Cleveland State Law Review

Volume 71 | Issue 2 Article

4-15-2023

Dignity and the Promise of Conscience

Duane Rudolph
Peking University School of Transnational Law, duanerudo@gmail.com

DIGNITY AND THE PROMISE OF CONSCIENCE

DUANE RUDOLPH*

> No client ever had enough money to bribe my conscience or to stop its utterance against wrong and oppression. My conscience is my own—my creator's—not man's. I shall never sink the rights of mankind to the malice, wrong, or avarice of another's wishes, though those wishes come to me in the relation of client and attorney.
>
> *– Abraham Lincoln*[1]

ABSTRACT

This Article focuses on the relationship between three specific invocations of dignity in American law, whose emphases are different. The first appeared in the late eighteenth century and is concerned with the dignity of a state or sovereign. The second made its appearance at the beginning of the nineteenth century and is devoted to the dignity of the court. The third is concerned with the dignity of the human person. International instruments and foreign constitutions evoked dignity in this sense in the 1930s and 1940s. In the United States, the *Restatement of Torts, First* evoked this sense of the term as early as 1934. While human dignity has since gained constitutional footing in American law, given its subordination to the dignities of the sovereign and court, its future is uncertain.

The Article's core insight is that the theory of conscience, as espoused by the court of conscience (which is now largely referred to as "equity"), can help dignity face the problems threatening its longevity. Conscience has been in the American legal system and its precursors for as long as dignity, and conscience has been deployed because it could (and did) create a transformative array of legal devices that now survive as a series of procedural, substantive, and remedial relics in the aftermath of the passage

---

* Assistant Professor of Law, Peking University School of Transnational Law, Shenzhen, China. A draft of this Article was presented at the annual conference of the Association for the Study of Law, Culture and the Humanities in Atlanta, Georgia, in June 2022. The foundations for this Article were laid when I served as the Reginald F. Lewis Fellow for Law Teaching at Harvard Law School from 2015-2017. Professors Randall Kennedy, Christine Desan, Samuel Moyn, Henry E. Smith, Todd Rakoff, and Aziz Rana all helped shape the foundational ideas that went into this Article. M. H. P., as ever, has been wonderfully insightful, generous, and thoughtful; thank you. I am also grateful to Peking University Library and Harvard Library, without which I could not have drafted this Article. All errors are my own.

[1] ABRAHAM LINCOLN, RECOLLECTED WORDS OF ABRAHAM LINCOLN 242 (Don E. Fehrenbacher & Virginia Fehrenbacher eds., 1996).

of the Rules Enabling Act of 1934. Specifically, the idea of a conscience now includes bits of the Federal Rules of Civil Procedure, the constitutional protection granted to the individual conscience of objectors, and various common-law doctrines such as the contractual doctrine of unconscionability and the shocks-the-conscience standard. Almost all of these were created or developed by the court of conscience.

This Article addresses itself to several critical audiences. To constitutional and human-rights scholars, the Article says that all forms of dignity retain their status-based focus in American law, which threatens human dignity's longevity. To procedure and remedies scholars, the Article argues that evocations of conscience, as developed by the court of conscience, have continued to be of practical significance longer than might be expected and that two major moral concepts have long tracked and informed each other—conscience and dignity—with conscience being of diminished utility after the passage of the Rules Enabling Act of 1934. Finally, for scholars of contracts, torts, and trusts and estates, the Article shows that dignity and conscience have had a direct bearing on the development of doctrines in those areas under American law and its precursors.

CONTENTS

I. DIGNITY AND CONSCIENCE[2]

Dignity, in American law, has been ascribed to everything from nations to individuals.[3] This Article focuses on the relationship between three specific invocations of dignity in American law, whose emphases are different. The first appeared, by name, in the late eighteenth century and is concerned with the dignity of a state or sovereign.[4] The second made its appearance, also by name, at the beginning

[2] In this Article, I both cite to (and build upon) insights and sources explored in three previous articles—one exploring the meaning of dignity in the workers-rights context, the other exploring the meaning of conscience in the water-rights context, and the third exploring interpretation and moral outrage in a number of contexts. *See* Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126 (2017); Duane Rudolph, *Why Prior Appropriation Needs Equity*, 18 U. DENV. WATER L. REV. 348 (2015); Duane Rudolph, *Of Moral Outrage in Judicial Opinions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 335 (2020).

[3] Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1925, 1942 (2003).

[4] *See* Chisholm v. Georgia, 2 U.S. 419, 450–53, 466, 468, 479 (1793) (mentioning "the dignity of a State," with the Court (4-1) rejecting the argument that a state's sovereign immunity immunized it from suits by private citizens of other states in federal court).

of the nineteenth century and is devoted to the dignity of the court.[5] The third is concerned with the dignity of the human person. While international instruments and foreign constitutions evoked dignity in this sense in the 1930s and 1940s in the United States, the *Restatement of Torts, First* evoked this sense of the term as early as 1934.[6]

This Article understands the three deployments of dignity in specific ways. The dignity of the sovereign implies that the sovereign enacts laws, which must be respected.[7] An important corollary of a sovereign's dignity is its ability to refuse to appear in court when sued.[8] The dignity of a court means that a court interprets sovereign enactments, and that court's determinations must be respected.[9] Failure to respect a court's conclusions can lead to findings of contempt.[10] The dignity of the human individual means that a human being is also to be respected, among other attributes, by virtue of that individual's inalienable humanity.[11] If a human being is not respected, that human being may be subject to humiliation, denigration, or demeaning.[12] All three understandings of dignity, I argue, go to status, with human dignity being wholly subservient to the dignities of the sovereign and the court.[13]

Implicit denials of human dignity have long characterized American law. Recall the conclusions of the Supreme Court in *Prigg v. Pennsylvania* (1842), *Dred Scott v.*

---

[5] *In re* Hall, 1 Tyl. 274, 280 (Vt. June 1802) ("For the furtherance of justice and the dignity of the Court, it is better that the plain letter of the writ should be preferred, than any nice construction which the ingenuity of counsel may suggest.").

[6] *See generally* SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS 26 (2015) (discussing foreign constitutions and international instruments); RESTATEMENT (FIRST) OF TORTS § 19 (AM. L. INST. 1934) ("In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity.").

[7] Alden v. Maine, 527 U.S. 706, 714 (1999) (holding that the Federal Constitution does not grant Congress the power to compel states to appear in private suits for damages in state courts and stating that "[t]he federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status").

[8] *See* Resnik & Chi-hye Suk, *supra* note 3, at 1947; Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 176 (2013); Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. 1229, 1251 (2015).

[9] Degen v. United States, 517 U.S. 820, 828 (1996) ("The dignity of a court derives from the respect accorded its judgments.").

[10] *See* Pounders v. Watson, 521 U.S. 982, 988 (1997) ("Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication.").

[11] Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187 (2011).

[12] *See infra* The Fragility of Dignity, pp. 319–20.

[13] JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 17–18 (Meir Dan-Cohen ed., 2012). While other commentators observe that dignity has been attentive to status, Professor Waldron premises his argument on the link between the two.

Sandford (1857), *Minor v. Happersett* (1877), *Chae Chan Ping v. United States* (1889), *Plessy v. Ferguson* (1896), *Fong Yue Ting v. United States* (1893), *Giles v. Harris* (1903), *Buck v. Bell* (1927), *Korematsu v. United States* (1944), *Gregg v. Georgia* (1976), and *Bowers v. Hardwick* (1984), among others.[14] As instructive as those cases might be, however, they do not explicitly evoke human dignity as the overarching theory or principle on which they base their conclusions, which is the focus of this Article.[15]

---

[14] *See* Prigg v. Pennsylvania, 41 U.S. 539, 608, 673 (1842) (Holmes, J.). (holding unconstitutional a Pennsylvania statute that prohibited the seizure and removal of African Americans to be enslaved in other states); Scott v. Sandford, 60 U.S. 393, 403, 454 (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); Minor v. Happersett, 88 U.S. 162, 178 (1874) (Waite, C.J.) (holding that, there being no constitutional right to suffrage, states could bar women from voting even though they were citizens); Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (Field, J.) (upholding the exclusion of Chinese workers under the Chinese Exclusion Act of 1882 because "[t]hose laborers are not citizens of the United States; they are aliens"); Plessy v. Ferguson, 163 U.S. 537, 542, 552 (1896) (Brown, J.) (upholding a Louisiana statute that would require an African-American man to sit with those "of the colored race" on public transportation); Fong Yue Ting v. United States, 149 U.S. 698, 705, 709, 732 (1893) (Gray, J.) (relying on *Chae Chan Ping* and citing to English law for the proposition that "aliens having no absolute right to enter its territory or to remain therein" could be excluded or expelled); Giles v. Harris, 189 U.S. 475, 482, 488 (1903) (Holmes, J.) (refusing to grant equitable relief to African Americans denied the right to vote under the Alabama constitution); Buck v. Bell, 274 U.S. 200, 205, 208 (1927) (Holmes, J.) (upholding Virginia's mandatory sterilization law of a woman alleged to be mentally disabled); Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (Black, J.) (holding that American citizens of Japanese descent could be convicted for remaining in areas from which the federal government had excluded them in wartime); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (Stewart, J.) (ending the moratorium on the death penalty); Stump v. Sparkman, 435 U.S. 349, 352, 359, 364 (1978) (White, J.) (holding that a state judge who, in an ex parte hearing, had granted permission to a woman to sterilize her fifteen-year-old daughter without her knowledge or permission was "absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors"); Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (White, J.) (upholding a Georgia law criminalizing all sodomy, which was selectively applied to a gay man). I am grateful to Dean Erwin Chemerinsky's and to Professor Jamal Greene's books, which have informed my approach to this list of cases. *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

[15] Indeed, there is also important scholarly work that is not explicitly an extended discussion of the meanings of human dignity. *See, e.g.*, William J. Aceves, *Amending a Racist Constitution*, 170 U. PA. L. REV. ONLINE 1, 3 (2021) (proposing a constitutional amendment to expunge from the document its racist vestiges); Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2290 (2020) (identifying the reasons many prosecutors may refuse to exercise their discretion in favor of restorative justice and proposing solutions); Bill Ong Hing, *Beyond DACA—Defying Employer Sanctions Through Civil Disobedience*, 52 U.C. DAVIS L. REV. 301, 305 (2018) (urging employer defiance of applicable law to uphold the dignity of those brought to the United States by undocumented family members). Indeed, there is also important work about the implicit dignity of non-human beings. *See, e.g.*, Sarah Schindler, *Pardoning Dogs*, 21 NEV. L.J. 117, 121 (2020) (defending the extension of a governor's discretionary pardon power to non-human beings); Matthew Liebman,

Tellingly, commentators have largely focused on the period following the Second World War as instructive, and they have found that dignity's meanings remain uncertain.[16] They have focused on the various meanings of dignity in the period leading up to (and including) Justice Brennan's service on the Court in 1956.[17] They have evoked dignity as an alternative theory that might explain the Court's procedural-due-process jurisprudence. Dignity was the right to be heard.[18] They have argued that members of minority communities should be given the opportunity to testify about the humiliation that they have faced—all subject to adversarial testing.[19] And they have shown that dignity in American case law is obdurate, with commentators identifying up to six meanings.[20] In all, this Article counts over twenty overlapping understandings of the term in American law.[21]

However uncertain its definition, human dignity, at least until recently, appeared ever more ascendant and, even, triumphant.[22] By raising the status of minority populations, human dignity was meant to arrest—or at least remediate—the continuous infliction of wounds on minority populations, which had occurred through their incessant humiliation and demeaning by our legal system.[23] Human dignity was meant to provide a legal forum for those whose stories testified to their own (and their community's) debasement and degradation by and through our legal system.[24] Human dignity was laudable, then, because it purported to uphold the narratives of the marginalized, not only because their lived experiences had been previously treated as legally unavailing, but also because the holders of those stories, to borrow and apply

---

Litigation & Liberation, ECOLOGY L. Q. (forthcoming 2022) (manuscript at 2) (addressing the benefits and limitations of litigation in upholding the rights of non-human beings), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4112458.

16 *See* Resnik & Chi-hye Suk, *supra* note 3, at 1929–46.

17 Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223, 223–24 (1998).

18 Jerry L. Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Matthews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–50 (1976).

19 Kenji Yoshino, *The Meaning of the Civil Rights Revolution: The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3092 (2014).

20 *See infra* The Fragility of Dignity, pp. 319–20.

21 *Id.*

22 *See generally* Eric Segall, Jonathan Adler, Pamela Karlan & Mark Tushnet, *The Swing Justice: Reflections on the Career of Justice Anthony Kennedy, Panel 1: Abortion and Gay Rights*, 35 GA. ST. U. L. REV. 871, 872 (2019); Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG (May 31, 2011, 9:52 AM), http://www.bloombergview.com/articles/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman.

23 *See* Obergefell v. Hodges, 576 U.S. 644, 670, 678 (2015).

24 *See generally* Yoshino, *The Meaning of the Civil Rights Revolution: The Anti-Humiliation Principle and Same-Sex Marriage*, *supra* note 19, at 3092.

Professor David Luban's phrase, were now seen as inherently vested with "ontological heft."[25] Recently, the Supreme Court has cited to sources evoking the dignity of "the elderly poor" and of minority communities, which implicitly amount to declarations of equal status.[26] Dignity, as Professor Jeremy Waldron observes, is indeed about status.[27]

What future awaits a concept that both fascinates and confounds? Professor Samuel Moyn observes that the future of human rights (of which human dignity is a part) is, for a number of reasons, uncertain.[28] As evidence of such uncertainty, we might note that there are only a thousand responsive cases returned in searches for "dignity" in American law.[29] At the international level, a search in the jurisprudence of the International Court of Justice returns just over one-third as many results.[30] Of course, the paucity of results does not mean that American or international courts do not believe in—or uphold—human dignity. It could be that the concept is not explicitly litigated as often as one might expect, which could mean that the concept is widely accepted but is often taken for granted. The fact that some of dignity's cognates (like equality, freedom, liberty, and respect) generate up to ten times more responses in the case law[31] suggests that dignity, however widespread it might be as a concept, may be at risk.[32]

---

25 David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 821 (2005).

26 *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375, 2386 (2020) (citing to the complaint, which mentions the complainant's commitment to uphold "the unique, inviolable dignity of every person, particularly those whom others regard as weak or worthless"); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

27 *See* WALDRON, *supra* note 13 and accompanying text, at 17–18. On dignity and status, *see also generally* Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 250–251 (Dieter Sion & Manfred Weiss eds., 2000); Resnik & Chi-hye Suk, *supra* note 3, at 1929; Paolo G. Carozza, *Human Dignity*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS 346 (Dinah Shelton, ed. 2013).

28 MOYN, *supra* note 6, at 173–77.

29 As of mid-May 2022, there were 981 responsive results in Westlaw to a search for "dignity," restricted by "U.S. Supreme Court."

30 I ran a search for "dignity" in the jurisprudence of the International Court of Justice, which returned 357 results, https://www.icj-cij.org/en/advanced-search (last visited June 16, 2022).

31 The following are the results from searches in the jurisprudence of the International Court of Justice: 357 results for "dignity," 3,959 results for "respect," 871 results for "equality," 1,176 results for "freedom," 598 results for "liberty," https://www.icj-cij.org/en/advanced-search (last visited Oct. 20, 2022).

32 I ran a search in Westlaw for "equality," "liberty," and "respect," all of which returned in excess of the maximum (10,000 results). A search for the language of dignity, also on Westlaw, only returned 440 results (Dignity /100 humiliat* or demean* or denigrat*).

Also placing human dignity's future at risk is the fact that the sovereign's and court's dignities have long upheld the assumed superior status or rank of the privileged and powerful in American law and its precursors.[33] The Supreme Court, the ultimate forum in which dignity is decided and upheld in the United States, has seen its composition undergo decisive changes in the last few years, cementing what has been decried as the Court's conservative drift, with often hostile implications for the rights of the vulnerable.[34] The effect of that reality has been felt by justices on the Court itself, with Justice Sotomayor, for example, recently lamenting the effects of a "restless and newly constituted court" and its effect on the rights of the vulnerable.[35] These facts should give us pause about dignity's future, and they warn us that dignity's future may, at best, be uncertain.

Given that reality, the central claim of this Article is that conscience—a moral theory like dignity—can be of service to dignity.[36] Conscience has been in our law and its predecessors for over two millennia.[37] Conscience has, as Professor Strohm notes in his volume on the subject, "outlasted epochs and empires, credos and creeds, and has influenced human behaviour for 2,000 years and more."[38] Of course, dignity, too, can teach conscience about its experience over the millennia. Nevertheless, as a legal theory directly relied upon to uphold the rights of the individual (and of marginalized communities), dignity is, unfortunately, no match for conscience.[39]

We might consider conscience and dignity siblings, or, at the very least, concepts born and raised in the same neighborhood. Both often trace their origins to antiquity, where Cicero (among others) had something to say about both *conscientia* and

---

33 *See generally* WALDRON, *supra* note 13, at 18.

34 *See* Jackson Women's Health Org. v. Dobbs, No.19-1392 (U.S. June 24, 2022); *see also* Egbert v. Boule, 142 S. Ct. 1793, 1818 (2022).

