Play in the States

Duane Rudolph*

What happens to a dream deferred?
Does it dry up
like a raisin in the sun?

–LANGSTON HUGHES[1]

The world only spins forward.
We will be citizens. The time has come.

–TONY KUSHNER[2]

This Article engages with the dignity of sexual and gender minorities in the states over the past several decades. Relying on the work of other commentators, this Article pursues the insight that a key facet of dignity is status. The innovation this Article provides lies in its identification and extension of status to the liberty to play of sexual and gender minorities. The liberty to play is a key right traditionally reserved for those holding superior or supreme status in our legal system. Against the backdrop of the passage of the Respect for Marriage Act of 2022 and the Supreme Court's opinion in Dobbs v. Jackson Women's Health Organization*, this Article is a retrospective, an evaluation of hope, and an assessment of a threat. As a retrospective, the Article analyzes a selection of same-sex marriage cases from the states. Specifically, it examines state courts' engagement with the dignity of sexual and gender minorities. As an evaluation of hope, the Article analyzes some of the changes in federal and state laws that uphold the equal status and liberty to play of members of the LGBTQIA+ community. Finally, the Article assesses a threat, which this Article identifies as the hostility to the equal status and liberty to play of sexual and gender minorities by those who revere traditional understandings of sex and gender. The Article*

* Assistant Professor of Law, Peking University School of Transnational Law, Shenzhen, China. This Article is possible thanks to the support that I have received from Dean Philip McConnaughay of Peking University of School of Transnational Law and the research support that I have received from Peking University of School of Transnational Law. M. H. P., as always, has been wonderfully generous, thoughtful, and kind; my reverence and love. The 2022–23 editors of the Texas Journal on Civil Liberties & Civil Rights have been thoughtful, generous, and insightful throughout the publication process. I dedicate this Article to the Texas Journal on Civil Liberties & Civil Rights. I offer my thanks in particular to Grace Thomas, the editor-in-chief of Vol. 28, for their insight and time. All errors are mine.

[1] LANGSTON HUGHES, HARLEM [2] (1951*), reprinted in* LANGSTON HUGHES, THE COLLECTED POEMS OF LANGSTON HUGHES 426 (Arnold Rampersad ed., 1995).

[2] TONY KUSHNER, ANGELS IN AMERICA: A GAY FANTASIA ON NATIONAL THEMES 289 (2013).

concludes with the insight that the present moment likely amounts less to a cessation of hostilities to the liberty to play of members of the LGBTQIA+ community than a partial diminution in those hostilities.

I. Status and Dignity

The following Article is about dignity, status, the liberty to play, and their importance for one of the most vulnerable communities in the nation.[3]

[3] In this Article, I rely on insights and sources explored in previous articles dealing with dignity in law. *See generally* Duane Rudolph, *We Have the Right to Play*, 26 U. PA. J. L. & SOC. CHANGE 369 (2023) [hereinafter *We Have the Right to Play*] (arguing for a more expansive, "lighthearted" understanding of dignity and developing a theory of a "right to play" by respecting LGBTQIA+ lives in their desired ways to live their lives and spend their time); Duane Rudolph, *Dignity. Reverence. Desecration.*, 53 SETON HALL L. REV. 1173 (2023) [hereinafter *Dignity. Reverence. Desecration.*] (arguing that dignity is about the status of specific communities and reverence, defined as veneration and deference, required by communities holding superior status); *see also* Duane Rudolph, *Dignity and the Promise of Conscience*, 71 CLEV. ST. L. REV. 305, 308 (2023) [hereinafter *Dignity and the Promise of Conscience*] (stating that "[t]he dignity of the sovereign implies that the sovereign enacts laws, which must be respected. An important corollary of a sovereign's dignity is its ability to refuse to appear in court when sued. The dignity of a court means that a court interprets sovereign enactments, and that court's determinations must be respected. Failure to respect a court's conclusions can lead to findings of contempt. 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. If a human being is not respected, that human being may be subject to humiliation, denigration, or demeaning."); Duane Rudolph, *Climate Discrimination*, 72 CATH. U. L. REV. 1, 67 (2023) (generally exploring the dignity of employees); Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126, 134 (2017) (arguing that "[d]ignity requires that courts not humiliate workers suffering from mental illness. Non-humiliation means that equitable courts should take American workers' mental suffering seriously enough to credit the documentation of their suffering, that courts should hear such workers' stories, and that such workers should not be treated as malingerers. Non-humiliation means changing the ways in which courts envision an equitable defense."); Duane Rudolph, *Of Moral Outrage in Judicial Opinions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 335, 374–75 (2020) (stating that "[f]rom a dignitarian perspective, moral outrage identifies conduct that is

