “right to demand respect” for their relationships “just as heterosexual persons do.”

So, you might be thinking, what’s wrong with a turn toward dignity? Well, to understand how dignity is a complex value in which to anchor civil rights claims we have to look no further than the same-sex marriage cases that were filed on the heels of the Lawrence decision. Indiana came first. An appellate court dismissed a lawsuit challenging the state’s heterosexual-only marriage law on the grounds that since only heterosexual couples can become accidentally pregnant they need the structure and responsibility of the institution of marriage so that the children of these accidents aren’t harmed by their parents’ irresponsible reproduction. Gay couples, on the other hand, do not get pregnant by accident. Rather they have to do a lot of work to have children: adopting, using insemination or surrogacy services, or other deliberate means. As such they are likely to be much more responsible reproducers, thereby not needing the institution of marriage to shore up otherwise weak family structure.

When this decision came out of Indiana we all thought it was a bit of a joke, and dismissed it, with high and mighty East Coast arrogance, as the naïve musings of midwestern know-nothings. But then a marriage challenge was filed in New York State and made its way to New York’s highest court, and guess what they found? That heterosexual’s irresponsible reproduction could justify limiting civil marriage to different sex couples.

So morality, in the form of dignity and responsibility, doesn’t obviously cut in any predictable direction when it comes to elaborating the civil rights of gay men and lesbians. In 1986, moral reasoning in the form of disgust for homosexuality justified upholding the criminalization of sodomy. Then, in 2003, the freedom to enter a relationship and define for one’s self the sweet mysteries of life required the overturning of criminal sodomy laws. And in 2005 in Indiana and 2006 in New York, gay couples could be denied access to marriage because they were too responsible in comparison with the biologically and ethically challenged heterosexuals who were getting pregnant willy-nilly.

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55. Lawrence, 539 U.S. at 574 (quoting Casey, 505 U.S. at 851).
56. Id. at 574–75.
I have to say that I didn’t see any of this coming—moral arguments flipping in favor of and then against the civil rights claims of gay people.

So this brings us to the Prop 8 case in California where morality has figured centrally. Of course those who supported Proposition 8, and wanted to ban gay marriage, used strong moral arguments that allowing same-sex couples to marry would ruin the institution of marriage and indeed ruin the unions of those straight couples that were now married.

The same-sex couples challenging Proposition 8 could have responded by meeting the moral arguments of their opposition with a demand that they be treated fairly and equally to heterosexual couples who want to marry. They could borrow from the race and sex cases, extrapolating from color-blindness to orientation-blindness. Let’s just think for a moment how this would go. There are a few different ways to make the case:

First, the gay couples could argue that when the state is issuing marriage licenses it should do so in a way that does not take the applicants’ sexual orientation into account. The state shouldn’t discriminate on the basis of sexual orientation when it issues fishing licenses or drivers’ licenses and certainly shouldn’t do so when it issues marriage licenses since all applicants, regardless of the sex of their loved one, are similarly situated. The sorting of license applicants on the basis of sexual orientation would be the issue, not the virtues of the type of license being applied for. We could call this the Justice O’Connor, orientation-blind approach, which would be grounded in neutral equality principles.

Or in the alternative, they could argue that the state should not interfere in a person’s freedom to choose the person they love as their spouse. Of course, we might support some limits on this freedom. As one commentator put it: “People do not have a right to marry their dog, their house, their refrigerator, July 21, or a rose petal.” But the idea here would be that the state’s interest is in promoting individual freedom, not in endorsing heterosexuality as the official state sexual orientation. This argument would derive from a neutral “personal freedom”-based value.

But that’s not, by and large, how these cases are being argued, or at least not how they’re being argued in the first instance. In this new generation of

59. The Alabama Sanctity of Marriage Amendment, amending the Alabama Constitution in 2006, offers a good example: “Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.” Ala. Const., art. I, § 36.03.


gay rights cases, neutrality is out and morality is in. And it’s really in. The trial in the Prop 8 case in San Francisco is a perfect example. The testimony by the four plaintiffs, two men and two women, focused primarily on their desire for respectability, their longing for the sacred blessing and societal recognition that marriage confers, on the fact that being married would be better for raising children, and finally on the disgrace of exile from the sacred domain of marriage. On top of that, they have argued that the state should play a vital role in promoting the institution of marriage and that including same-sex couples in the institution would be good for marriage more generally.