35 *Egbert*, 142 S. Ct. at *1818 (Sotomayor, J., concurring in part) ("Just five years after circumscribing the standard for allowing *Bivens* claims to proceed, a restless and newly constituted Court sees fit to refashion the standard anew to foreclose remedies in yet more cases. The measures the Court takes to ensure Boule's claim is dismissed are inconsistent with governing precedent.").

36 Unless otherwise stated, in this Article, I use the terms "moral" and "morality" in their descriptive rather than prescriptive or normative sense. *See generally* Bernard Gert, *The Definition of Morality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 8, 2020), https://plato.stanford.edu/entries/morality-definition/#DescDefiMora.

37 PAUL STROHM, CONSCIENCE: A VERY SHORT INTRODUCTION 1 (2011); *see generally* MOYN, *supra* note 6, at 178–79.

38 STROHM, *supra* note 37, at 178–79.

39 For an overview of the history of dignity, *see generally* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 7 (2012).

dignitas.[40] Religion is then said to have molded and deployed both concepts.[41] Both moral concepts find support in the work of Immanuel Kant.[42] Both appear in American case law and its English predecessors, and both have generated considerable anxiety regarding their meanings, applications, and implications.[43] Both are mentioned in international instruments like the Universal Declaration of Human Rights.[44] While one concept (conscience) has been largely compelled into a diminished form of itself in American law, as Professor Moyn tells us, Christian conceptions of human rights deployed the other concept (human dignity) in the 1930s, culminating in the secularization and omnipresence of dignity to which we are currently witnesses.[45] In a word, dignity has more recently held the spotlight while conscience has largely been ostracized.

What, then, might the remedial notion of a conscience have achieved that would justify its prominence in this Article? The presence of a conscience helped create many procedural, substantive, and remedial devices of continuing vitality in American law—few of which mention conscience explicitly.[46] Procedurally, think of class actions, depositions, discovery, examination of the defendant, joinder, relaxed

---

[40] On *conscientia, see* 10 CICERO, IN CATILINAM 1–4. PRO MURENA. PRO SULLA. PRO FLACCO 110–11 (C. Macdonald, trans., G.P. Goold ed. 1976) (referring to a "guilty conscience" ("*abiectus conscientia*")). On *dignitas, see id.,* at 160–61, 186–87, 202–03 (referring to the "majesty of the republic" ("*rei publicae dignitas*") and to the fact that his client's "equality with [his accuser who have accused him of electoral bribery] in these respects means that neither of you is inferior in standing [*dignitate*] to the other"); CICERO, ORATIONS: PRO LEGE MANILIA. PRO CAECINA. PRO CLUENTIO. PRO RABIRIO. PERDUELLIONIS REO. 472–73 (H. Grose Hodge, trans. 1927) (referring to the dignity of judicial proceedings ("*dignitatem iudiciorum*")); CICERO, DE OFFICIIS 108–09 (Walter Miller, trans. 1913) (enjoining human beings to "bear in mind the superiority and dignity [*dignitas*] of our nature"). I am grateful to STROHM, *supra* note 37, at 7 for bringing the reference in *De Officiis* to my attention.

[41] *See generally* STROHM, *supra* note 37, at 6–37 (conscience); *see also* MOYN, *supra* note 6, at 2 (dignity). For dignity in other religions and cultures, *see generally* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 39–41 (Marcus Düwell, Jens Braarvig, Roger Brownsword & Dietmar Mieth eds. 2014).

[42] *See* Irit Samet, *What Conscience Can Do for Equity*, 3 JURISPRUDENCE 13 (2012) (conscience); *see also* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 537 (2006) (dignity); Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 46 (2016) (dignity). I am grateful to Professor Giannini's article for bringing to my attention several of the sources on dignity to which I cite.

[43] For concerns about the meanings of dignity, *see infra* FROM THE 1930S at 319–20. For concern about the meanings of conscience, *see infra* A TRANSFORMATIVE CONSCIENCE at 355.

[44] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter Universal Declaration].

[45] *See* MOYN, *supra* note 6, at 15, 99.

[46] *See, e.g.*, *infra* notes 48–50.

pleading, testimony under oath, submissions in writing, and subpoenas.[47] Substantively, think of accounting, the doctrine of contractual unconscionability, equitable mortgages, estates, trusts, the treatment of stocks and shares as property, the shocks-the-conscience standard, the parol-evidence rule, and actions involving accident, mistake, and fraud.[48] Remedially, think of that tireless workhorse, the injunction; of that just restorer, restitution; and of that enforcer of promises, specific performance.[49] Think, too, of equitable tracing, equitable estoppel, and subrogation.[50] All of these were created or developed at or because of conscience, which we now largely call "equity."[51] Thus, they were all creations of Remedies (or they owe a debt to what we now call "Remedies") before they took up residence in procedural or substantive law, their current homes.

---

47 *See generally* Ann M. Scarlett, *Jury Trial Disparities Between Class Actions and Shareholder Derivative Actions in State Courts*, 72 OKLA. L. REV. 283, 291 (2020) (citing Ross v. Bernhard, 396 U.S. 531, 541 (1970) (class actions)); *see also* 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 380–81 (1846) (depositions); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 84 (1797) (same); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 54–56 (1980) (discovery); 7 W.T. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 72 (1914) (examination of the defendant); Howard P. Fink*, Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 408 (1965) (joinder); IX W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 336, 337, 343–44 (1926) (submissions in writing, relaxed pleading); FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 125 (1915) (testimony under oath); A.W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 398 (1910) (subpoenas).

48 *See* Morris S. Arnold, *A Historical Inquiry the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 847 (1980) (accounting); *see also* Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for A Digital World*, 81 MD. L. REV. 46, 51–52 (2021) (unconscionability); D.P. Waddilove, *The "Mendacious" Common-Law Mortgage*, 107 KY. L.J. 425, 430 (2019) (equitable mortgages); Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1509 (2001) (estates); Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 470 (2022) (trusts); VII W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 159 (1925) (stocks and shares as property); 1 JAMES BARR AMES, A SELECTION OF CASES IN EQUITY JURISDICTION WITH NOTES AND CITATIONS 264 n.2 (1901) (shocks the conscience); BARBOUR, *supra* note 47, at 93–96 (parol evidence); SPENCE, *supra* note 47, at 628–37 (accident, mistake); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L. J. 1054, 1065–66, 1082 (2021) (fraud).

49 *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 555 (1986) (injunctions); *see also* Smith, *supra* note 48, at 1054, 1097 n.181 (restitution); BARBOUR, *supra* note 47 at 120–23 (specific performance).

50 *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 648 (1995) (equitable tracing); *see also* Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 384 (2008) (equitable estoppel); Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1433 (2015) (subrogation).

51 *See* Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 660 (2007).

Of course, we still maintain explicit iterations of conscience in American law, almost all of which were also developed at or contributed to by chancery. We have judges who still refer to chancery or equity as the "court of conscience."[52] We have the shocks-the-conscience standard in constitutional and remedies laws, and we still have references to "equity and good conscience" that pepper various parts of our legal discourse.[53] We have, too, the contractual doctrine of unconscionability, and we have freedom of conscience.[54] While the theory of conscience on which the constitutional notion of conscientious objection relies is distinct from that deployed by the court of conscience, there are links and parallels between the two.[55] In other words, conscience persists, but it has been largely reduced to a series of terms and phrases that only so faintly recall the potency of the original moral concept.[56]

Why has conscience waned? Conscience may have waned because of fusion, the sweeping change that came into existence following the enactment of the Rules Enabling Act of 1934.[57] The Rules Enabling Act lead to the adoption of the Federal Rules of Civil Procedure in 1938, and it created a single court in which a federal judge sat both as a common-law judge and as a chancellor.[58] Conscience may also have waned because of the decline in the teaching of equity as complex area of law in its own right and its absorption into the field of Remedies in the 1950s, with equity competing with other topics for teaching time.[59] The decline of conscience may be because Remedies is often a field considered subsidiary to ostensibly more important substantive fields, whose significance Remedies is supposed to underscore by guaranteeing what has been called, in a different context, "the practical payoff."[60] It may also be that lawyers' affinity for other theories is the reason for the demise of our legal system's previous interest in equity and its transformative moral theory of conscience.[61] Of course, a significant chunk of the blame may also be placed at the

---

52 *See infra* THE VESTIGES OF CONSCIENCE at 330.

53 *See infra* THE FIRST AMERICAN USE OF "SHOCKS THE CONSCIENCE" at 342.

54 *See infra* THE VESTIGES OF CONSCIENCE at 333–34.

55 *See id.* at 332–33.

56 *Id.* at 329–30.

57 *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987).

58 *See id.* at 910.

59 *See generally* Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L. J. 567, 570 (2013).

60 Douglas Laycock, *How Remedies Became A Field: A History*, 27 REV. LITIG. 161, 165 (2008).

61 *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 28 (3d ed. 2018) (approaching remedies from an economic perspective and noting that "[t]o impose a remedy is to impose costs and to create benefits. Any remedy, including injunctive and other non-money remedies, will impose costs upon defendant [sic]").

doors of the court of conscience itself for its abuse of discretion and the corruption of its officers—from the chancellor right down to the clerks—over several centuries.[62]

As a result, we have lost much of the complexity and texture of conscience in American law. Banished are the achievements of conscience and its precursors, with an accompanying loss of the extent to which the transformative moral principle of conscience has been relied upon by what we now call the equitable branch of our legal system to foment change so desperately needed because the common law has been ineffective, blunt, or indifferent.[63] Equity's reliance on conscience created what Frederic W. Maitland and Francis C. Montague called, over a century ago, "an appendix" to the common law. [64] The appendix produced a vast body of law, much of which remains with us, which Professor Henry Smith has recently memorably termed "meta law."[65]

Yet, as this Article shows, there are lessons to be learned from the experience of a conscience in American law and its precursors. Conscience makes it clear that the law thrives with the help of a moral core that is at once attentive to the plight of the vulnerable and to the charges of its critics.[66] Conscience's vast experience as a moral corrective imparts the message that innovation and adaptation are essential to the survival and flourishing of a vibrant and responsive legal system.[67] Indeed, conscience shows that moral theories, even those having religious origins, can be relied upon to save the law from its own harshness and myopia.[68] And, just as importantly, conscience shows that a moral system can collapse under the weight of its own failures

---

62 *See infra* A TRANSFORMATIVE CONSCIENCE at 355–56.

63 *See infra* HOW DIGNITY AFFECTS CONSCIENCE at 337–38.

64 MAITLAND & MONTAGUE, *supra* note 64, at 124–25. To be sure, Maitland and Montague are talking about "equity" more than they are about conscience, but they do note that "[i]n the name of equity and good conscience, [the chancellors] had, as it were, been adding an appendix to the common law."

65 Smith, *supra* note 48, at 1054, 1123. While Professor Smith is talking about "equity" more than he is about conscience, he does observe that conscience is part of the historical branch of equity. One of the insights of this Article is that the importance of conscience has continued for much longer than has been previously noted, and it continues under current American law, although in diminished form.

66 *See generally* Subrin, *supra* note 57, at 917, 932, 1001 (1987) (stating concerns about abuse of discretion and arbitrariness at chancery).

67 *See generally* Zechariah Chafee, Jr., *Foreword*, *in* RE, SELECTED ESSAYS ON EQUITY III (1955).

68 *See generally* Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 219 (2004) (noting the role and effect of Roman Catholicism in the development of chancery and the common law). By underscoring the religious roots of chancery, I acknowledge that religion and morality are not the same thing since religion is often broader than morality. Nevertheless, religion does include morality. *See generally* Gert, *supra* note 36.

and excesses, but it can learn from those failures and, by doing so, revive itself and lay the foundation for further change and revision.[69]

While other commentators have mentioned both dignity and conscience in their work, this Article is the first to explore dignity and conscience in an extended and comparative analysis of how two powerful moral theories have worked together (and sometimes against each other) in American law and its precursors over at least half a millennium.[70] More importantly, this is the first Article to argue that the insights of a conscience, as conceived by the equitable branch of our remedies system, can be of particular utility to the notion of dignity, a largely procedural and substantive constitutional mandate in American law.

Part II shows that dignity's rise since the 1930s has proven it to be invariably concerned with upholding the status of the privileged and powerful in American law, and it has often done so on moral grounds. Applying Professor Waldron's insights, this Part shows that dignity's betrothal to status has seen it attribute inferior status to sexual minorities, in particular.[71] Dignity has even asserted itself over the consciences of sexual minorities, silencing them. Conscience, during this period, has been reduced to a series of vestiges, which has diminished the concept's power.

---

[69] *See infra* A TRANSFORMATIVE CONSCIENCE at 351–53.

[70] *See, e.g.*, Erin Sheley, *The Dignitary Confrontation Clause*, 97 WASH. L. REV. 207, 232–33 (2022) (discussing the dignitary interest inherent in a face-to-face confrontation with one's accuser as well as "a guilty conscience" in a broader discussion of the Sixth Amendment's Confrontation Clause); *see also* Neville Rochow, *Towards A Constitutional Spatial Theory for the Resolution of Conflicts in Rights and Liberties Claims*, 29 MICH. ST. INT'L. L. REV. 469, 509 (2021) ("In its spatial theoretical role, dignity shares common features with the notion of 'conscience' as used in equity, preventing the law from effecting harsh consequences that would result from a doctrinaire application of legal principles."); Frederick Mark Gedicks, *Dignity and Discrimination*, 46 B.Y.U. L. REV. 961, 970 (2021) ("Constitutional care for the dignity of religious conscience is evident in the 1st Amendment's guarantee of religious free exercise and prohibition of religious establishments, as well as in Article VI's proscription of religious tests for federal office."); Miguel H. Díaz, *An Unfinished Project: John Courtney Murray, Religious Freedom, and Unresolved Tensions in Contemporary American Society*, 50 LOY. U. CHI. L.J. 1, 5 (2018) ("Respect for the human dignity and conscience of oppressed and marginalized communities within the Church and society, coupled with defending religious freedom of all persons, is the litmus test to reject what Pope Francis has called 'the globalization of human indifference.'"); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 223, 226 (2011) (mentioning "shocks the conscience" in a discussion dignity as reflecting "collective virtue"); Wright, *supra* note 42, at 557 ("We must be able to see general censorship, for example, as contrary to dignity in the relevant sense, and silencing of conscience as humiliating."); Richard Schenk, *Voices of Conscience*, 54 VILL. L. REV. 593, 593 (2009) (discussing "dignity of conscience"); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 750 (2006) (quoting the Universal Declaration of Human Rights for the proposition that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

[71] *See* WALDRON, *supra* note 13, at 110.

Part III shows that from the colonial era to the 1930s, dignity enforced status, specifically status-based determinations that turned on sex and race.[72] Women were deemed of subordinate dignity to men, and the enslaved were deemed of inferior dignity to both White men and White women.[73] Conscience applied, for the first time in the United States, the idea of conduct that shocks the conscience, and, at least in cases involving women's property, conscience often provided a remedy that might not have otherwise been available.[74] Part III shows that both dignity and conscience, consistently failed enslaved human beings and deepened their suffering.

Part IV shows that even at English law, dignity reinforced rank and class distinctions. This Part also relies on Professor Waldron's insights, and it shows that English law allowed those of superior dignity to bring suit when their dignity was attacked in speech.[75] Laws were also passed that regulated how money could be expended for personal use so that status differences could be maintained.[76] During this time, conscience, as a major moral theory, generated an extensive array of procedural, substantive, and remedial devices to empower litigants, which we still use in American law. Conscience did so because dignity authorized it do so.

Part V shows that both dignity and conscience are systems, with dignity being a web of relationships between the dignities of the sovereign, the court, and the human being. For its part, conscience is a system engrafted onto the system of the common law so that conscience might save the common law from its own excesses. Conscience can teach dignity that a responsive legal system exists for the sake of the vulnerable human individual, whose humanity conscience protects and upholds.

My conclusion states that conscience has survived for millennia because it has been important, and it continues to be so.

II. FROM THE 1930S TO THE PRESENT

Beginning with an overview of dignity in our time, this Part shows that dignity has yielded at least twenty related meanings that show both how powerful the concept is and how puzzling. The concept has been detected in everything from constitutional law to tort law, both as the ground of rights and as the content of those rights,[77] but its

---

72 WALDRON, *supra* note 13, at 57, 59, 110; *see infra* THE COLONIAL ERA TO THE 1930S at 341–42.

73 WALDRON, *supra* note 13, at 57, 59.

74 *See* Rudolph, *supra* note 2, at 342–43.

75 WALDRON, *supra* note 13, at 47–48.

76 Lucille M. Ponte*, Echoes of the Sumptuary Impulse: Considering the Threads of Social Identity, Economic Protectionism, and Public Morality in the Proposed Design Piracy Prohibition Act*, 12 VAND. J. ENT. & TECH. L. 45, 58 (2009).

77 *See, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home, 140 S. Ct. 2367, 2386 (2020); *see also* Fulton v. City of Phila., Pa., 141 S. Ct. 1868, 1882 (2021); Brown v. Plata, 563 U.S. 493, 499 (2011) (Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.).

core meaning focuses on status. Conscience, on the other hand, has been diminished.[78] It persists as a series of remnants that have limited procedural, substantive, and remedial power, and they possess nothing of the momentary éclat of dignity.[79] Dignity, then, seems to have the upper hand, and it can override the presence of an individual conscience, but dignity's future is uncertain.