As such, this Article deals with at-risk human beings who often struggle with depression and suicidal ideation.[4] If anyone reading this Article is struggling with suicidal ideation, help is available.[5] If you are in the United States, please call or text 988; the call is free.[6] If you are outside the United States, please consult the following resource, which includes a comprehensive and most up-to-date list of suicide-prevention hotlines in several other countries: https://blog.opencounseling.com/suicide-hotlines/.[7]

Dignity has over twenty definitions, which range from autonomy to liberty to respect.[8] The term has been examined at the federal, state, and international levels.[9] Its history has been documented, and its meanings have been explored across cultures and religions.[10] We have learned that humiliation, demeaning, and denigration of human beings are antonyms of human dignity, and that the presence of these antonyms in a legal case

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difficult to understand and accept because it violates the inherent human dignity of the individual being targeted. . . . dignity does two things for moral outrage. First it implies that certain actions are inimical to inherent human dignity because those actions humiliate a given individual, usually on the basis of the individual's perceived belonging to a class or community that is deemed inferior and worthy of debasement. Second, [Professor David] Luban's insight implied that outrage, which is something fundamentally vocal, vocal-*ized*, voci*ferous*, can be aligned with the necessity to be heard in a given situation and that the court in such a case acts, to use Luban's word, as the targeted community or class's 'mouthpiece.'").

[4] *See infra* Section II (B). I acknowledge similar issues in other articles. *See We Have the Right to Play*, *supra* note 3, at 379. Given the importance of such language, I intend to include it at the beginning of every article I write that engages with similar concerns.

[5] *Suicide Prevention*, NAT'L INST. OF MENTAL HEALTH (Aug. 2022), https://www.nimh.nih.gov/health/topics/suicide-prevention [https://perma.cc/GK3W-JQAW].

[6] *The Lifeline and 988*, 988 Suicide & Crisis Lifeline, https://988lifeline.org/current-events/the-lifeline-and-988/, [https://perma.cc/HHU5-TUFT] (listing the 988 or 1-800-273-8255 as the free phone number to call, text, or chat to receive free counseling services for those suffering from suicidal ideation, depression, feeling overwhelmed, or feeling hopelessness).

[7] *International Suicide Hotlines*, OPEN COUNSELING, https://blog.opencounseling.com/suicide-hotlines/ [https://perma.cc/LV6P-6Q7S].

[8] *See We Have the Right to Play*, *supra* note 3, at 373 (including the following possible meanings: autonomy, collective virtue, comporting oneself in a particular way, a concept informed by religion, a legal norm operating in the background, liberty, the mandate that we hear people's stories, and a mandate to treat others as ends in themselves); *Dignity. Reverence. Desecration.*, *supra* note 3, at 1176 (including equality, respect, honor, personal integrity, and intrinsic worth as meanings); *Dignity and the Promise of Conscience*, *supra* note 3, at 320–21 (providing similar definitions).

[9] *See Dignity and the Promise of Conscience*, *supra* note 3, at 308–10 (explaining that implicit denials of dignity have been the result of multiple U.S. Supreme Court decisions and that dignity has been explored more directly by Justice William Brennan).