When asked by Ted Olsen, one of the gay couples’ lawyers: “Have you encountered instances where because you are not married you were placed in embarrassing or awkward situations?” Jeff Zarrillo, one of the plaintiffs, testified: “One example is when Paul and I travel, it’s always an awkward situation at the front desk at the hotel . . . the individual working at the desk will look at us with a perplexed look on his face and say, ‘You ordered a king-size bed. Is that really what you want?’”62 Or it is always certainly an awkward situation walking to the bank and saying, ‘My partner and I want to open a joint bank account,’ and hearing, you know, ‘Is it a business account? A partnership?’ It would just be a lot easier [to be able to say]: ‘My husband and I are here to check into a room. My husband and I are here to open a bank account.’”63

When asked by Mr. Olsen about why they haven’t had children, Mr. Zarrillo said: “Paul and I believe that . . . the important step in order to have children would be for us to be married. It would make it easier—for us, for our children, to explain our relationship, for our children to be able to explain our relationship.”64

Mr. Olsen then asked Mr. Zarrillo why he and his partner were not domestic partners—the California domestic partnership law confers on same-sex couples all of the legal and economic benefits of marriage, just under a different legal name.65 Zarrillo answered: “we hold marriage in such high regard . . . [Domestic partnership would not give] due respect to the relationship that we have had for almost nine years. Only a marriage could do that.”66

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63 Id. at 84.
64 Id. at 81–82.
65 Id. at 82.
66 Id. at 82–83.
When his boyfriend, partner, hopefully spouse Paul Katami was asked a similar question about why marriage was so important to them, he said: “By allowing us full access to [the rights and identity of marriage it makes us] a full participant as a citizen of our country and our state.”

Kris Perry, one of the other plaintiffs, testified in response to Olsen’s questioning: “the state isn’t letting me feel happy. It’s not letting me experience my full potential, because I am not permitted to experience everything I might feel if this barrier were removed.”

When she was asked about what the institution of marriage meant to her, she said:

So in some ways it’s hard for me to grasp what it would even mean, but I do see other people who are married and I—and I think what it looks like is that you are honored and respected by your family. Your children know what your relationship is. And when you leave your home and you go to work or you go out in the world, people know what your relationship means. And so then everyone can, in a sense, join in supporting your relationship, which at this point I can only observe as an outsider.

When she was pushed further about what would happen if she and her girlfriend were able to marry, Perry described marriage almost like a club she was barred from joining. She said:

I think it would be an enormous relief to our friends who are married. Our straight heterosexual friends that are married almost view us in a way that—I know they love us, but I think they feel sorry for us and I can’t stand it. You know, many of them are either in their second marriage or their first marriage, but nevertheless, they have a word and they belong to this institution or this group. And I can think of a time recently when I went with Sandy happily to a football game at the high school where two of our kids go and we went up the bleachers and we were greeted with these smiling faces of other parents sitting there waiting for the game to start. And I was so acutely aware that I thought, they are all married and I’m not.

The gist of the plaintiffs’ arguments here is that California has set up a segregated system: different sex couples can get married while same-sex couples can get domestic partnered. From here, the normative argument

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67. Id. at 116.
68. Id. at 142–43.
69. Id. at 142.
70. Id. at 155.
71. Id. at 155–56.
could go in two different directions. One would point out that the different legalization schemes for different-sex and same-sex communicated a message of inferiority about or stigmatized the less-favored group—same-sex couples. The account of discrimination or injury need not “carry a brief” for the good being denied same-sex couples. Instead it turned on the fact of the different treatment, just as we might with drinking fountains, lunch counters or train cars.