A. The Fragility of Dignity

Dignity is an ascendant constitutional principle in American law. In recent years, the Supreme Court has cited to the dignity of the elderly and to the dignity inherent in all human beings, "particularly those whom others regard as weak or worthless."[80] Minority communities, the Court has indicated, have "dignity and worth."[81] Dignity has been detected in the First, Fourth, Fifth, Sixth, Eighth, Eleventh, Fourteenth, and Fifteenth amendments; it has also been seen at the state level.[82] Indeed, both by underscoring the inherent dignity of sexual minorities and by upholding the inherent dignity of prisoners afflicted with mental illness under the Fourteenth Amendment, the Court has strengthened dignity's status as a constitutional concern.[83] Dignity matters, then, because it makes actionable the violation of the inherent worth and equal status of those often regarded as moral and legal inferiors.

Human dignity is notoriously intractable, or, to use Professor Leslie Meltzer Henry's characterization, we still face the "conceptual chaos surrounding dignity."[84] We need only look at the range of meanings generated by the term to see that its

---

78 Smith, *supra* note 48, at 1054.

79 Scarlett, *supra* note 47, at 291; *see also* SPENCE, *supra* note 47, at 380–81; COKE, *supra* note 47, at 84; Devlin, *supra* note 47, at 54–56; BARBOUR, *supra* note 47, at 72; Fink, *supra* note 47, at 408; IX W.S. HOLDSWORTH, *supra* note 47, at 408; MAITLAND & MONTAGUE, *supra* note 64, at 125; SIMPSON, *supra* note 47, at 398; Arnold, *supra* note 48, at 847; Boliek, *supra* note 48, at 51–52; Waddilove, *supra* note 48, at 430; Nicolas, *supra* note 48, at 1509; Bray, *supra* note 48, at 470; VII W.S. HOLDSWORTH, *supra* note 48, at 150; AMES, *supra* note 48, at 264 n.2; BARBOUR, *supra* note 47, at 93–96; SPENCE, *supra* note 47, at 628–37; Smith, *supra* note 48, at 1065–66; Raack, *supra* note 49, at 555; BARBOUR, *supra* note 47, at 120–23; Langbein, *supra* note 50, at 648; Anenson, *supra* note 50, at 384; Rendleman, *supra* note 50, at 1433.

80 *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2386.

81 *Fulton v. City of Phila., Pa.*, 141 S. Ct. at 1882.

82 *Dignity in the United States*, 68 HASTINGS L.J. 1135, 1167 (2017) (Fourteenth Amendment, state level); Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2178 (2016) (Eighth Amendment); Giannini, *supra* note 42, at 56–57 (Fourth, Fifth, Fourteenth amendments); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 Wis. L. Rev. 655, 661–62 (2008) (Fourth); Goodman, *supra* note 70, at 789–90; Wright, *supra* note 42, at 534–35 (Fourth, Eighth amendments).

83 *See* Brown v. Plata, 563 U.S. 493, 499 (2011) (Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.); *see also* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.).

84 Henry, *supra* note 70, at 176; *see also* Mary Ann Glendon, *The Bearable Lightness of Dignity*, 213 FIRST THINGS 41 (2011).

semantic field is as wide as it is confounding.[85] In the 1970s, Professor Jerry Marshaw evoked dignity as a different theory that might help understand the Court's procedural due-process jurisprudence.[86] In the 1990s, Professor Stephen J. Wermiel identified six meanings of dignity in the period leading up to Justice Brennan's service on the Court in 1956—the state's dignity, the sovereign's dignity, the language of dignity in grand-jury felony charges, the dignity of the courts, the dignity of patent inventions, the equal dignity of certain claims, and status.[87]

More recent studies have similarly underscored dignity's recalcitrance. Professor Henry's empirical study of the Court's jurisprudence has shown that "dignity" has five meanings in the Court's case law—status, equality, liberty, personal integrity, and collective virtue.[88] Professor Rex D. Glensy evokes four approaches to dignity—dignity as a substantive right, dignity as a background legal norm, dignity as a substitute for other rights, and dignity as an expressive concept.[89] Judge Neomi Rao puts forth three meanings of dignity—intrinsic worth; conducting one's self in a certain manner; and respect, recognition, and concern for the other.[90] Professor David Luban says that dignity's meaning is determined contextually.[91] Professors R. George Wright and Mary Margaret Giannini turn to Immanuel Kant (among others) to inform their approach to dignity.[92] Professor Jeremy Waldron persuasively tells us that dignity is really about status, which includes both positive and negative meanings.[93]

Keeping these definitions in mind, dignity, then, evokes a web (and maybe even a labyrinth) of twenty (or more) related and enmeshed concepts in American law. Dignity implies (1) collective virtue, (2) concern for the other, (3) equality, (4) honor, (5) intrinsic worth, (6) liberty, (7) personal integrity, (8) recognition, (9) respect, and (10) status.[94] We take dignity to be (11) a background legal norm, (12) an expressive concept, (13) a substitute for other concepts, (14) a substantive right, (15) a mandate

---

85 *See* Marshaw, *supra* note 18; Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223, 224–25 (1998).

86 Marshaw, *supra* note 18.

87 Wermiel, *supra* note 85.

88 Henry, *supra* note 70, at 189–90; *see also* Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1122 (2017) (on dignity as equality, "equal dignity").

89 Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 71–72 (2011).

90 Rao, *supra* note 11, at 187–89.

91 David Luban, *Human Rights Pragmatism and Human Dignity*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 263, 264 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015).

92 Wright, *supra* note 42, at 537–38; Giannini, *supra* note 42 at 46–47.

93 WALDRON, *supra* note 13, at 18.

94 Henry, *supra* note 70, at 189–90; Rao, *supra* note 11, at 187–88, 224.

that we should treat people as ends in themselves, (16) a requirement that people be heard, and (17) a concept whose meaning is determined by its context.[95]

As additional proof of the semantic complexity surrounding the concept, we might keep in mind religious approaches to the term. Professor Doron M. Kalir looks at dignity from the perspective of Jewish law, and he draws attention to the sacredness of the concept, bringing attention to the fact human dignity is treated as (18) a delegation of God's dignity.[96] Professor Kalir notes that the concept includes (19) equality and love of humanity.[97] Professor Andrea Pin approaches the concept attentive to its meanings in Islamic theology and law, and he notes that "the religious concept fluctuates between 'grace,' understood as a charismatic gift or the capacity to perform miracles, or as 'miracles' in themselves."[98] Professor John Witte, Jr., looks at dignity from a Christian perspective, and he cautions that the omnipresence of dignity in our time could lead us to overlook dignity's ability to achieve a (20) balance between human depravity and sanctity.[99] But, as Professor Waldron notes, notwithstanding all the definitions of dignity offered by commentators, the concept might still, at least in the West, refer to the status of the individual, and all other meanings might feed into status as they capture "the particular rules that protect and support it."[100]

So much for dignity's positive meanings. Commentators have asked how we might know when dignity is—or has been—undermined.[101] Among dignity's negative meanings is an (21) injunction against the humiliation of human beings.[102] As with everything dignity touches, non-humiliation has itself generated several related understandings.[103] Consistent with Professor Bruce Ackerman, we might say that humiliation occurs between two individuals when one attacks the status of the other,

---

95 Glensy, *supra* note 89, at 71, 84; Marshaw, *supra* note 18, at 49–50; Luban, *Human Rights Pragmatism and Human Dignity*, *supra* note 91, at 263, 276.

96 Doron M. Kalir, *Rethinking Religious Objections (Old-Testament Based) to Same-Sex Marriage*, 33 NOTRE DAME J. L., ETHICS & PUB. POL'Y 109, 128 (2019).

97 *Id.* at 127–28.

98 Andrea Pin, *Arab Constitutionalism and Human Dignity*, 50 GEO. WASH. INT'L L. REV. 1, 16 (2017).

99 John Witte, Jr., *Between Sanctity and Depravity: Human Dignity in Protestant Perspective*, *in* IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES 119, 120–22 (Robert P. Kraynak & Glenn Tinder eds., 2003). I am grateful to Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2178 (2016) for bringing this essay to my attention.

100 WALDRON, *supra* note 13, at 18.

101 *Id.* at 19.

102 *See id.* at 38–39, 41–42.

103 BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 128–29, 150, 152 (2014).

who fails to rebuff the attack through a show of defiance.[104] We might agree with Professor Kenji Yoshino that "what, after all, is the opposite of 'humiliation' but 'dignity'?"[105] Professor Yoshino invites us to use the civil trial's adversarial-testing mechanism to allow those who have faced institutionalized humiliation to testify about their experience.[106] We might similarly agree with Professor David Luban that a human being is humiliated when the weight of that person's being ("ontological heft") is "wrongly taken down a peg".[107] Or we might agree with Professor Avishai Margalit that for humiliation to be present, the individual must have "a sound reason . . . to consider his or her self-respect injured."[108]

We may even decide that however compelling non-humiliation may be as part of the kaleidoscope of meanings projected by dignity, we should direct our attention instead at *not* (22) demeaning, debasing, or degrading human beings.[109] Under this reading, Professor Deborah Hellman's insight is key. Professor Hellman observes that humiliation may not be the right concept if humiliation is considered inherently bad, if it requires that the perpetrator intend to humiliate the victim, and if humiliation requires that the victim accept the humiliation.[110] Humiliation is not always intentional, the victim may oppose it, and, in some contexts, humiliation of perpetrators may sometimes be warranted to promote equality.[111] We should think, instead, Professor Hellman indicates, of the demeaning aspect of discrimination because that which demeans rejects the equality of the individual, it refuses to respect that individual, it debases or degrades that individual, all the while casting that individual in a subservient position.[112] Expressed in terms used by this Article, dignity is about status, about who imputes to themselves (and their group) elevated status on which basis another individual or group is denied equivalent status and is, as a result, humiliated, denigrated, or demeaned.

But how useful is the term "dignity" at all? Is dignity not "useless"? Professor Ruth Macklin asks in a widely cited editorial.[113] Professor Macklin finds that the concept adds nothing to the requirement that we respect others or their (23) autonomy?[114]

---

104 *Id.* at 138.

105 Yoshino, *The Meaning of the Civil Rights Revolution: The Anti-Humiliation Principle and Same-Sex Marriage*, *supra* note 19, at 3082.

106 *Id.* at 3092–103.

107 Luban, *Lawyers as Upholders of Human Dignity*, *supra* note 25, at 821–22, 839.

108 AVISHAI MARGALIT, THE DECENT SOCIETY 9 (Naomi Goldblum trans., 1996).

109 Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L. J. 3036, 3040–42 (2014).

110 *Id.*

111 *Id.* at 3042–44.

112 *Id.* at 3046–53.

113 Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRITISH MED. J. 1419, 1419 (2003).

114 *Id.* at 1419–20.

Professor Stephen Pinker responds that dignity is "[a]lmost" useless since its meaning has varied over time, it is given up for the things we want, and it can be conscripted for harmful purposes—even by the state.[115] Professor Pinker indicates that while dignity, as a moral concept, is a "mess" (prompting, for example, contradictory claims in those who proclaim its importance), it might still retain some of its utility by operating as a kind of (24) umbrella term under which moral specific imperatives, like autonomy and respect, might coalesce.[116] Given all of dignity's meanings, as the judge and essayist Michel de Montaigne might prompt us to observe, we ask for the meaning of one term, and a hive of meanings is returned to us; such is the practice of law.[117]

The Supreme Court's jurisprudence supports the insight that dignity is, probably more than anything else, about status, and such status is attentive to the moral (and religious) tides of the moment.[118] Recall *Obergefell v. Hodges,* which relied on human dignity to hold that states must issue marriage licenses to same-sex couples and recognize same-sex marriages performed in other states.[119] Justice Kennedy, writing for the Court, observed that "the annals of human history" showed that "[t]he lifelong union of a man and a woman always ha[d] promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm."[120] That Justice Kennedy aligned "dignity" with "nobility" imputed a somewhat aristocratic quality to the institution of marriage, implying that those who entered into the institution historically enjoyed superior status— "all persons," in the Court's language, referring, thus, to "all persons who would marry someone of the opposite sex."[121]

Status meant that those who married someone of the opposite sex enjoyed elevated status and superior protections under the law.[122] Many of those who enjoyed such status "did not deem," said Justice Kennedy, "homosexuals to have dignity in their own distinct identity."[123] That is, many of those who married someone of a different

---

115 Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), https://newrepublic.com/article/64674/the-stupidity-dignity.

116 *Id.*

117 *See* MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS OF MONTAIGNE 819 (Donald M. Frame, trans. 1976).

118 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 656, 660–61, 673–74, 678, 681 (2015); United States v. Windsor, 570 U.S. 744, 763 (2013).

119 *Obergefell*, 576 U.S. at 656–57, 681.

120 *Id.* at 656–57.

121 *But see* Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 170 (2015) (observing that *Obergefell* is less about dignity than it is about liberty and anti-subordination).

122 *Obergefell*, 576 U.S. at 645.

123 *Id.* at 660.

sex had long granted themselves higher legal status on which basis they denied equivalent status to those they deemed defective and inferior.[124] Why? Because, Justice Kennedy continued, they considered "same-sex intimacy as immoral, and homosexuality was treated [by them] as an illness."[125] Status, thus, implies the power to assign inferior status to a minority group and to characterize members of that group as ill—of inferior dignity.[126] Showing the centrality of status to discussions of dignity, Justice Kennedy similarly observed in *United States v. Windsor* that "it seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[127]

Such debased legal status, foisted on same-sex couples, tracked and was rooted in morality. As Professor Michael J. Klarman has observed in a comment comparing major civil-rights cases involving race and sexual orientation, the result in landmark cases rarely turns solely on the law itself since gradual moral changes in the broader society also contribute to shifts in precedent.[128] Professor Klarman observes that the extent to which people knew someone who had come out as gay had a direct impact on whether those people might speak of gay people in negative moral terms.[129] In a similar vein, Professors Eric Segall, Jonathan Adler, Pamela Karlan, and Mark Tushnet note that knowing someone from a disfavored group may have a bearing on a judge's capacity for empathy toward members of that group, which could affect a judge's disposition of cases involving that group.[130] Urvashi Vaid, a civil-rights activist, has similarly observed that "[u]ntil each gay and lesbian person tells the truth about his or her life—by coming out every day, everywhere, and in every situation—the heterosexual world will be able to deny the existence of homosexuality."[131] Morality matters, but it is tied to visibility, which has an impact on moral attitudes to

---

[124] *Id.* at 645.

[125] *Id.*

[126] *Id.*

[127] United States v. Windsor, 570 U.S. 744, 763 (2013).

[128] Michael J. Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 129–35 (2013).

[129] *Id*. at 133. While Professor Klarman is not explicitly treating of the relationship between dignity and status in his comment, the connection between the two is inherent in his treatment of the Federal Constitution and same-sex marriage. Professor Klarman observes that the result in *United States v. Windsor* would not have been possible two decades before, and he cites to *Windsor,* a case in which Justice Kennedy held for the Court that the Defense of Marriage Act (DOMA) violated the Fifth Amendment's proffer of liberty. *Id.* at 130. The *Windsor* quotation aligns status and dignity, showing that both concepts are related. "It seems fair to conclude," Justice Kennedy wrote for the *Windsor* majority in language cited by Professor Klarman, "that until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Id.* at 130 n.18.

[130] Segall et al., *supra* note 22, at 878–81.

[131] URVASHI VAID, VIRTUAL EQUALITY 30 (1995).

members of a minority. Such moral attitudes can inform judicial engagement with members from those groups.

The extent to which morality and status matter in discussions of the human dignity of a vulnerable community is similarly evident in Congress's decision to treat gay people as inferior under federal law.[132] In *Windsor,* Justice Kennedy cited to congressional language, which showed that in crafting the Defense of Marriage Act, the House of Representatives had been sensitive to religious and moral concerns that made it refuse to extend the protections of over one thousand federal statutes to those who could not marry someone of the opposite sex:

> The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.' . . . The stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'[133]

Dignity is, then, about legal status, which is often rooted in morality and religion, both of which have a say in how vulnerable communities are treated.[134] As Justice Kennedy observed in *Windsor*, "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[135]

By raising the status of gay people, cases like *Obergefell* and *Windsor* reflected changing morality in American life, and they extended substantive causes of action to gay people under the Federal Constitution.[136] Professor Waldron is helpful here, and he cites to Professor Gregory Vlastos for the proposition that, under recent understandings of dignity, we are now all aristocrats—or, at the very least, we are all entitled to many of the same rights once reserved for those who would, in another time and place, be emphatically considered our moral, social, political, and legal superiors:

> Vlastos argued that we organize ourselves not like a society without nobility or rank, but like an aristocratic society that has just one rank (and a pretty high rank at that) for all of us. Or (to vary the image slightly), we are not like a society that has eschewed all talk of caste; we are like a caste society with just one caste (and a very high caste at that). Every man a Brahmin. Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone's person and body sacrosanct, in the way that

---

132 *Windsor*, 570 U.S. at 771.

133 *Id.*

134 *Id.*

135 *Id.* at 770.