[10] *See generally* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 53–182 (Marcus Düwell, Jens Braarvig, Roger Brownsword & Dietmar Mieth eds., 2014) (exploring the origins of the concept of dignity in Greco-Roman antiquity, in the European Enlightenment, and in non-Western European religions, such as Islam, Buddhism, Confucianism, and Daoism).

indicates a violation of dignity has occurred.[11] Dignity appears controversial or chaotic, however, and it has been assailed for possessing so many meanings.[12]

By examining both the sacred and jovial aspects of dignity, my work has contributed to the abundance of dignity's meanings.[13] First, my work has argued that dignity—a religiously inflected term historically tied to status—is about reverence, veneration, and deference.[14] People granted superior or supreme status by our legal system have required reverence for what they have traditionally held sacred.[15] The opposite of reverence is desecration, which mandates the marking and treatment of those deemed inferior as unsacred.[16]

Flowing from both reverence and desecration is a little studied facet of superior or supreme status—the liberty to play.[17] Play, which is often associated with psychological development, is central to the flourishing of an individual from their time as a student to the very end of that individual's journey.[18] Through an examination of almost twenty federal cases that engage with the rights of sexual and gender minorities, I have shown that dignity's lighter side—the liberty to play—hid something injurious.[19] In the

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[11] *See We Have the Right to Play*, *supra* note 3, at 391 (explaining that these are umbrella terms of "desecration"); *Dignity. Reverence. Desecration.*, *supra* note 3, at 1176–77; *Dignity and the Promise of Conscience*, *supra* note 3, at 322 (relying on Professor Hellman's work to state that "that which demeans rejects the equality of the individual, it refuses to respect that individual, it debases or degrades that individual ").

[12] *See Dignity and the Promise of Conscience*, *supra* note 3, at 319–20.

[13] *See generally We Have the Right to Play*, *supra* note 3, at 373 (defining dignity); *Dignity. Reverence. Desecration.*, *supra* note 3, at 1176 (expanding dignity's definition); *Dignity and the Promise of Conscience*, *supra* note 3 (providing a deep historical analysis of dignity in American jurisprudence from the colonial era to present-day understandings).

[14] *See Dignity. Reverence. Desecration.*, *supra* note 3, at 1180–81 (explaining that the American legal system has historically applied sacred language to objects, such as a burial place, flag, a religious building, or sacred text, and, as an extension of this, dignity is equally about reverence and veneration).

[15] *See id*. at 1200–01 (stating that "[f]or those holding superior or supreme status, desecration is witnessing the reduction to heretical banality of what they hold sacred. . . . [T]he sacred Federal Constitution required traditional veneration of the sacred heterosexual family and traditional deference to that family. Anything beyond that boundary or 'line' was unacceptable, a threat to the sacred dignity of the Federal Constitution and to the sacred dignity of an institution . . . upheld").

[16] *Id*.

[17] *See We Have the Right to Play*, *supra* note 3, at 375–76 (introducing the idea of the "liberty to play").

[18] *See id.* at 376 (applying the concept of play throughout a person's lifespan, starting with school, then work, home life, participation in the community, and ending with an examination of play at life's end).

[19] *Id*. at 378–79 (providing an overview of the cases that touch on topics of standing, free association, free speech, equal protection, procedural due process, and substantive due process of sexual and gender minorities).

shadow of the liberty to play, cast by those possessing superior or supreme status, lay the desecration of vulnerable individuals from sexual and gender minorities and the desecration of their liberty to play.[20] As a result, dignity possessed both serious and lighthearted attributes traditionally held by those commanding the highest status in our legal system, who often wield their elevated status with impunity.[21]