The other direction—one on which the arguments in the marriage cases increasingly rely—maintains that not only are same-sex couples being treated differently from different-sex couples, they’re being treated worse. The emphasis here is on the worse treatment not the different treatment. It’s one thing to say the different treatment imposes a badge of inferiority, it’s quite another to claim that the two groups are being treated differently and one group is getting something wonderful and the other something obviously inferior. Like one group’s drinking fountain dispenses champagne and the other group is getting water from Lake Erie.

Here’s where we see a disagreement brewing in the lesbian and gay community—about the strategy to treat marriage like champagne and domestic partnership or civil unions like water from Lake Erie. The one is a social and legal institution that confers legitimacy, respectability and dignity to the couples who can get it, and the other brings with it illegitimacy, shame and impropriety. In some cases, the same-sex couples have gone even further and adopted the argument that marriage is the ideal family formation in which responsible reproduction can and should take place for both homo and heterosexual couples.

These are very different approaches to why same-sex couples should be permitted to marry—one that disables the state from taking sexual orientation into account in the distribution of public licenses and other goods, and the other on the blessings conferred from inclusion in a fundamentally dignifying institution: marriage. The former invests in a principle of neutrality while the latter invests in the dignity of marriage and kinds of relationships that are deserving of marriage’s blessings.

The strategy pursued in the Prop 8 case illustrates well the normative turn the gay community has taken in the years since the Bowers defeat. It also helps us understand something fundamental about the relationship of responsibility to rights to dignity. Lesbian and gay people have mounted a ritualized performance of responsibilized citizenship that, over time, was used to convince courts and the public that they have put their errant ways behind them and/or that they have been horribly misunderstood. It can no longer be said that they are promiscuous, value Eros over kinship, are unable to form and maintain long-term commitments, and love in dangerous
and forbidden ways. Having become recognizable as respectable, the court could recognize them as dignified, rights-bearing subjects and equal in rank to other (heterosexual) legal citizens.

Now it may seem odd to be critical of such an important victory for lesbian and gay people. What I want us to consider, however, is how the judicial conferral of dignity and the recognition of equal rank in a case such as this comes at a price. A recognition-based project of this sort provides few tools with which to transform or render more just the fundamental underlying norms of the institution into which a group seeks inclusion. As Judith Butler has observed in another context:

> The problem is not merely how to include more people within existing norms, but to consider how existing norms allocate recognition differentially. What new norms are possible, and how are they wrought? What might be done to produce a more egalitarian set of conditions for recognizability?

I am concerned that an opportunity has been lost in the same-sex marriage cases to expand the social and legal ideal of family beyond a fairly traditional model. After all, through history the institution of marriage has not been all that great for women. Who better than the lesbian and gay community to think more broadly about what it means to love, care for and have responsibility for others?

But even more than that, if these cases are about taking stock of the benefits and worth of various family forms, why insist on winning in a way that reinforces the vulnerability and illegitimacy of people who do not, or cannot, marry? I recall watching the arguments before the Iowa Supreme Court in the same-sex marriage case in that state not too long ago. The lawyer representing the interests of one of the plaintiffs, a child of one of the lesbian couples who could not marry, told a story about how their daughter could not enroll in day care because the day care center required that the parents of all the children be married. He told the Court that the parents should be able to marry so that their child could enroll in the center’s program. But it strikes me that the problem with the day care center’s policy was not that Iowa prohibited same-sex couples from marrying, but that the marital status of the parents was at all relevant to a child’s eligibility for child care. Children of married parents and children of unmarried parents are similarly situated relative to their qualifications for childcare.

When the Iowa Supreme Court ruled, it found that the state had a constitutional obligation to open up marriage to same-sex couples, but it did

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so for reasons very different from Judge Walker’s opinion in the Prop 8 case.73 Whereas Walker reinforced a notion that only respectable people may marry, and gay people are surely respectable, the Iowa Supreme Court steered clear of the kind of moralism grounded in human dignity that we’ve seen in so many other Court decisions on this issue. The Iowa court started with the state motto, printed on their flag: “Our liberties we prize and our rights we will maintain.”74 Building on this notion, the court wrote: “Like all Iowans, [the gay and lesbian plaintiffs] prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected—a belief embraced by our state motto.”75 The court made every effort to situate the marriage case within the context of a time-honored Iowan commitment to treating people equally.76 Whether it was a refusal to recognize the legitimacy of slavery in 1839, a recognition that racial segregation violated the Iowa Constitution in 1873 long before the U.S. Supreme Court did in 1954, or being the first state to grant women the right to practice law in 1869, Iowans have had their own strong sense of justice and fairness, and as the court noted, “in each of those instances, our state approached a fork in the road toward fulfillment of our constitution’s ideals and reaffirmed the ‘absolute equality of all’ persons before the law as ‘the very foundation principle of our government.’”