136 Obergefell v. Hodges, 576 U.S. 644, 645, 656, 660–61, 666, 673–74, 678, 681 (2015); *Windsor*, 570 U.S. at 763.

> nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege.[137]

Indeed, we see a similar connection between dignity and equal status in the Universal Declaration of Human Rights, which guarantees "all the rights and freedoms set forth in this Declaration, without [regard to status]."[138] We might say, then, that the untouchables of yesteryear—the gender, sexual, and other minorities assigned to the lower rungs of the social, legal, political order, all have claims to equivalent legal status as our assumed superiors of yesteryear—we who were legally subordinated and repulsive in some respect to many members of the majority only yesterday.[139]

Timing is important in this discussion. Dean Erwin Chemerinsky tells us, for example, that the seminal case of *Brown v. Board of Education,* which desegregated American schools in 1954, likely would not have been possible had it been decided a year earlier because the composition of the Court at that time appeared opposed to desegregating American schools.[140] Professor Klarman similarly tells us that the outcome cases like *Windsor* would not have been possible decades before given prevailing attitudes in the public at large to gay people.[141] An even more powerful reminder about timing comes from Frederick Douglass, who helps us understand that members of a minority are painfully aware of the inferior status that has been forced upon them by the majority long before the majority decides to do anything to change that status.[142] Frederick Douglass mentions "dignity," and he implies its connection to status when he states that he was "well aware of the unjust, unnatural and murderous character of slavery, when nine years old . . . ."[143] The horrendous mistreatment of slaves is of an entirely different magnitude from the mistreatment of sexual minorities, but the issue of timing and status applies to both groups.

Dignity is not only a constitutional matter in American law; it is also a common-law concern, also reflecting concerns about status. We have, for example, common-law causes of action enforcing human dignity—the "dignitary torts," which protect bodily and emotional integrity.[144] Tort concerns about dignity explicitly arose as early as 1934, when the *Restatement of Torts, First* proscribed a bodily contact that "would offend the ordinary person and as such one not unduly sensitive as to his personal

---

137 WALDRON, *supra* note 13, at 34.

138 *See generally* Universal Declaration, *supra* note 44.

139 On disgust and sexuality, *see generally* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST. SHAME, AND THE LAW 89–94, 96–98 (2004).

140 CHEMERINSKY, *supra* note 14, at 40.

141 Klarman, *supra* note 128, at 130.

142 FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 41 (Dover Publications 1969) (1855).

143 *Id.* at 133.

144 *See generally* DAN B. DOBBS ET AL., HORNBOOK ON TORTS 931–32 (2d ed. 2016).

dignity."[145] It would take three more decades before a court would explicitly embrace the term in tort.[146] That case involved married tenants who counterclaimed against their landlord, alleging, in relevant part, that their landlord had committed an "indecent attack and assault" on the female tenant.[147] In affirming the judgment in the tenants' favor, the state court cited to the *Restatement of Torts, First*.[148] The case explicitly enshrined in the law the *First Restatement's* dignitarian language, and it implicitly held that the female tenant's own understanding of her dignity was reasonable and actionable at private law.[149]

Yet, for all its power, dignity is still in doubt. Courts rarely refer to "dignitary torts" and to dignity in torts cases,[150] and searches in the legal database appear to confirm this fact.[151] Of course, we could identify dignity as a tacit value in almost any case, but saying that we see it at work does not mean that a judge is actually relying upon it[152] because our reading could tell us more about ourselves as readers of case law than about the judges writing a particular opinion.[153] Perhaps in a show of how the dignity bestowed by courts on sexual minorities is often questioned by large parts of the public, it is notable that as of March 2022, state legislatures in the United States had already proposed 238 bills restricting the rights of LGBTQI+ individuals.[154] Since 2018, just three years after *Obergefell,* almost 670 such bills had already been proposed.[155] It is also worth noting that only three hundred cases total directly cite to *Windsor* or *Obergefell* for their groundbreaking dignity or anti-humiliation language.[156] In other words, human dignity's hold on American law as a mark of equal status, at best, may be somewhat tenuous. This fact could portend a return to a time

---

145 RESTATEMENT (FIRST) OF TORTS, *supra* note 6, § 19.

146 *See* Edmisten v. Dousette, 334 S.W.2d 746, 752 (Mo. Ct. App. 1960).

147 *Id.* at 748.

148 *Id.* at 752.

149 *Id.* at 752–53; RESTATEMENT (FIRST) OF TORTS, *supra* note 6, § 19.

150 *See* Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 319–20 (2019).

151 *Id.*

152 *See* HANS-GEORG GADAMER, TRUTH AND METHOD 165–66 (Garrett Barden & John Cumming trans., Sheed and Ward 1975) (1960); Abraham & White, *supra* note 150, at 319–20.

153 *Id.*

154 *See* Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 so far, Most of Them Targeting Trans People*, NBC NEWS (March 20, 2022), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418.

155 *Id.*

156 I ran searches in both Westlaw and LexisNexis for "Windsor or Obergefell /200 dignit* or humiliat*", which returned two hundred eighty results.

when dignity was not the law when it came to sexual minorities, among others, because a sovereign's dignity and a court's had aligned against them.

To further underscore the fragility of dignity in this moment, I rely on Professor Samuel Moyn's insight. Professor Moyn observes in his monograph, *Christian Human Rights*, that the future of human rights (of which human dignity is a major part) is, for a number of reasons, itself uncertain.[157] Professor Moyn observes that:

> [U]nlike Christianity, human rights do not give much of a chance for spiritual transfiguration for the rare authentic seeker of transcendence. Or, if there are knights of faith in the world of human rights, it boasts no churches or cathedrals and has inspired none of the great art that has been Christianity's most impressive contribution to human affairs. And one doubts that human rights will ever move true believers to self-sacrifice or even martyrdom, giving themselves as witnesses to the truth of their faith.[158]

Discussions of dignity are often surrounded by religious and moral considerations. Professor Moyn's insight implies that the degree to which a concept (like dignity) survives is tied to the extent to which it generates at least some moral support (or fervor) in its favor.[159] Of course, there are many whose gift to humanity has been their devotion to the fight for the rights of others. Professor Moyn's point, however, appears to be about the particular sacrifices that religious experiences often entail. This can be difficult for non-religious experiences to duplicate, however much their own origins can be traced to religious sources.[160] Indeed, perhaps as an indication of how strong the religious and moral backlash against minority rights is, our current cultural and political moment is witnessing increasing vociferous—and even violent—opposition to the human dignity of constituencies at risk.

As even further evidence of dignity's fragility, we might note that even with powerful references to the concept as early as 1937 in constitutions abroad, and despite its enshrinement in international instruments after the Second World War, dignity, in American law, has retained a central feature for at least decades—it has referred to status.[161] Even in the 1930s, dignity recalled the dignity of the state or sovereign, again, showing that the concept goes to rank, status, and position.[162] Dignity also evoked the dignity of the courts.[163] There are also references to the dignity of individual claims in a bankruptcy case from 1934, which talks of the unequal dignity of two claimants in a bankruptcy proceeding (that is, the likely order of claims

---

157 MOYN, *supra* note 6, at 81.

158 *Id.* at 176.

159 MOYN, *supra* note 6, at 176.

160 *Id.*

161 *See supra* text accompanying note 13.

162 *See* Bolding v. State, 66 S.W.2d 633 (Ark. 1934) (mentioning "the peace and dignity of the State of Arkansas").

163 Commonwealth v. Superintendent of Cnty. Prison, 20 Pa. D. & C. 277, 277 (C.P. 1934).

distribution).[164] And we have seen tort law upholding individual dignity in the 1930s.[165]

In sum, dignity, at least since the 1930s, has been a feature of American law, and it has more recently become an explicit constitutional mandate that has transformed the lives of so many people in the United States. And yet, as increasingly important as dignity might be to our understanding of the mandates of the law, dignity is still about legal status, which often tracks social and political status in the society at large. That fact is attentive to moral (and religious) trends that often also have an impact on judicial discourse, and which can threaten conferrals of equal status.

I now turn to the enumerations of conscience in our legal system and their weaknesses, followed by a discussion of dignity's relationship to conscience.

B. The Vestiges of Conscience[166]

Conscience, in our legal system, appears either moribund or as a series of empty shells. Recall that dignity has over twenty meanings in American law.[167] Conscience has at least five, almost all of which owe a debt to the court of conscience, which we now largely call "equity."[168] Most invocations of conscience survive as disconnected remnants of a former overarching presence. That is, while retaining their original moral aspect, they are untethered from the comprehensive moral system that made or developed them and that would ground, modify, and shape their trajectories. As such, they subsist, but their evocation of conscience tells us little about conscience overall, and such evocations are not generating much in the way of novelty, portending their further weakening in the time ahead.

I begin with a brief discussion of the forms of conscience in current American law. They are (1) the court of conscience, (2) the shocks-the-conscience standard in constitutional law, (3) the shocks-the-conscience standard that applies to grants of damages, (4) conscientious objection, and, finally, (5) the doctrine of contractual unconscionability. I discuss each of these sequentially to provide an understanding of why these doctrines are untethered standalone doctrines under current law. As such,

---

164 Gordon v. Silvert, 24 Pa. D. & C. 112, 113 (C.P. 1934) ("The two are not of equal dignity: The claim of the bank is upon a judgment, that of Silvert is a general claim, objected to by the secretary.").

165 *See supra* note 6 and accompanying text.

166 *See supra* note 65, at 1135, and accompanying text (referring to "the residue of equity").

167 *See supra* The Fragility of Dignity, pp. 319–320.

168 Dennis R. Klinck, *The Unexamined "Conscience" of Contemporary Canadian Equity*, 46 McGILL L. J. 571 (2001); Rosales-Mireles v. United States, 138 S. Ct. 1897, 1906 (2018); *see infra Remittitur in Employment Litigation*, THOMSON REUTERS ("The standard of review for damage awards, whether compensatory or punitive, is whether the award is so grossly excessive as to 'shock the conscience' of the court and constitute injustice to the defendant. This standard is applied when reviewing a motion for a new trial or remittitur."); *see* A Transformative Conscience, pp. 351–63; Addit, LLC v. Hengesbach, 341 So.3d 362, 367 (Fla. Dist. Ct. App. 2022) ("To determine whether a contract is substantively unconscionable, a court must look to the terms of the contract, itself, and determine whether they are so 'outrageously unfair' as to 'shock the judicial conscience.'").

they do not produce much in the way of novelty after the passage of the Rules Enabling Act of 1934.[169]

Consider the court of conscience. The court of conscience refers to the equitable branch of our remedies system, which is the focus of this Article.[170] Jurisdictions still refer to conscience in this equitable sense.[171] For example, a recent New Jersey case involving an appeal from the Chancery Division of the Superior Court asked whether the chancery judge had abused the court's discretion in a foreclosure action involving a tax sale certificate by refusing to vacate the default judgment given the available defense.[172] In reversing the chancery judge, the Appellate Division held that the defendant had made the required meritorious defense, and that the defendant's "missteps, while regrettable, were not so egregious as to fail to waken the conscience of the chancery court."[173] A Florida case also refers to the court of conscience in the same way. In Florida, in a case involving the standard applicable to a temporary injunction, a court observed that "[a] temporary injunction is an equitable remedy. As we have explained, a court of equity is a court of conscience; it should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience."[174] Thus, we still see references to a court of conscience.

The very idea of a court of conscience, this Article argues, is moral.[175] For example, a New Jersey case explains that equity "involves the obedience to dictates of morality and conscience. The morality of which equity speaks is that of society and not the judge's personal view of right and wrong."[176] Thus, the conscience involved is external, placed outside a particular judge's view of right and wrong.[177] Even as individual jurisdictions cite to a court of conscience as moral, in the aftermath of the Rules Enabling Act, there has been a precipitous drop in the number of cases referring to a court of conscience.[178] And even those that continue to mention a court of

---

169 *See infra* note 178 and accompanying text.

170 *See* Klinck, *supra* note 168, at 578.

171 *See, e.g.*, Keystone Servicing Co., LLC v. Armani Realty Grp., LLC, No. A-3170-19, 2021 WL 4933067, at *2 (N.J. Super. Ct. App. Div. Oct. 22, 2021); Planned Parenthood of Greater Orlando, Inc. v. MMB Properties, 211 So. 3d 918, 925 (Fla. 2017) (citations and quotation marks omitted).

172 *Keystone*, 2021 WL 4933067, at *2.

173 *Id.* at 4.

174 *Planned Parenthood*, 211 So. 3d at 925.

175 *See generally* Smith, *supra* note 48, at 1070; Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2016).

176 Sheridan v. Sheridan, 247 N.J. Super. 552, 559 (Ch. Div. 1990).

177 *Id.*

178 I ran a search in Westlaw for "court of conscience", which returned 1,690 cases total, of which 1,100 were decided before December 31, 1934. I also ran a search in Westlaw for "'court of conscience' or 'equitable conscience' or chancery /7 conscience or chancellor /7 conscience". Just over two thousand results, total, were returned in the database. The majority of those

conscience in this sense are in no way reviving the court of conscience as an independent court whose overarching theory is conscience.[179]

Also deploying the language of conscience is the shocks-the-conscience standard, which determines whether extreme and egregious misconduct has resulted in a substantive due-process violation of the Fifth and Fourteenth amendments.[180] The shocks-the-conscience standard is only said to be met, as Justice Sotomayor has explained, when the alleged misconduct of the "governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[181] In other words, the conscience at issue is external, and it engages with the moral sensibilities of the time in which the case is adjudicated.[182] The shocks-the-conscience standard was likely applied for the first time in the United States by the court of conscience (chancery) in the nineteenth century.[183] Chancery created the shocks-the-conscience standard to thwart unethical conduct in contracting. [184] The shocks-the-conscience standard likely became a constitutional standard sometime in the mid-twentieth century, showing that one of the possible effects of the Rules Enabling Act was that previously equitable notions became substantive ones.[185] However, such a displacement of the language of conscience is not the result of a resurrection of the court of conscience or a theory of conscience as a major theory.

A shocks-the-conscience test similarly applies to grants of compensatory and punitive damages, where a reviewing court decides whether an award of damages made by a lower court is so excessive that it shocks the judicial conscience, which means that such a conscience lies outside the litigants.[186] Punitive-damage awards, in which the test is applied, are expressions of public morality since they track the moral outrage of the jury.[187] While punitive damages are traditionally considered legal or

---

references are from before the passage of the Rules Enabling Act of 1934 (when there were likely even fewer courts in the nation than there are now), which shows that explicit reliance on the notion of a court of conscience—as a result of which other references to conscience are possible—may be on the wane.

179 *See supra* at note 178 and accompanying text.

180 Rosales-Mireles v. United States, 138 S. Ct. 1897, 1906 (2018).

181 *Id.*

182 *Id.*

183 *See infra* The First American Use of "Shocks the Conscience," at 341–42.

184 *See id.*

185 *See id.*

186 *See supra* note 178 ("The standard of review for damage awards, whether compensatory or punitive, is whether the award is so grossly excessive as to 'shock the conscience' of the court and constitute injustice to the defendant. This standard is applied when reviewing a motion for a new trial or remittitur."); Grant v. Lockett, No. 19-1558, 2021 WL 5816245, at *6 (2d Cir. Dec. 8, 2021) ("The jury's award of $1,130,000 in compensatory damages to Alonzo neither shocks the conscience nor materially deviates from what would be reasonable compensation.").

187 *See* Rudolph, *Of Moral Outrage in Judicial Opinions*, *supra* note 2, at 349–51.

common-law remedies, they are now available at equity or conscience, meaning that the conscience of the jury in such cases performs an equitable function traditionally reserved for the conscience of the court.[188] The shocks-the-conscience standard, as stated above, is likely a creation of chancery, and after the passage of the Rules Enabling Act, it now applies both at law and at equity for remedies.[189] Yet, again, the presence of this language of conscience does not portend a revival of the theory of conscience.

A similar insight applies to the fact that Congress has permitted anyone to object to participation in the armed forces based on individual conscience.[190] Conscientious objection is internal to the individual and, as such, it reflects professors Kyle Swan's and Kevin Vallier's definition of conscience as being "the human faculty that delivers judgments that lie at the *core* of one's moral judgments."[191] Congress itself, as Justice Marshall once noted, understood when drafting the statutory exemption for conscientious objectors "the principle of supremacy of conscience."[192] This understanding of conscience thus focuses on the individual, and it upholds the individual's core beliefs about the self, including the self's relationship to external commands that would violate the self's betrothal to overriding moral imperatives governing it.[193]

The roots of conscientious objection show its links to the court of conscience, which we now largely call "equity." In the United States, "conscientious objection" likely appeared for the first time in a nineteenth-century case involving a refusal to own an enslaved person, but the phrase's roots are likely in religious liberty of conscience, which appears for the first time in the case law of the late eighteenth century.[194] While conscientious objection is not directly traceable to the court of

---

188 *See* JOHN J. KIRCHER & CHRISTINE M. WISEMAN, 2 PUNITIVE DAMAGES: LAW AND PRAC. 2D §20:6 AVAILABILITY OF PUNITIVE DAMAGES IN EQUITY (2022 ed.) (mentioning punitive damages available at equity); Fassnacht v. Moler, 358 Ga. App. 463, 480 (Ga. Ct. App. 2021) ("Questions concerning the amount of punitive damages to be awarded are for the enlightened conscience of the jury.").

189 *See infra* The First American Use of "Shocks the Conscience," at 341–42.

190 *See* 50 U.S.C.A. § 3806 (j) (West 2022).