Critics may portray dignity's profusion of meanings, including its embrace of the liberty to play, as a semantic explosion that does little to clarify the term for serious thinkers. We might, like Justice Samuel Alito in *Dobbs v. Jackson Women's Health Organization*,[22] advise caution because, just like liberty, dignity has so many meanings.[23] Indeed, liberty is one of dignity's meanings,[24] and Justice Alito's reference to liberty as "a capacious term" cautions against constitutional interpretations that may be contaminated by personal "ardent views about the liberty that Americans should enjoy."[25] Specifically, Justice Alito states the following in *Dobbs*:

> Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing." In a well-known essay, Isaiah Berlin reported that "[h]istorians of ideas" had cataloged more than 200 different senses in which the term had been used.[26]

Since dignity encompasses liberty, "dignity" likely possesses over two-hundred meanings.[27] The question becomes whether we should balk at this fact or celebrate it.

We should honor the abundance of dignity's meanings, while leaving open the possibility for the discovery of additional meanings. True, we might say that equal "status" is dignity's most crucial meaning and all other

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[20] *Id.* at 377, 385–87 (arguing that courts should recognize sexual and gender minorities' right to play and "endorse the idea of fun for everyone," because courts have historically perpetuated a system in which minority communities have had to ask for equal access to fun in all aspects of their life from those who have the power to grant it).

[21] *See Dignity. Reverence. Desecration.*, *supra* note 3, at 1211–12 (concluding that deities and sacred traditions are not in and of themselves "the problem," but rather the problem is the privileging of a single perspective and its consequences for vulnerable communities).

[22] 142 S. Ct. 2228 (2022).

[23] *Id.* at 2247 (discussing whether rights were contained in the Fourteenth Amendment because "liberty" in the Due Process Clause can contain different meanings for different people).

[24] *See We Have the Right to Play*, *supra* note 3, at 373–75 (defining dignity and expounding on "liberty" as a part of that definition).

[25] *Id.*

[26] *Id.*

[27] *See id.*

meanings derive from that status.[28] We might also say that "respect for autonomy" is key,[29] or we might prefer Immanuel Kant's or John Stuart Mill's conceptions of the term.[30] But to suggest that dignity is unhelpful because different commentators perceive different things reflected and refracted in the concept's expansive mirror is to misapprehend the utility of the concept. Dignity's mirror shows us what matters to each commentator and their time; no interpreter can avoid being the product of their time, and no commentator can avoid telling us about their time as an expression of their own interpretive status.[31] As such, dignity is no less relevant or powerful than concepts like "liberty," "happiness," or even "love," which all have rich literatures embedded in their powerful appeal across the ages.[32] We do not reject those words as useless just because their meanings are complex and varying over time; instead, we encourage care and thoughtfulness when using them. The same applies to—and should be applied to—dignity.

By focusing on dignity's relationship to the liberty to play, this Article extends the insights of my previous work.[33] The federal cases, on which

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[28] *See* JEREMY WALDRON, *Lecture 1: Dignity and Rank*, *in* DIGNITY, RANK, AND RIGHTS 13, 17–18 (Meir Dan-Cohen ed., 2012) (discussing dignity as equal status and rank).

[29] *See* Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419, 1420 (2003) (stating that "a report refers to the sense of responsibility as 'an essential ingredient in the conception of human dignity, in the presumption that one is a person whose actions, thoughts and concerns are worthy of intrinsic respect, because they have been chosen, organized and guided in a way which makes sense from a distinctively individual point of view.' Although this renders the concept of human dignity meaningful, it is nothing more than a capacity for rational thought and action, the central features conveyed in the principle of respect for autonomy.").

[30] *See* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 542 (2006) (explaining that Kant's idea of dignity hinges on universalized respect from all persons to all persons); Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 46–47 (2016) (demonstrating Kant's view of dignity as "a person's ability to engage in rational, autonomous, and self-directed thought"); Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 545 n.138 (2010) ("The Millian conception is that 'dignity attaches to human beings simply by virtue of their capacity to explore the unknown and to share their discoveries, rather than because, as 'rational beings' they are (unrealistically) presumed to have the capacity to recognize and act upon objective ethical truths.'").