The Iowa court’s approach, based in neutrality and treating similarly situated people similarly, is an outlier among the same-sex marriage cases, for most courts prefer the thickly normative, dignity-based approach. The Iowa Court’s reasoning situates the new gay civil rights as the next step in a long tradition of civil rights claims for women and African Americans, and it handed a win to gay rights not at the expense of creating a class of sexual and domestic outlaws, or ranking forms of human attachment, desire, love, kinship and intimacy.

What is more, the approach the Iowa Court took meant it didn’t have to weigh in on the moral worth of marriage as opposed to non-marriage. Instead it found that so long as the state is in the marriage business, it must make it available to all in a non-discriminatory way. We know how to make this argument, it’s the approach being taken in the gays in the military cases: you can agree that barring gay men and lesbians from openly serving in the military is a kind of discrimination while not necessarily carrying a brief for the military. By that I mean, you don’t have to sign up for

74 Id. at 872 n.1.
75 Id. at 872.
76 Id.
77 Id. at 877 (quoting Coger v. Nw. Union Packet Co., 37 Iowa 145, 153 (1873)).
militarism to appreciate that homosexuals are similarly situated to heterosexuals when it comes to military service. What troubles me in the marriage context is that many of the parties have taken the view that challenging the discrimination in heterosexual-only marriage laws entails becoming a congregant in the ministry of marriage.

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Toward the end of his paper, Waldron offers a cautionary note: “I can imagine that once the responsibility-form for rights is made available . . . there may be a temptation by some people to use it in ways that other people will want to resist.” The example he provides is of pro-life, or anti-abortion, advocates “arguing that a woman’s right over her body and her reproductive capacities is to be understood as a responsibility . . . rather than as a pure right of willful choice.” I have a different kind of consequentialist concern in mind than the one Waldron suggests. Rather than worry about how the responsibility-rights form may be put to good use by those whose ends I disagree with, I am discomfited by its use by those whom I see as allies. Strategies grounded in dignity and responsibility may provide a new avenue to secure important rights we have long been denied. But they do so at a cost, and a cost not all of us are willing to bear.

Waldron’s essay challenges us to consider how “some rights actually are responsibilities,” and that what conjoins right and responsibility, on this account, is a foundational commitment to human dignity. Waldron’s argument comes off as synchronic in nature: responsibility-rights are an expression of the dignity that each person’s humanity entails. But the marriage cases tell a different story, one that imposes a different kind of temporality into the picture. That temporality is, in important respects, redemptive in nature. Collapsing rights into responsibilities without unpacking the steps that make those rights “take hold” conceals the degree to which an individual’s or group’s dignity is dependent upon and the product of the epistemic capacities of others to apprehend that dignity. So too, it takes as given the frames that work to differentiate the dignified from the depraved, and how those frames operate as a disciplinary set of norms that facilitate that recognition. Perhaps most problematically, political and legal strategies that tether rights to responsibility are less able to provide the

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78. Waldron, supra note 1, at 29.
79. Id.
80. Id. at 1.
tools to transform the very norms and conditions that make the equalization of rank possible.

To be sure, Waldron’s thoughtful account of responsibility-rights in the Shoen Lecture makes an important contribution to our understanding the multiple forms that rights claims can take in liberal society. But as Waldron also notes, simply because a particular right is available doesn’t tell us anything about whether or not it is a good thing to pull it off the shelf and put it to work. That’s where judgment of a different kind must intrude. To my judgment, responsibility-rights can be, and often are, won at a cost too high to be paid.