191 Kyle Swan & Kevin Vallier, *The Normative Significance of Conscience*, 6 J. ETHICS & SOC. PHIL. 1, 2 (2012) ("Core moral reasons are moral reasons that have significant importance in an individual's practical deliberations and, consequently, order and structure the agent's entire network of moral reasons."); *see also* J. Colin Bradley, *Solidarity, Legitimacy, and the* Janus *Double Bind*, 131 YALE L. J. FORUM 823, 835 (2022) (stating that "conscience-based claims for exemptions are typically rooted in values that individuals feel they must uphold as a matter of deep integrity").

192 Gillette v. United States, 401 U.S. 437, 453 (1971).

193 *Id.* at 454.

194 *See* Inhabitants of Stockbridge v. Inhabitants of W. Stockbridge, 12 Mass. 400, 400 (Mass. 1815) ("Having conscientious objections against holding a slave, the witness purchased the time of the slave for ten years, for which he paid the master £100, New Jersey currency."); Mumford v. Buel, 1 Root 145, 146 (Conn. Super. Ct. 1789) (evoking "liberty of conscience" in a discussion of prohibited "secular business upon the Lord's day"); *see also* CONSCRIPTION AND

conscience, conscientious objection's focus on an individual's conscience is reminiscent of medieval chancery's focus on the conscience of a particular litigant.[195]

It is noteworthy that the espousal of religious freedom in the United States included a focus on conscientious objection.[196] Judge Arlin M. Adams and Professor Charles J. Emmerich observed that this was the case because "[a] liberal Roman Catholic tradition represented by Erasmus and Thomas More also exerted significant influence in the colonies . . . ."[197] Thomas More was Lord Chancellor under Henry VIII, who had More executed in 1535 for following the dictates of his individual conscience in violation of a royal statute that made "it high treason to maliciously deprive the King and Queen of the dignity, title, or name of their royal estates, by word, deed, or thought."[198] The Rules Enabling Act does not appear to have had an impact on this iteration of conscience. Here, again, the concept of a conscience is not doing much in the way of reviving a theory of conscience.

The fifth use of conscience in American law appears in the doctrine of contractual unconscionability, which determines whether the terms of a contract are procedurally or substantively oppressive to an extent that, in at least some jurisdictions, the contract shocks the conscience.[199] Like most forms of conscience in American law, unconscionability in contract focuses on a conscience external to the litigant, which must find that a contractual provision "is so outrageous and unfair, in its wording or its application, that it shocks the conscience or offends the sensibilities of the court or is against public policy."[200] This understanding of conscience allows the court to

---

THE "CONSCIENTIOUS OBJECTOR" TO WAR 3 (1917) (opening with the observation that "Liberty of conscience is essentially an Anglo-Saxon tradition for which our ancestors fought and died, and for which thousands emigrated to America").

195 *See infra* A Transformative Conscience, at 351–57.

196 Cindy Wooden, *Conscientious Objection is Part of Religious Freedom, Commission Says*, NAT'L CATH. REP. (Apr. 29, 2019), https://www.ncronline.org/news/politics/conscientious-objection-part-religious-freedom-commission-says.

197 Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1561 (1989) ("A liberal Roman Catholic tradition represented by Erasmus and Thomas More also exerted significant influence in the colonies, inspiring the Lords Baltimore and the Carrols of Maryland to rethink the proper relationship between church and state.").

198 THOMAS MORE, THE ESSENTIAL WORKS OF THOMAS MORE xxviii (W. Stephen Smith & Gerard Wegemer, eds. 2020).

199 *See* 8 WILLISON ON CONTRACTS, UNCONSCIONABILITY UNDER THE SALES ARTICLE OF THE U.C.C., §18:3 18–19 (4th ed. 2022) (mentioning unconscionability as an equitable doctrine); Addit, LLC v. Hengesbach, 341 So.3d 362, 367 (Fla. Dist. Ct. App. 2022) ("To determine whether a contract is substantively unconscionable, a court must look to the terms of the contract, itself, and determine whether they are so 'outrageously unfair' as to 'shock the judicial conscience.'").

200 David Frisch, 4C ANDERSON U.C.C. §2A-108:27: DETERMINING UNCONSCIONABILITY (3d. ed. 2021), https://1.next.westlaw.com/Document/I24ec8502f72211da95f3adac5bc1eef5/View/FullText.h

focus on its own "sensibilities" (or conscience), which it might ground in public policy.[201] Some states align the contractual doctrine of unconscionability with morality when they note that "[a]n unconscionable contract is abhorrent to good morals and conscience . . . ."[202] The doctrine is a creation of the court of conscience, and it historically allowed the chancellor to intervene in moneylending cases when the terms were disproportionately prejudicial to the borrower.[203] The doctrine of unconscionability has remained a creature of conscience even after the passage of the Rules Enabling Act.[204] Indeed, as Professor Gary Watt has observed, while the tendency is to think of unconscionability as "a particular equitable doctrine . . . it is more correctly understood as the founding justification for the equitable jurisdiction in chancery."[205]

Although these five evocations of conscience persist, their use tends to be formulaic, showing that the idea of a conscience, in American law, may be on the wane. Take, for example, the concept of the conscientious objector, which has ties to the history of chancery.[206] On the one hand, the idea of a conscientious objector has found its way to cases outside the military realm.[207] Courts, for example, have adjudicated cases involving those who have a "conscientious objection to abortions" and involving "conscientious objectors who sought to avoid paying 'the part of their taxes . . . .'"[208] Similarly, the Supreme Court has upheld the rights of those who refuse, on religious grounds, to provide commercial services to members of the LGBTQI+ community.[209] But the idea of the conscientious objector is still, traditionally, one of

---

tml?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=4C+Anderson+U.C.C.+s+2A-108%3a27.

201 Indeed, this alignment of "sensibility" with conscience approaches an older French understanding of a conscience as reflecting a sensitivity that allows the individual to pass judgment. *See* 1 DICTIONNAIRE DE LA LANGUE FRANÇAISE 257 (E. Littre, ed. 1881) (defining "conscience" as "sense of self that allows us to judge our existence") (translating "Sentiment de soi-même qui nous permet de juger de notre existence").

202 PruittHealth-Augusta, LLC v. Lyell, 362 Ga. App. 799, 801(Ga. Ct. App. 2022).

203 LAW AND SOCIETY IN ENGLAND 1750-1950 210–11(William Cornish, Stephen Banks, Charles Mitchell, Paul Mitchell & Rebecca Probert, eds. 2d ed. 2019).

204 *See infra* The First American Use of "Shocks the Conscience," at 341–42.

205 GARY WATT, EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW 106 (2009).

206 *See supra* note 198 and accompanying text.

207 Marie-France Major, *Conscientious Objection and International Law: A Human Right*, CASE W. RSRV. J. OF INT'L L. 349, 350 (1992).

208 *See, e.g.*, Diamond v. Charles, 476 U.S. 54, 58 (1986) (abortion); Ruhaak v. CIR, 157 T.C. 103, 119 (2021) (taxes).

209 *See* Masterpiece Cakeshop, Ltd. v. Colorado C. R. Comm'n, 138 S. Ct. 1719, 1731–32 (2018).

objection to military service.[210] And while the extensions of conscientious objection to topics outside the military realm can be read as expansions of conscience, the expansions are merely displacements of the language of conscience, which means that language is being moved from one area of the law to the next without much else.[211] In other words, conscience is not working as part of an overarching moral theory that compels such displacement.[212] Conscience, in this very limited sense, is not working like dignity at the constitutional level, with all of its antecedents and myriad meanings.

Further, even when the language of conscience is extended to other areas of the law, such extensions are bereft of any overarching theory of conscience that might explain or justify such movement. While courts have appeared willing to extend the shocks-the-conscience standard to environmental claims, this evocation of conscience is also devoid of any overarching theory of conscience that would explain why it should be extended or not.[213] On its own terms, the shocks-the-conscience standard is fairly restrictive, operating as trigger for "highly deferential judicial review that provides a very light check on government power."[214] Such claims are difficult to win because of the level of deference granted to the government, implying that the standard is fairly demanding since it is difficult to convince even the "most hardened sensibilities" that the government has acted in a manner that shocks the conscience.[215] Why? I argue that this understanding of conscience is free-floating, and it is not telling us very much about the meanings of conscience outside its own use. It is also not telling us about a theory or principle of conscience that would open the doors of conscience to more litigants.

The same insight applies to the doctrine of contractual unconscionability. To be sure, contractual unconscionability has been applied expansively.[216] Professors M. Neil Browne and Lauren Biksacky note that such an expansion "it serves as a protection for consumers in general and not just a provision in a commercial code designed for merchant-to-merchant transactions."[217] But the doctrine of contractual unconscionability is not part of an overarching moral theory of conscience that would map and anticipate its expansions wholly consistent with similar expansions at

---

210 *See* Ryan P. Coleman*, A Truer Concept of Service for Citizenship: Reimagining Military Naturalization*, 54 CONN. L. REV. 243, 282 (2022) (military context); Bradley, *supra* note 191, at 830.

211 *See* Major *supra* note 207, at 350.

212 *Id.*

213 *See* Toni M. Massaro, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 204 (2017).

214 *Id.* at 179.

215 *Id.* (internal citations omitted).

216 M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 218 (2013).

217 *Id.* at 219; *see also* 8 WILLISTON ON CONTRACTS § 18:5 (4th ed. 2010) ("Extension of the law of unconscionability outside the U.C.C").

chancery in the past.[218] Indeed, as Professor David Horton notes in his article arguing for the expansion of the doctrine of contractual unconscionability to trusts, "[a]lthough trust and contract share defenses such as fraud, duress, mistake, illegality, incapacity, impossibility, and undue influence—not to mention the same intent-seeking mode of interpretation—unconscionability exists only in contract."[219] In other words, applying one doctrine of the court of conscience (contractual unconscionability) to another doctrine of the same court (trusts) is difficult, even though they are both constructs of conscience; they were both created at chancery.[220] Again, these evocations of conscience appear not to be part of an overriding understanding of conscience; they operate as standalone doctrines.

We observe a similar phenomenon in the copious references to the phrase "equity and good conscience" in American law. If we consider the Supreme Court's most recent references to the phrase, we see that the Court, for example, is referring to "equity and good conscience" as embodied in Rule 19 of the Federal Rules of Civil Procedure (joinder—a creation of conscience), which shows that conscience is not only substantive and remedial, it is also procedural.[221] Or the Court is referring to a lower federal court's treatment of Federal Rule of Civil Procedure 60(b).[222] Thus, we are looking at phrases that include the word "conscience," but these are remnants of a time when "conscience" meant something more powerful.[223] In other words, we now take conscience's presence for granted since it is empty of much of the meaning it once had.[224] Again, these evocations of conscience are not conveying much in the way of novelty.

Why might this be? The passage of the Rules Enabling Act of 1934 may explain, at least in part, these exsanguinated references to conscience.[225] As Professor Henry Smith has explained in his seminal work on equitable remedies, "equity . . . was engulfed in the process of fusion, which unified the court system and placed the distinctiveness of equity in a harsh and unflattering light. Common-law legal systems have been trying to digest equity ever since."[226] Fusion, Professor Smith notes, almost buried the work of chancery under the flatness and homogeneity of the common

---

218 *See* David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1680 (2009).

219 *Id.*

220 Langbein, *supra* note 50, at 628.

221 Republic of Philippines v. Pimentel, 553 U.S. 851, 862 (2008).

222 United States v. Beggerly, 524 U.S. 38, 41 (1998) (relief from a court judgment or order on bases developed by the court of conscience).

223 *See generally* Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEG. STUD. 659, 661–62 (2007).

224 *Id.* at 68.

225 *See generally* Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2020).

226 Smith, *supra* note 48, at 1050.

law.[227] Indeed, we see this in the database, which shows a drop in references to conscience after the passage of the Rules Enabling Act.[228]

To summarize, conscience exists in limited senses in current American law, none of which really points to a great revival of the moral theory of conscience, as we have seen with human dignity. If anything, these are the vestiges of a more powerful conscience, whose contours will become clearer in the following Parts.

I now consider the recent relationship between dignity and conscience in American law.

C. How Dignity Affects Conscience

To witness the power of dignity and its effect on conscience, recall a case that upheld the sovereign's ability to touch and affect a minority community's conscience and human dignity, on moral grounds. Recall *Bowers v. Hardwick,* which asked whether the majority of Georgia's citizens "moral choices" (selectively criminalizing consensual oral sex between two men in the privacy of the home as "sodomy" with up to twenty years of imprisonment) violated the Federal Constitution.[229] In 1989, Justices Warren E. Burger (C.J.), Sandra D. O'Connor, Lewis F. Powell, Jr., William H. Rehnquist, and Byron R. White held that there was no federal constitutional violation by the State of Georgia for the following reason:[230]

> [E]ven if the conduct at issue here is not a fundamental right, respondent ['a practicing homosexual'] asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[231]

Hardwick, then, envisioned a world in which the status of the gay individual was entirely subordinate,[232] and a sovereign, consistent with its own dignity, could compel and enforce what Professor William Eskridge Jr. has called "compulsory

---

227 *Id.* at 1050, 1143.

228 *See supra* note 178 and accompanying text.

229 Bowers v. Hardwick, 478 U.S. 186, 188 n.1, 190 (1986). For the story behind the case, a discussion of the case and its effects and the response to it, *see* WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 229–56 (2008).

230 *Hardwick*, 478 U.S. at 196.

231 *Id.*

232 ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, *supra* note 229, at 256 and accompanying text.

heterosexuality" on such citizens in its borders.[233] History and the law were conscripted, recast, and reimagined as tools of the majority's supremacy over a disparaged minority.[234] And this was done although that recasting, as Professor Eskridge shows, did not adequately grapple with the Court's own precedent on issues of privacy, and the majority's deployment of "historiography . . . [was] beclouded with white lies, ahistorical generalizations, and contestable value choices masquerading as historical analysis."[235]

Morality was central to the outcome in *Hardwick,* showing how morality remains close to evocations of dignity and conscience. In his concurrence in *Hardwick,* Chief Justice Burger underscored the very "ancient roots" of legally sanctioned discrimination (and violence) against gay people, going back at least to Blackstone, who placed gay people below rapists—status.

> As the Court notes . . . the 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. Condemnation of those practices is firmly rooted in Judeao-Christian [*sic*] moral and ethical standards. . . . During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed . . . . 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.' . . . The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.[236]

Implicit in Chief Justice Burger's remarks is the fact that the sovereign has dignity, with the accompanying respect and deference that are owed to it, especially when the sovereign's positions are mirrored by other sovereigns over time.[237] As the majority in the case held, "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally

---

233 WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 163 (1999); s*ee also* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, *in* POWERS OF DESIRE: THE POWER OF SEXUALITY 177 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983).

234 ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET, *supra* note 233, at 149.

235 *Id.* at 149.

236 *Hardwick*, 478 U.S. at 196–97 (Burger, C.J., concurring).

237 For a discussion of state sovereignty and before and after the adoption of the Constitution, *see generally* Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003).

insulated from state proscription is unsupportable."[238] In other words, the sovereign could do as it pleased to members of a vulnerable minority under the circumstances. In their brief for Michael Hardwick, professors Kathleen Sullivan, Laurence Tribe, and Brian Koukoutchos cautioned against "experiments at the expense of the dignity and personality of the individual" implying that the sovereign's dignity could trample individual dignity underfoot.[239]

And, yet, what was particularly striking in *Hardwick's* upholding of status and morality was that members of the majority engaged in exactly the same conduct that was criminalized and that was before the Court.[240] As the American Psychological Association observed in its amicus brief in *Hardwick*, "[s]tatistical studies show[ed] that the sexual conduct criminalized by Georgia [was] commonplace among predominantly heterosexual people."[241] In other words, superior status implied the ability to overlook the very acts in which the majority engaged while it punished their enjoyment by members of a minority. As Professor John Boswell noted in his groundbreaking study of Western attitudes toward gay people, *Christianity, Social Tolerance, and Homosexuality,* intolerance has been a distinctive feature of the Western treatment of gay people, and such intolerance has often cloaked itself in the language of religion, which is identified as the source and cause of hostility toward gay people when the same religious sources condemn many of the same actions (and others) in which intolerant members of the majority themselves engage.[242]

Dignity made an explicit and fleeting (but powerful) appearance in *Hardwick.* Justice Stevens indicated in his dissent that the majority's moral biases were being deployed to suppress a minority's "dignity of individual choice."[243] As Justice Stevens observed, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[244] Justice Stevens's dissent cited to what we now recognize as one of dignity's offshoots—liberty (and freedom)—as protecting individuals from unnecessary invasions by the sovereign. Liberty, as Professor Yoshino notes, was prominent as a motivating principle in *Obergefell.*[245] For its part, Justice Blackmun's dissent in *Hardwick*, evoked what we might consider another of

---

238 Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

239 Brief for Respondent at 16, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720442, at *13 n.23.

240 Brief for Am. Psych. Ass'n & Am. Pub. Health Ass'n. as Amici Curiae Supporting Respondents, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

241 *Id.*

242 JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 6 (1980).

243 *Hardwick*, 478 U.S. at 217 (Stevens, J., dissenting).

244 *Id.* at 216.

245 Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, *supra* note 121, at 148.

dignity's corollaries—(25) privacy.[246] Justice Stevens indicated that *Hardwick* involved "fundamental" liberty interests that rendered "certain state intrusions" into individual life decisions "intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of *conscience* and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases."[247]

A few insights flow from Justice Stevens's statement. Justice Stevens's dissent implicitly confers the language of equal status on the "practicing homosexual."[248] Justice Stevens reminds us of the nation's "tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system."[249] Human dignity, then, incorporates respect for the individual's core knowledge of the self in the world and the beliefs that result from such knowledge—conscience—which Justice Stevens explicitly mentions.[250] A possible reading of Justice Stevens's insight is that the sovereign and its courts are wrong to ask the individual to disrespect the self (and that self's own dignity by going against conscience) solely because the sovereign and its courts require it.[251]

Tying all of this together, dignity (of the sovereign and the courts) has an embedded (oppressive) element that can touch and silence expressions of individual conscience. In *Hardwick*, Justice Stephens helped us understand as much, and so did Justice Kennedy in *Obergefell*.[252] Many people, implied Justice Kennedy, given their status, had denied equal dignity to members of the gay community and, in the process, had compelled them into silence, meaning that the consciences of those who were not attracted to members of the opposite sex could not be similarly expressed, and, more importantly, lived.[253] As Justice Kennedy explained:

> Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful

---

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

247 *Hardwick*, 478 U.S. at 217 (Stevens, J., dissenting) (emphasis added).

248 Tobin Sparling, *A Path Unfollowed: The Disregard of Dignity Precedent in Justice Kennedy's Gay Rights Decisions*, 26 TUL. J.L. & SEXUALITY 53, 68 (2017).

249 *Hardwick*, 478 U.S. at 217 (Stevens, J., dissenting).

250 *Id.*

251 *See id.*

252 *See Hardwick*, 478 U.S. at 217 (Stevens, J., dissenting) (emphasis added); *Obergefell*, 576 U.S. at 660.

253 On equal dignity, *see generally* Lawrence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16 (2015).

> declaration by same-sex couples of what was in their hearts had to remain unspoken.[254]

Of course, this recalls the language of nineteenth-century England—Lord Alfred Douglas (Oscar Wilde's troubled and troublesome lover), who talked of a love that dared not identify itself.[255] Following Justice Kennedy's insight, status-based dignity denied equality of status to members of the gay community, and only those existing outside the criminal ban on what was considered gay immorality could truthfully speak their consciences and reveal "what was in their hearts."[256]

To summarize, dignity has a variety of related meanings, whose main focus is status. Dignity has generated—or transformed—constitutional and common-law causes of action, and its imprint is also visible at the procedural level, where it implies a right to be heard. As inherent worth, dignity is internal, but the concept also reaches external expressions of dignity such as the dignity of the sovereign or the dignity of the courts. Inherent worth only matters to the extent that it receives a legal imprimatur as status from the sovereign and the courts.[257]

Conscience, too, has a variety of meanings that are reflected at the procedural, substantive, and remedial levels. Conscience, like dignity, has both internal and external manifestations in our time, but these are vestiges of conscience since they are unhinged from an overarching system that might generate much in the way of novelty as dignity has recently done. While both dignity and conscience are moral, dignity can—and does—subjugate the individual conscience to its status-based imperative, meaning that conscience, as whole, is further weakened in our time.

Next, I consider an innovation in the use of conscience in the period up to the 1930s.[258] In this period, conscience helped some litigants, failed others horribly, all the while being of service to dignity.[259]

III. THE COLONIAL ERA TO THE 1930S

A. The First American Use of "Shocks the Conscience"

We need only examine what is likely the first application of "shocks the conscience" in American law to witness an innovation in the use of conscience in the period up to the 1930s, which sets the foundation for other uses of the phrase afterward.[260]

---

254 *Obergefell*, 576 U.S. at 660.

255 *See* MERLIN HOLLAND, THE REAL TRIAL OF OSCAR WILDE: THE FIRST UNCENSORED TRANSCRIPT OF THE TRIAL VS JOHN DOUGLAS (MARQUESS OF QUEENSBERRY), 1895 66–68 (2003).

256 *Obergefell*, 576 U.S. at 660.

257 *See id.*; *see Hardwick*, 478 U.S. at 196–97 (Burger, C.J., concurring).

258 *See infra* note 260.

259 *Id.*

260 I say "likely" because, as Justice Story, John Norton Pomeroy, and James Barr Ames indicate, "shocks the conscience" was already known to English law, which likely created the concept when courts of chancery used the phrase to thwart fraud in cases involving the

To do so, let us take a quick look at New York State in the nineteenth century. New York State is the state that most often refers to conscience in its case law.[261] The case law from New York State implies that conscience is one of two theories available at what we would now call equity, and that conduct that shocks the conscience is likely conduct that is morally outrageous.

A New York case from the nineteenth century shows that the identification of conduct shocking to the conscience is part of chancery's work.[262] In *Mackie v. Cairns* (1825), an insolvent debtor assigned property to a trust to satisfy his debts in a particular order of priority.[263] Among the provisions of his trust, the debtor reserved part of the trust resources for himself and his family so as to place some of his property beyond the reach of his creditors for up to four years.[264] The issue was whether the assignment to himself invalidated the entire trust or just part of it.[265] Applying a statute, it was held that all assignments to the trust were invalid both at law and at equity.[266]

Mackie shows that conduct that shocks the conscience is morally outrageous. The court cited to governing precedent that prompted the conclusion that:

> Any attempt of a debtor to set apart a fund for his own support, must be fraudulent and void. If he may take $2,000 a year, why not $5,000? And if for four years, why not for ten or even twenty, as in the case of *Murray* v. *Riggs?* To state such a proposition, is a sufficient refutation of it. It offends the moral sense; it shocks the conscience and produces an exclamation! It is directly against the Statute, and can not [*sic*] stand before it.[267]

"Shocks the conscience," then, was meant to combat fraud, which was of particular interest to the court of conscience even in a case involving a trust.[268] In thwarting fraud, chancery focused on the totality of the facts.[269] *Mackie's* deployment of "shocks the conscience" in the nineteenth century shows that chancery could import

---

inadequacy of contractual consideration. *See* I JOSEPH STORY: COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 277 (6th ed. 1853); JOHN NORTON POMEROY, II POMEROY'S EQUITABLE JURISPRUDENCE AND EQUITABLE REMEDIES 1312 n.102, 1313 (1905); I JAMES BARR AMES, A SELECTION OF CASES IN EQUITY JURISDICTION WITH NOTES AND CITATIONS 264 n.2 (1901).

261 Of the 4,556 results returned for a search of "conscience" in Westlaw, 548 are from New York State.

262 Mackie v. Cairns, 1 Lock. Rev. Cas. 190, 192 (N.Y. 1825).

263 *Id.*

264 *Id.*

265 *Id.* at 194.

266 *Id.* at 206.

267 *Id.* at 195.

268 *Id.*

269 *Id.*

conscience-based notions from English law and apply them in the United States, showing the ongoing vitality of a conscience at equity in this period.[270] Justice Story refers to shocks the conscience as an "expressive phrase" likely because the conduct in question produced "an exclamation!"—the language of moral outrage.[271]

Note the significance of a conscience in the phrase—"shocks the conscience." The conduct does not, on its own terms, "shock equity," "shock the equity," "shock the equitable sense of the court," or "shock the court." It "shocks the conscience."[272] It appears that it is only in the years leading up to—and after—the passage of the Rules Enabling Act of 1934 that the phrase "shocks the conscience" was explicitly adopted outside the realm of trusts and contracts.[273]

B. Conscience, Dignity, and Vulnerable Communities

To witness further deployments of conscience in the period leading up to the 1930s, I briefly consider the experience of women and of those who were enslaved. The experience of these vulnerable groups shows how conscience provided some protection to vulnerable constituencies, but these protections only existed to the extent permitted by the dignities of the sovereign and court.

1. Sex: Dower, Coverture

Take, dower, for example, which dealt with the property a woman could own upon the death of her husband. Conscience allowed women to assert their right to property following the death of their husbands.[274] In his seminal treatise on equity (which he also referred to as "conscience"), Justice Story observed that equity retained concurrent jurisdiction over a woman's claim to dower to avoid her being "much embarrassed" by proceeding at common law.[275] John Norton Pomeroy, another major commentator of nineteenth-century American equity, explained that equity presented the widow with procedural and remedial devices not otherwise available to her.[276] Hazel D. Lord, a more recent commentator, sounds a correctly cautious note in her

---

270 *Id.*

271 *See* STORY, *supra* note 260, at 277.

272 *Id.*

273 *See, e.g.*, In re Candido, 31 Haw. 982, 1001 (1931) ("[I]f forms of punishment were to be declared prohibited by the Constitution because their cruelty shocks the conscience of some thinking persons, there would be very little punishment today and crime in all probability would go substantially unchecked."); Commonwealth v. Tunstall, 178 Pa. Super. 359, 363–64 (1955) ("[I]n the present case the evidence admitted was not obtained as the result of any procedure which shocks the conscience or violates appellant's fundamental constitutional rights. The conduct of the police officers was the natural reaction to appellant's attempt to destroy incriminating evidence.").

274 *Id.*

275 STORY, *supra* note 260, at 689.

276 POMEROY, *supra* note 260, at 865.

work on the laws relating to marriage in England until the nineteenth century.[277] Lord notes that chancery's procedures in England provided greater protection to women in property cases than did the common law.[278] The cost, however, of proceeding at chancery could be prohibitive for many women, and chancery's dower decisions, Lord states, "were not uniformly advantageous to women."[279]

The avenue for redress in dower cases was shaped and constricted, however, by the dignity of men (husbands, chancellors, and even sons). Consider *Stewart v. Stewart,* a case in which the husband, two years before his death, placed all of his real estate in a trust "in the possession of a third person" for the benefit of his six children so that upon his death, the trust could deliver the real estate to his children.[280] Contrary to governing law, the husband's deed was only signed in the presence of two people.[281] The probate court held that the widow, consistent with state law, was entitled to her dower—her share of the property.[282] A male heir appealed against the grant of dower, arguing that the decedent had not devised the property to his children (through a will), but, instead, that the decedent had conveyed real property to his children (through a trust).[283] There was no fraud, said the grantee (a son), which the son aligned with "ill conscience."[284]

That the dignity of men mattered is visible in the court's holding in the case. The court rejected both of the woman's arguments. The first was that the deed was a devise subject to dower of one third of her deceased husband's estate. The court also rejected the second argument, offered in the alternative, that if the deed was not a devise, the woman's husband had fraudulently deprived her of her statutory right to one third of his real estate.[285] The court specifically rejected the argument that the deed amounted to "a testamentary disposition of the estate," reasoning that since the husband had failed to meet the required number of witnesses for a devise, he could not have intended the grant to be a devise that would come into effect after his death.[286] The husband, therefore, had to have intended the deed to be a conveyance before his death.[287] The court cited to precedent for the proposition that the husband's alienation

---

277 Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 3 (2001).

278 *Id*. at 28.

279 *Id.* at 31.

280 Stewart v. Stewart, 5 Conn. 317, 320 (1824).

281 *Id.*

282 *Id.* at 322.

283 *Id.* at 319–21.

284 *Id.* at 319.

285 *Id.* at 322.

286 *Id.* at 320–21.

287 *Id.* at 319.

of all of his property before his death was to be treated as a trust and not as a will that was defective and subject to dower.[288] The court reasoned that fraud (a concern of conscience) was absent because American law, unlike English law, predicated a grant of dower on the death of the husband (not on the fact of marriage).[289] Thus, there being no real estate at the death of the husband on which a wife could predicate an argument of fraud (her husband having already deeded all of his real estate away), the son would win.[290]

Conscience, though, did not apply itself in a uniform manner, and, in some cases, men and their dignities saw it fit to grant women dower. Thus, *Norman v. Norman,* a West Virginia case, comes to a different conclusion in a case involving a woman, and it ultimately holds for the woman in her petition for dower.[291] In *Norman,* a wife sued her husband "for divorce a mensa et thoro" on the basis of "cruel and inhuman treatment."[292] Her husband, an especially vile individual, (1) "seized her shoulder, shook her violently, and used some abusive language toward her" when she asked him to help with their sick baby while she went outside to attend to other chores.[293] Then the husband, on a subsequent occasion, (2) went much further in his violence as he:

> [S]eized her by the throat, and with his left hand by the right arm, and choked her and shook her so violently that she lost consciousness. She says that while he was choking her she grabbed his shirt collar in order to support herself, but the button came off and she was left without any support. She also says that when he released her throat she regained consciousness for a moment, but was unable to support herself, and while she was falling he struck her a violent blow on the head, and while she lay prostrate on the floor that he struck her or kicked her in the side, which resulted in breaking two or three of her ribs. That this occurrence happened substantially as detailed by the plaintiff there can be little question. The defendant in effect admits that he deliberately provoked it for the purpose of teaching his wife that he was boss in the home.[294]

The husband contested the divorce on the grounds that his wife had "condoned" his actions by remaining in the home after his violence and by being intimate with him in the following weeks.[295] The victim suggested that such intimacy was the result of

---

[288] *Id.* at 321.

[289] *Id.* at 321.

[290] *Id.* at 320.

[291] Norman v. Norman, 107 S.E. 407, 411(W. Va. 1921).

[292] *Id.* at 408.

[293] *Id.* at 409.

[294] *Id.*

[295] *Id.*

sexual assault perpetuated by her husband since "on these occasions he forced his embraces upon her, and she was too weak physically to resist."[296]

As a sign that the consciences of the men deciding such cases could be varying and disastrous for vulnerable individuals, conscience, in the lower court, failed the woman in *Norman*.[297] The Supreme Court of Appeals of West Virginia noted the lower court had done something "a little extraordinary to say the least."[298] Ostensibly applying chancery principles, the lower-court judge granted the divorce to the wife, but, the lower court stripped her of all of her property rights under the marriage contract, including alimony and dower.[299] The lower court also granted custody of one of the couple's two children, a five-year-old boy, to the violent father, and it granted custody of the sixteen-month-old to the mother.[300] The Supreme Court of Appeals of West Virginia reversed in part, favoring the wife's dower argument because the lower court's disposition of the case amounted to an arbitrary deprivation of the woman's statutory right to property.[301] The state's highest court, however, kept in place the custody disposition, holding that, although the law court could not understand why the lower court had divided the infants, "we are not disposed to change it."[302]

Both *Stewart* and *Norman* allow us to draw a few insights about conscience. In *Stewart,* the wife/mother was deprived of her right to dower because her husband was implicitly held to have no "ill conscience."[303] In *Norman,* the woman's dower rights were vindicated in a case that did not explicitly mention conscience, chancery, or equity, but in which chancery/equitable principles were being applied, making conscience implicit.[304] Conscience, then, depended on the court and on the circumstances, and while some women might get their property, others might not.[305] Although neither *Stewart* nor *Norman* mentions dignity, we might infer dignity's presence in both cases by turning to other cases, one after *Stewart* and the other after *Norman*.[306] These cases suggest that the language of dignity was known in the nation at large both before and long after both cases and that women were often considered

---

296 *Id.* at 410.

297 *Id.*

298 *Id.*

299 *Id.*

300 *Id.* at 411.

301 *Id.*

302 *Id.*

303 *Stewart*, 5 Conn. at 316.

304 *See Norman*, 107 S.E. at 410 (citing Kittle v. Kittle, 102 S.E. 799, 800–01 (W. Va. 1921)).

305 *See Stewart*, 5 Conn. at 316 (holding the wife may be granted property and dower); Norman, 107 S.E. at 410 (same).

306 *See* Poor v. Poor, 8 N.H. 307, 319 (1836) (following Stewart v. Stewart); Aubry v. Aubry, 26 Wash. 2d 69, 71 (1946) (following Norman v. Norman).

of inferior dignity to men.[307] A woman, thus, had three [male] dignities stacked against her.[308] First was the dignity of the sovereign and *his* laws, followed by the dignity of the woman's husband and *his* actions before his death, followed by the dignity of the court and of the male judge's upholding of laws enacted by men to help some women after the death of the husband.[309] A woman's independence—and her financial security—were made wholly dependent, then, on the dignities and consciences of men.

Similar subordination of women was visible in coverture cases. Under coverture, a woman was subordinate to her husband as a matter of law, meaning that "[m]arried women could not sue, be sued, make contracts, own property, or keep their earnings."[310] While conscience provided relief from the strictures of coverture (as Professor Allison Anna Tait observes), in some states, like New York State (as Judge Dollinger notes), "New Yorkers . . . viewed equity courts as fortresses of privilege for wealthy New York families who could afford the expense of such trust documents to protect property rights for their wives and married daughters."[311] Thus, while courts of conscience permitted women to seek redress from the constraints of coverture, courts could make it prohibitively expensive, meaning that conscience came at a price even when dignity said that the doors of conscience were open to women.

2. Race: Slavery

Slavery underscores even more so the disastrous extent to which conscience was subordinated to the sovereign's and the court's dignities. Chancery's work was placed at the behest of slaveholders, and chancery actively participated in selling human beings.

The tools of conscience were made available to slaveholders, showing how conscience, consistent with the demands of dignity, could turn barbaric. Consider the following uses of chancery's tools to help the slaveholder. In Alabama, joinder of offenses (a creation of conscience) against a slaveholder was permitted in a case

---

307 *See Poor*, 8 N.H. at 319 (1836) (stating "Let [the wife] submit to the authority of her husband, and remember that the dignity of a wife cannot be violated by such submission."); *Aubry*, 26 Wash. 2d at 71 (1946) (noting that the lower court had found that the wife had engaged in "conduct imcompatible [*sic*] with the dignity of a wife and mother and had associated, both night and day with a certain man, in the apartment of plaintiff and defendant and elsewhere in the city of Tacoma; and that by reason of her conduct the parties separated from each other").

308 *See, e.g.*, Poor v. Poor, 8 N.H. 307, 319 (1836); Aubry v. Aubry, 26 Wash. 2d 69, 71 (1946).

309 *Id.*

310 Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497 (2009).

311 Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 167 (2014); Hon. Richard A. Dollinger, *Judicial Intervention: The Judges Who Paved the Road to Seneca Falls in 1848*, 12 JUD. NOTICE 4, 6 (2017). Although Judge Dollinger refers to them as "equity courts," at least in the early part of nineteenth century, these courts were referred to as "Chancery" in the official reports, showing that the terms can be interchangeable.

alleging cruelty to enslaved human beings because the slaveholder "derives an obvious advantage from the joinder, in meeting in a single count the accumulated charge of misconduct in reference to all the slaves affected, rather than incurring the vexation and peril of numerous separate prosecutions."[312] In Louisiana, depositions (a creation of conscience) and the parol-evidence rule (developed by conscience), could be used when dealing with the sale of a slave suffering from "dropsy of the chest [from which] it was not *probable* he could recover so as to become a healthy slave."[313] In Louisiana, injunctions (a creation of conscience) issued to prevent the sale of slaves erroneously taken in satisfaction of debt; injunctions issued in North Carolina to prevent the sale of slaves that were about to be sold by another; and injunctions issued, also, in Mississippi to prevent the removal of slaves from the state.[314] In Virginia, discovery (a creation of conscience) could be sought to "ascertain the names, sexes and residence, of the slaves."[315] In Virginia, as well, slaves could be bequeathed in trusts (a creation of conscience) to women subject to coverture.[316]

The court of conscience participated in the selling of enslaved human beings. In South Carolina, even while the state's equity court had used the words "conscience" and "chancery," Professor Thomas D. Russell's work shows that courts of equity, together with common-law courts, comprised that state's "greatest slave auctioneering firm."[317] Officers of the court of equity in South Carolina auctioned dozens of human beings, showing that conscience directly participated in upholding and furthering the ends of slavery while directly showing enslaved human beings that the court of conscience believed that they were well beneath its protection, to be sold to the highest bidder as chattel.[318] As further evidence of the extent to which conscience/chancery/equity buttressed an institution devoted to the imposition of mass and perpetual suffering (and even death) on human beings, Professor Faith Rivers

---

312 Cheek v. State, 38 Ala. 227, 232 (1862).

313 Milliken v. Andrews, 11 Rob. 241, 242 (La. 1845).

314 Tucker v. Peeble's Curator, 10 La. 403, 405 (1836) (slaves about to be sold by another); White v. White, 36 N.C. (1 Ired. Eq.) 441, 442 (1841) (slaves removed from the state); Sims v. Harrison, 31 28 Va. (1 Leigh) 346, 347 (1833) (slaves sold in execution of debt); Goddard v. Long, 13 Miss. 782, 790-91 (Miss. Err. & App. 1846) (same); s*ee also* Cross v. Camp, 42 N.C. 193, 196 (1851) ("[W]hen a tenant living here, has threatened to carry away slaves or to sell them to another with the view their removal, he has always been laid under an injunction and bonds not to remove them and to have them forthcoming.").

315 Rankin v. Bradford, 28 Va. (1 Leigh) 163, 168 (1829).

316 *Id.* at 169.

317 Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241 (1993). For references to chancery and conscience in South Carolina's equity courts, *see, e.g.*, Kirksey v. Keith, 32 S.C. Eq. 33, 39 (S.C. App. Eq. 1859) ("It is not merely on the presumption of payment or in analogy to the statute of limitations that a Court of Chancery refuses to lend its aid to stale demands. There must be conscience, good faith and reasonable diligence to call into action the powers of the Court.") (citation and quotation marks omitted).

318 *See* Russell, *supra* note 317, at 1242.

indicates that chancery in South Carolina "affirmed its jurisdiction over the partition of "land and negroes" in both testate and intestate estates."[319]

In sum, while conscience was willing to provide relief to some women in dower and coverture cases, it appeared less willing to do so when it came to those reduced to slavery.[320] As such, the sovereign's and the court's dignities upheld the dignities of men and of some women; much less so when it came to the enslaved.

IV. ENGLISH LAW TO THE COLONIAL ERA

In English law, from which American law draws its foundation and inspiration, we see that dignity also went to rank and status. Conscience, as permitted by dignity, both served and transformed dignity in English law, meaning that delegations of power from dignity to conscience worked in dignity's favor; they may even have saved dignity.

A. The Monotony of Dignity

Dignity meant status in English law. Professors Kenneth S. Abraham and G. Edward White note in their article on dignitary torts that the absence of a dignitary cause of action at early common law did not mean the dignity was unimportant; dignity was omnipresent in English law, which directly regulated status.[321] "Status," Professor Jeremy Waldron tells us, went to the rights that came with one's position.[322] In his discussion of dignity and status, Professor Waldron invites us to think of the English tort of *scandalum magnatum* (the scandal of the magnates) and of sumptuary laws—laws regulating the public (external) presentation and treatment of certain individuals.[323] Following Professor Waldron's lead, I consider each, in turn.

The common-law tort of *scandalum magnatum* survived to the nineteenth century, and it showed that dignity was the preserve of the powerful.[324] The tort was the creation of an initial English statute protecting those of superior dignity from the telling or publication of "any *false news* or tales;" the idea was to locate "the first author of the tale."[325] A further statute identified those whose dignity was protected from the telling of "*false news,* and of *horrible and false lies*"—clerics, nobles, members of the sovereign's household, and the chancellor.[326] Lord Coke pointed to

---

319 Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 38–39 (2007).

320 LAWRENCE M. FRIEDMAN, PART II: FROM THE REVOLUTION TO THE MIDDLE OF 19TH CENTURY 206–07 (Oxford University Press 2019).

321 Abraham & White, *supra* note 150, at 324.

322 WALDRON, *supra* note 13, at 17.

323 *Id.* at 47. Professor's Waldron's insights, as will become clear, have largely shaped my own in this Part.

324 THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMORS 196 (1813).

325 *Id.* at 103.

326 *Id.*

the religious foundation of the tort of *scandalum magnatum* when he cited to biblical sources condemning the vilification of those in positions of power, showing, yet again, the moral underpinnings of dignity and its conscription in the service of those in positions of authority.[327] As a commentator observes, Lord Coke meant to show that commission of the tort violated both temporal and divine laws.[328]

To slander someone of superior dignity was to incur the threat of damages.[329] The tort of *scandalum magnatum,* then, shows that from the early thirteenth century to the latter part of the nineteenth century, dignity gave rise to a substantive cause of action at common law, warranting a grant of damages.[330] The tort (action on the case) was meant to suppress verbal threats to the stability of the realm, meaning the entrenched dignities of those in power, especially titled men.[331] A substantive dignitary cause of action, thus, shows how a cause of action was made available to protect hereditary and other authority based on status.

Sumptuary laws also upheld status, and they governed expenditures on items for personal use and consumption, like clothing, reflecting prevailing attitudes toward status. As Professor Lucille M. Ponte notes, as early as the fourteenth century, England passed laws that enforced visual distinctions between the upper and lower classes by regulating expenditures and clothing.[332] "To this end," observes Professor Ponte, "the law banned anyone below the rank of knight or lady from wearing fur and prohibited knights from wearing ermine, a specific type of fur that could be donned only by the highest ranks of nobility."[333] Professor Ponte observes that another fourteenth-century law was meant to address the "outrageous and excessive apparel of divers [sic] people against their estate and degree."[334] Professor Ponte notes that Elizabethan England also passed its own sumptuary laws.[335] Indeed, colonial America, Professor Ponte points out, similarly enacted sumptuary laws.[336]

Thus, whether it be through action in tort (*scandalum magnatum*) or through laws publicly regulating dress and personal expenditure (sumptuary laws), dignity was

---

327 John Carroll Lassiter, Scandalum Magnatum: The "Scandal of Magnates" in English Law, Society, and Politics 4–5 (July 1974) (Master's thesis, College of William and Mary) (ProQuest).

328 *Id.* at 5.

329 STARKIE, *supra* note 324, at 119.

330 Lassiter, *supra* note 327, at 5.

331 STARKIE, *supra* note 324, at 119.

332 Ponte*, supra* note 76, at 58.

333 *Id.*

334 *Id.* at 59.

335 *Id.* at 60–61.

336 *Id.* at 62.

explicitly about the identification, maintenance, and enforcement of status in English law.[337]

B. A Transformative Conscience

It is also in English law that we see the extent to which the metamorphoses of conscience were transformative—and this because the sovereign and his dignity allowed it.[338]

The court of conscience—chancery—was a sovereign creation, whose goal it was to uphold the idea of conscience based on the sovereign's laws and statutes. When chancery became an independent court in the fourteenth century, the chancellor was empowered to independently issue remedies in the sovereign's name.[339] The chancellor was "the keeper of [the king's] conscience."[340] The court at whose head the chancellor sat—chancery—exercised both ordinary and extraordinary (or prerogative) jurisdiction.[341] Ordinary jurisdiction was based on the sovereign's laws and statutes, and extraordinary jurisdiction was based on what was equitable and morally good—good conscience.[342] One chancellor recognized his dual power when he clarified that his common-law power was "temporal" and his extraordinary power was as a "Judge de conscience."[343]

Empowered to act in the sovereign's name, the court of conscience deployed a variety of moral theories as part of the sovereign's Prerogative of Grace, meaning that, unlike at common law, chancery's jurisdiction was neither based on writ nor on positive law.[344] The Prerogative of Grace meant that "conscience" was one of possibly six moral principles or theories associated with chancery, the others being "equity,"

---

337 Of course, implicit references to human dignity characterize much of Western history. *See, e.g.*, JEAN-FRANÇOIS RAYMOND, LES ENJEUX DES DROITS DE L'HOMME 11 (1987).

338 References to the dignity of the sovereign can be found in medieval texts. *See* MIDDLE ENGLISH DICTIONARY (Hans Kurath & Sherman M. Kuhn, eds. 1961), https://quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED11625/track?counter=1&search_id=20715958, (dignitē n. Also dingnite. (OF dignité) 3a. "He [a king] mot be more magnefied, For dignete of his corone, Than scholde an other low persone Which is noght of so hih emprise." And "3e [sic] renounsed and cessed of the State of Kyng, and of Lordesship and of all the Dignite and Wirshipp that longed therto.").

339 SPENCE, *supra* note 47, at 337; HENRI LÉVY-ULLMANN, THE ENGLISH LEGAL TRADITION, ITS SOURCES AND HISTORY 297–98 (Frederick M. Goadby ed., 1935); *see also* Smith, *supra* note 48, at 1059.

340 III WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (Facsimile 1st ed. 1979).

341 *See* Spence, *supra* note 47, at 338, 341; LÉVY-ULLMANN, *supra* note 339, at 295–96, 301.

342 COKE, *supra* note 47, at 79 (1797). *See also* I W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 252 (1903) for the various categories of equitable jurisdiction.

343 BARBOUR, *supra* note 47, at 83.

344 SPENCE, *supra* note 47, at 338.

"good faith," "right," "reason," and "honesty."[345] While notions of equity had existed at Roman law, conscience was of more recent religious extraction, and ecclesiastical courts "originally assumed jurisdiction in all cases of breach of faith, operating no doubt by means of their spiritual authority upon the *conscience* of the party complained of."[346] These moral principles had to be expressly evoked in the pleadings to get the chancellor's attention.[347] Thus, a plaintiff had to state that the case was grounded in theories of "reason and conscience," or, say, "good faith, right, and conscience."[348]

The moral principles overlapped over time, leading to a point when distinctions, for example, between "conscience" and "equity," "soon became confounded."[349] As such, "equity" and "conscience" were both considered to be major moral principles or theories at chancery, but they were not the only ones.[350] Even in the nineteenth century, when Justice Story mentioned "equity" and "conscience," he aligned them with "good faith," and he observed that "a court of equity requires a scrupulous good faith in transactions which the law might not repudiate. It acts upon conscience, and does not content itself with the narrower views of legal remedial justice."[351] More recent commentators add another principle to equity's vocabulary when they acknowledge that good faith mattered at equity and observe that "[t]he moral premise which most often sustained equitable intervention was the need to honour trust."[352] In other words, the moral idea of a conscience operating at chancery—which we now largely call "equity"—had persisted for centuries along other theories, but it was conscience that gave its name to the court and to many of its creations and developments.

By relying on morality, which often drew on religious sources, conscience responded to lacunae in the common law, and it transformed English law in ways that are still visible to us. Blackstone says that chancery created trusts after the common law rejected cases involving "uses of land," but the clergy considered those cases "binding in conscience."[353] Conscience created the subpoena specifically for use in

---

345 *See id.* at 407–08 (mentioning conscience, equity, good faith, and honesty as part of the prerogative of grace); LÉVY-ULLMANN, *supra* note 339, at 309 (conscience, good faith, reason, equity); SIMPSON, *supra* note 47, at 397 (mentioning conscience, faith, right, reason—rejecting honesty); BARBOUR, *supra* note 47, at 87-88 (mentioning conscience and reason).

346 SPENCE, *supra* note 47, at 338, 411.

347 *See* BARBOUR, *supra* note 47, at 155.

348 *Id.* at 155.

349 SPENCE, *supra* note 47, at 413.

350 *See id.* at 413–14; LÉVY-ULLMANN, *supra* note 339, at 309 (conscience, good faith, reason, equity).

351 STORY, *supra* note 260, at 152.

352 LAW AND SOCIETY IN ENGLAND, *supra* note 203, at 208.

353 BLACKSTONE, *supra* note 340, at 51.

cases involving trusts.[354] "*Subpena*" [*sic*] specifically identified the kinds of cases over which chancery had jurisdiction.[355] Given that the subpoena acted against the person of the litigant, chancery acted *in personam*.[356] The chancellor's power allowed him to take litigants into custody until they complied with his decrees.[357]

Conscience specifically allowed chancery to shape cases sounding in contract. "Conscience," as a matter of contract, governed the obligations parties owed to each other, giving rise to the expectation that one party should treat the other in good faith.[358] As part of the obligations the parties owed each other, "conscience" encompassed "all departures from fair dealing and honesty, and it included some cases which might perhaps be more appropriately ranged under the head of Public Policy."[359] "Conscience" covered casual promises regarding marital gifts "as examples of prior obligations in conscience, there being a general duty to endow in the eyes of the canonists."[360] Similarly, a party who was "charged in conscience" was both under a moral obligation and was liable under the laws of chancery.[361] So powerful was the moral principle of conscience that by the late fifteenth century, the principle of "conscience" may have become a theory on which chancery relied.[362] Theodore F. T. Plucknett, for example, notes that "[l]ate in the fifteenth century there was a search for a theory and there was some talk of 'absolute power,' 'conscience,' and 'natural law.'"[363]

Conscience also shaped procedure in a manner that distinguished chancery from the common law. Conscience meant that chancery focused on arriving at the truth in a given matter, sometimes disturbing the workings of common-law courts in the process.[364] The idea was to "inform the conscience of the court," meaning the conscience of the chancellor (or his representative), who questioned the claimant in

---

354 *Id.*

355 SIMPSON, *supra* note 47, at 397.

356 W.C. ROBINSON, ELEMENTARY LAW 386 (Little, Brown, and Co., 1910).

357 *Id.* at 386.

358 SPENCE, *supra* note 47, at 411. *But see* SIMPSON, *supra* note 47, at 398 (disagreeing with Spence's position).

359 SPENCE, *supra* note 47, at 411–12.

360 SIMPSON, *supra* note 47, at 420.

361 *Id.* at 444.

362 *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 637 (Butterworth & Co. (Publishers) Ltd., 4th ed. 1948).

363 *See id*. ("Late in the fifteenth century there was a search for a theory and there was some talk of 'absolute power', 'conscience', and 'natural law'."); *id.* at 647 (morality); *see also id.* at 170 (stating that what we would now identify as equitable relief was initially also available in Parliament for "important personages"). Plucknett warns against calling Chancery "the keeper of the King's Conscience" until at least the 16th century. *Id.* at 171.

364 SPENCE, *supra* note 47, at 411.

private, deposed the parties, and put the evidence in writing, all of which was likely an artifact of Roman law.[365] All the while, the chancellor focused on the totality of the facts in the name of total justice.[366] Conscience meant that even a defendant who had been falsely accused, but who did not respond to the bill asserted, could win—an effect of canon law.[367] By statute, the chancellor could exercise his discretion in favor of claimants proceeding as paupers, and he could assign them counsel at no cost to them.[368] Amended pleadings were allowed at chancery, while the common law did not permit them.[369]

"Conscience" similarly informed the liberality with which chancery read pleadings, meaning that when substance prevailed over form, conscience was present. Indeed, substance prevailed over form at chancery, an approach rooted in canon law.[370] The chancellor permitted relaxed pleading (even allowing illiterate complaints), and he required the parties to stipulate to the truth of their admissions.[371] A source observes that "[i]n chancery, it was remarked by a chancellor that a man will not be prejudiced by mispleading or defects of forms, but only by the truth of the matter; we have to judge according to conscience and not according to pleadings."[372] Since the rules generated at chancery, at least initially, were in a state of constant refinement, older precedent was of little utility to the lawyer who had, instead, to rely on more recent cases.[373] Maitland notes that even when the chancellor did not consider himself strictly bound by precedent, "he could still listen to the voice of conscience."[374]

Conscience likely saved the common law by allowing it to focus on "permanence" and "continuity."[375] Maitland indicates that "the old private law" represented "permanence" and chancery "progress."[376] Recasting Maitland's insight for the purposes of this Article, which deals with dignity, we might replace Maitland's words

---

365 IX W.S. HOLDSWORTH, *supra* note 47, at 337, 337 n.5; *see also* COKE, *supra* note 47, at 83 n.5 (depositions).

366 I W.S. HOLDSWORTH, *supra* note 342, at 255; IX W.S. HOLDSWORTH, *supra* note 47, at 336, 338, 344.

367 PLUCKNETT, *supra* note 362, at 184.

368 SPENCE, *supra* note 47, at 381.

369 PLUCKNETT, *supra* note 362, at 645.

370 *Id.* at 647.

371 I W. S. HOLDSWORTH, *supra* note 342, at 253; IX W.S. HOLDSWORTH, *supra* note 47, at 336, 338, 343–44.

372 PLUCKNETT, *supra* note 362, at 184.

373 I W. S. HOLDSWORTH, *supra* note 342, at 251, 254.

374 MAITLAND & MONTAGUE, *supra* note 47, at 126.

375 *Id.* at 128.

376 *Id.* at 127.

by saying that "'the old private law' represented '~~permanence~~ dignity' and chancery '~~progress~~ conscience.'" The common law represented dignity because it was presumed to represent stability in the application of the legal status quo. By creating a ~~progressive~~ conscientious "appendix" to "~~the old private law,~~ dignity" conscience, then, permitted ~~the common law~~ dignity to remain itself and develop its own hallmarks in distinctive fashion—for example, trial by jury—because the court of conscience, restricted the reach of "~~the old private law~~ dignity . . . to an appropriate sphere."[377] The court of conscience, thus, can be considered to be, in at least some senses, at the vanguard of legal change, meeting "the requirements of a new age" while allowing the common law to remain lasting and unceasing.[378]

Just like with dignity, concern about the meanings of conscience arose. Commentators noted that the very differences among individuals gave rise to different consciences.[379] One powerful salvo that has reverberated through the centuries is John Selden's late-seventeenth-century observation that conscience at chancery was like the chancellor's foot—"[o]ne Chancellor has a long foot, another a short foot, a third an indifferent foot."[380] Selden, of course, is often summarily cited by those who may want to limit the reach of equity and its transformative effect on the common law.[381]

Chancery responded to such criticisms by making conscience less varying and less dependent on the whims and discretion of any individual chancellor—in ways that are still visible to us. Chancery initially turned to an external source, Roman law, to anchor its understanding of conscience.[382] So, public policy, as developed by the Roman emperor, Constantine (272-337), was deployed at chancery under the guise of "conscience" when it came to mortgages.[383] Then, in the reign of Queen Elizabeth I (1558-1603), reference was made to the sovereign's conscience, that is, "the holy conscience of *the Queen,* for matter of equity."[384] Justice Story observes that Lord Chancellor Bacon (1561-1626) subsequently indicated that chancery was "the general conscience of the realm."[385] And Professors Langbein, Lerner, and Dean Smith note that from the seventeenth to nineteenth centuries, a rule-bound conscience, in line with Lord Nottingham's view, came to prevail at chancery.[386] "What mattered now was

---

377 *Id.*

378 *Id.*

379 I W. S. HOLDSWORTH, *supra* note 342, at 254.

380 JOHN SELDEN, *Equity*, *in* TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 43–44 (Israel Gollancz, 3d ed. 1906) (1689).

381 *See generally* Smith, *supra* note 48, at 1057.

382 SPENCE, *supra* note 47, at 413.

383 *Id.* at 602–03.

384 *Id.* at 414.

385 STORY, *supra* note 260, at 534.

386 JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 317 (2009).

the civil conscience of the court, which was nothing other a new system of law, and the conscience of the party slowly passed out of consideration."[387] Spence cautions, however, that Lord Nottingham was not announcing a new rule as much as he was "declaring what had become the established doctrine of the Court."[388]

The language of conscience persisted given the corruption of the chancellor and his staff—all of whom enjoyed immense power.[389] Maitland notes that at least some disputes between chancellors and common-law judges in the period 1307-1600 regarding jurisdiction were owing to the fees that could be generated by exercising jurisdiction over a given matter.[390] Consistent with this view, Holdsworth states that Lord Hardwicke (who systematized chancery in the eighteenth century), involved himself in all jurisdictional matters in bankruptcy cases.[391] Holdsworth observes that Lord Hardwicke did so because "[t]he immense patronage and large fees which thereby accrued to the Chancellor, sufficiently explain the eagerness with which the jurisdiction was assumed, and the tenacity with which it was retained."[392]

The unconscionable corruption encompassed excesses of all sorts.[393] Masters at chancery flouted statutes that capped the amount of money they could earn from fees generated by each case.[394] Commissioners in bankruptcy cases evaded statutory restrictions on the fees they could collect.[395] Lawsuits could go on for up to three decades, and entire families could be ruined.[396] Holdsworth observes that "it was inevitable that among these parties there should be deaths and marriages. That meant that new parties—personal representatives, heirs, or devisees, or husbands must be brought before the court."[397] Such excesses resulted in manifest injustice to claimants who had viable claims, "only to increase the influence of the rich, and to aggravate the

---

387 *Id.* at 317.

388 SPENCE, *supra* note 47, at 417.

389 I W. S. HOLDSWORTH, *supra* note 342, at 218–219, 221–22, 228, 258–59.

390 MAITLAND & MONTAGUE, *supra* note 47, at 124.

391 LANGBEIN ET AL., *supra* note 386, at 317; I W. S. HOLDSWORTH, *supra* note 342, at 258.

392 I W. S. HOLDSWORTH, *supra* note 342, at 258.

393 *Id.* at 222, 228, 258–59.

394 *Id.* at 218, 221; *see also* LÉVY-ULLMANN, *supra* note 339, at 291–92.

395 I W. S. HOLDSWORTH, *supra* note 342, at 258–59.

396 *Id.* at 218, 223–24. Of course, similar issues bedeviled the common law, *see* PLUCKNETT, *supra* note 362, at 650–51.

397 *Id.* at 345.

misery of the poor."[398] Such corruption of conscience was likely a violation of the very oath of office that chancellors took, which Lord Coke recites in his work.[399]

In this Part, we have seen that dignity has been remarkably monotonous in its meanings, upholding status, and conscience has varied over time in the range of its meanings and legal importance. Conscience served dignity, and in doing so, conscience revolutionized English law, a precursor of American law, making conscience a powerful and transformative moral theory. But conscience was subject to abuse, leading to attempts to reign it in. What, therefore, might dignity learn from conscience, and what makes conscience promising?

V. DIGNITY AND THE PROMISE OF CONSCIENCE

Dignity, as we have seen, is beset by problems. It implies a hierarchical system of relationships between the dignity of the sovereign, the dignity of the court, and the dignity of the human individual.[400] The dignities of the sovereign and court often reflect majoritarian anxieties that subordinate the dignity of the human being from a minority community. As Professor Andrew Heard has observed:

> At a very basic level, the proclamation and acceptance of human rights norms inherently involves majoritarian morality. Human rights are agreed to exist because a majority says they do. Specific goods and benefits are treated as human rights because a majority says they do. But, what of the minorities who object to the concept of universal human rights, or disagree with the particular entitlements to be included in lists of human rights? Why should they be bound by what others believe? What happens when a minority sincerely believe that some benefit being deliberately denied them by the majority is a matter that they view as a human right? In many specific human rights contexts, a problem of moral majoritarianism assumes central importance.[401]

Thus, the dignity of the human being, especially that of an individual from a minority community, is made subordinate to majoritarian anxieties about status and morality.[402] The effect of such anxieties is that the status of human beings from minority communities—to use language often associated with the kindness of a sovereign—becomes a matter of majoritarian mercy or grace.

---

398 *Id.* at 371.

399 COKE, *supra* note 47, at 88 (stating that the second oath the chancellor swore was "[t]hat he shall doe right to all manner of people, poore and rich, after the lawes and usages of the realm").

400 *See infra* Part III.B.

401 Andrew Heard, Human Rights: Chimeras in Sheep's Clothing? (1997) (unpublished manuscript), https://www.sfu.ca/~aheard/intro.html.

402 *Id.*

The court of conscience similarly represents a system of relationships.[403] But this system can help dignity understand that a legal system needs an engraftment onto itself that monitors and mitigates the legal system's tendency to be harsh in specific cases. As Professor Smith indicates, equity "corrects [common-law] problems from without and thereby allows law to be more general and certain than it otherwise could be."[404] Professor Lawrence B. Solum has indicated that the idea of equity attends to the individual "consistent with the rule of law."[405] Professor Smith further shows that the common law and equity have long been in a synergistic relationship.[406] The synergy is noteworthy because "by working in tandem they produce effects of efficiency, fairness, and justice, not feasible by either operating alone or through any other single-tier system."[407]

Conscience teaches that a focus on specificity—on individual facts—amounts to a focus on the human individual, who can be particularly vulnerable to majoritarian violence and predation. In dower and coverture cases, for example, we saw how, as an exception to the dignity of men, conscience could be attentive to the dignity of some women.[408] The effect of such a focus on women as a specific group made our legal system a little more humane, that is, more attentive to human dignity.[409] Without such focus, women would have been even more subject to the supremacy of men at common law, as reflected in sovereign and judicial pronouncements.

Conscience also teaches that human dignity needs to be upheld and defended, and conscience has prominent part to play in that endeavor. Recall, here, the Universal Declaration of Human Rights.[410] The document opens with a "recognition of the inherent human dignity" of all human beings.[411] The Universal Declaration then indicates that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind," implying that the outraged conscience is a legitimate response to savage attacks on inherent human dignity.[412] Conscience, then, inflamed, is a symptom of injured human dignity, and conscience is shocked because it upholds the ends of human dignity.[413] The Universal Declaration

---

403 *See generally* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2015).

404 Smith, *supra* note 48, at 1056.

405 Lawrence B. Solum, *Equity and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 120, 135 (Ian Shapiro ed., 1994).

406 Smith, *supra* note 48, at 1100.

407 *Id.*

408 *See supra* Part III.B.

409 *See generally* Rudolph, *Workers, Dignity, and Equitable Tolling*, *supra* note 2, at 139.

410 *See generally* Universal Declaration, *supra* note 44.

411 *See id.* at pmbl.

412 *See id.*

413 *See id.* at art. 01.

implies that conscience is further tied to human dignity when it tells us that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[414] Again, human dignity and conscience are tied to each other.

The dignities of the sovereign and court can learn that a system that undermines either the dignity of the individual or the individual's conscience is a system that hollows out its own moral core and charts the course for its own weakening and revision. We saw the egregious failures of conscience in the treatment of slaves—a permanent stain on the idea of a conscience.[415] We saw this stain in the treatment of women, in the many corruptions of the court of conscience itself, leading to reform and to criticisms about the meaningless of conscience.[416] We also saw that when the consciences of vulnerable individuals are muted, what suffers is the individual's capacity for "self-expression, bonding with another person, and pleasure."[417] Conscience is the servant of human dignity, and where human dignity is present, conscience is close. Similarly, where conscience is present, human dignity finds a companion that oversees and protects it from conduct that is shocking.

The promise of conscience, then, is the promise of moral discernment externalized as corrective action for the sake of the vulnerable individual or community. Professor Dennis R. Klinck reminds us, for example, that a major commentator on conscience like Christopher Saint German (1460-1540) indicated that conscience went in part to moral discernment, a concept known as *synderesis,* which, for Saint German, held that conscience was "concerned with the universal aspect of things to be done."[418] As such, conscience applied universal principles to specific legal circumstances.[419] We have seen from deployments of conscience in the shocks-the-conscience test that such moral discernment is externalized in American law, meaning that it is located in public policy or public morality to thwart particularly egregious misconduct.[420] However, it attends to specific cases when a remedy would otherwise be unavailable.

Further, conscience can teach the dignities of the sovereign and court that just because something has been the law for a long time—just because it is ancient—does not make it conscientious. In other words, the law that has long bound the many can, for an equally long period, have been wholly injurious to (and unconscientious in its engagement with) the few. As W.C. Robinson tells us, common-law courts bound by "their ancient customs" originally refused to hear five types of cases because there

---

414 *Id.*

415 *See supra* Part III.B.

416 *See id.*

417 ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET, *supra* note 233, at 257.

418 Dennis R. Klinck, *The Unexamined "Conscience" of Contemporary Canadian Equity*, 46 MCGILL L. J. 571, 579 (2001).

419 *Id.* at 580.

420 *See supra* Part III.A.

was no common-law precedent supporting them.[421] If a litigant needed a remedy to prevent someone from doing something, the common law did not help.[422] If a litigant needed to do something and could not identify a customary common-law basis for that action, the common law was unresponsive.[423] If more than two litigants were involved, the common law did not help.[424] If the common law did not provide a defendant with the opportunity to present a "just defense," the common law did not help.[425] Litigants in those types of cases would have to appeal to chancery—the court of conscience—to be heard, implying that conscience appealed to litigants because it was willing to innovate the law on their behalf.

Finally, conscience teaches dignity that judges are fallible, that their actions can be shocking, that they can abuse their power, and they can overturn precedent when they should not. The gift of a functioning conscience, then, is that it is self-evaluating, adaptive, and corrective. Lord Coke (1552-1634) indicates that in the articles brought against Cardinal Wolsey (1473-1530), his accusers, including Thomas More (who followed Cardinal Wolsey in the office of chancellor), prompted by their own consciences, stated that they felt "[c]onstrained by necessity of fidelity and conscience, [to] complaine and show" that Cardinal Wolsey had, among the many abuses of his office, unjustly overturned common-law decisions; summarily issued injunctions of his own will, which he directed both against common-law judges and parties not before the court; and Cardinal Wolsey had also extorted individuals.[426] Despite the many changes he wrought at conscience, Cardinal Wolsey's conscience proved fallible, and it took acts of conscience to respond.[427] As Professors Langbein, Lerner, and Dean Smith imply, in Wolsey's example, an abusive judge's conscience becomes "tyranny . . . personified . . . ."[428]

In this Part, we have seen that both dignity and conscience are systems dealing with individuals. Dignity often privileges the status of the sovereign and court over that of the vulnerable individual, whose conscience dignity can subjugate.[429] For its part, conscience is a system that shows that a legal system that responds to the vulnerable individual is one that endures because it possesses a moral core that allows it to adapt.[430] Conscience teaches that the undermining of human dignity or

---

421 *Id.*

422 *Id.*

423 *Id.*

424 *Id.*

425 *Id.*

426 COKE, *supra* note 47, at 91.

427 *See generally id.* at 95.

428 LANGBEIN ET AL., *supra* note 386, at 316.

429 *See supra* Part III.B.1.

430 COKE, *supra* note 47, at 88–89 (showing how the court may act to correct the fallible actions of judges).

conscience tarnishes a system and makes that system subject to revision.[431] The gift of a conscience, thus, is that it promises the individual that a legal system can transcend the contingencies of the moment. And even when conscience fails, conscience promises to learn from its errors—the abuses of conscience that can mark judicial opinions. Indeed, conscience, and the moral system of which it is a part, promise the vulnerable individual that adaptation and flexibility are the hallmarks of a functioning legal system, which gladly yields to conscience in specific cases as a gesture of humility.

VI. WHY CONSCIENCE PERSISTS

Conscience persists—two thousand years and counting after its inauguration. Conscience could not have persisted if it were useless or ineffective. It could not have persisted if it were meaningless or obscure. It must have persisted because it is as responsive now to the needs of specific human beings as it was two millennia ago. Sure, it is diminished, but conscience endures because, just as human beings realized thousands of years ago, there is something persuasive and eminently transmissible about a moral concept that ensures that human fallibility can be constantly evaluated and corrected.[432] Where such a moral capacity is lacking, as Maitland noted, while we would still have a legal system in place, "in some respects our law would have been barbarous, unjust, absurd."[433] It is against the barbarity of such a legal system that a functioning conscience militates. The Universal Declaration indicates that the "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind."[434] Human dignity and conscience, then, are companions, and conscience can teach dignity that some things in the law are worth being shocked about, some things in the law are worth being morally outraged about, and some things in the law are worth protecting.

---

431 *See supra* p. 359 ("The dignities of the sovereign and court can learn that a system that undermines either the dignity of the individual or the individual's conscience is a system that hollows out its own moral core and charts the course for its own weakening and revision.").

432 *See, e.g.*, *id*.

433 F. W. MAITLAND, EQUITY AND ALSO THE FORMS OF ACTION AT COMMON LAW 19 (A. H. Chaytor & W. J. Whittaker, eds., 1920).

434 Universal Declaration, *supra* note 44, at art. 01.