[31] *See* HANS-GEORG GADAMER, TRUTH AND METHOD 13 (Joel Weinshemer & Donald G. Marshall trans., 2d ed. 2004) (arguing that a person's concepts and knowledge about the world are a reflection and externalization of their own inherent concepts and knowledge).

[32] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491–92 (1977) (discussing the U.S. Supreme Court's understanding of liberty under the Fourteenth Amendment); Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 613 (2003) (including economic rights in the conception of the pursuit of happiness); David Kennedy, *The Turn to Interpretation*, 58 S. CALIF. L. REV. 251, 273 (1985) (arguing that "love/hate seem to be subjective descriptions of feelings while separation/community describe objective conditions of association").

[33] *See supra* text accompanying note 3.

another article relied, explored the concept of play as it affected sexual and gender minorities asserting constitutional claims regarding free association and free speech, equal protection, procedural and substantive due process, and other federal violations.[34] The federal statutory causes of action raised in those cases alleged discrimination in educational programs, employment discrimination, obscenity, and immigration law violations.[35] While those cases incidentally involved state law, state claims were often not the focus of the lawsuits. If they were, courts often did not deal with state claims in great detail.[36]

In this Article, state law claims raised by sexual and gender minorities are the focus. This Article shows that in all of the state claims for same-sex marriage and other rights, while the liberty to play was not explicitly raised, it was raised implicitly.[37] State cases help us appreciate the fact that the fight for the liberty to play has been—and currently is—waged at the state level.[38] Federal law, however, remains the overarching backdrop against which the discussion of the liberty to play in the states occurs. Because of this, federal law still receives significant attention in this Article.[39]

By focusing on a selection of same-sex marriage cases from state courts, Section I provides a retrospective of the liberty to play in the states. Play matters because it speaks to the freedom to voluntarily engage in activities that nourish and sustain the self within established parameters that favor pleasure and joy.[40] Play enables the human being to be creative in every respect and in every place.[41] By identifying the benefits denied to same-sex couples, some state courts implicitly recognized the preconditions for the liberty to play that had been traditionally denied to same-sex couples. Unfortunately, the recognition of the liberty to play for sexual and gender minorities was, in some instances, transient since constitutional amendments in the states and changes in federal law desecrated anew the liberty of sexual and gender minorities to play.

Section II identifies sources of hope when it comes to the liberty to play for sexual and gender minorities. Hope can be found in important recent changes to the status of members of the LGBTQIA+ community. First,

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[34] *We Have the Right to Play*, *supra* note 3, at 378–79.

[35] *Id.*

[36] *Id.* at 377–79.

[37] *See infra* Section I; Section II; Section III.

[38] *See infra* Section I; Section II; Section III.

[39] *See infra* Section II; Section III.

[40] *See We Have the Right to Play*, *supra* note 3, at 376–79 (discussing the article's contribution as describing exactly what play is and why it is important in the legal context).

[41] *See id.* at 377 (stating that "[p]lay implies freedom of choice. . . . Play assumes the presence of rules that provide structure, and such structure favors creativity.").

federal cases and the Respect for Marriage Act have upheld the liberty to play for sexual and gender minorities. The *Dobbs* opinion also appears to uphold the liberty to play for members of the LGBTQIA+ community, although its assurances ring hollow for several reasons.[42] The liberty to play is also upheld in state laws prohibiting discrimination on the bases of sexual orientation and gender. State anti-discrimination laws extend a portion of reverence to sexual and gender minorities traditionally reserved for members of the majority, providing another source of hope.

Section III identifies the threat to the liberty to play. A discussion of federal law is relevant as federal law is supreme when it comes to many of the fundamental liberties that guarantee the liberty to play in the states. The *Dobbs* opinion's desecration of a woman's[43] liberty to control her body has reverberated across the landscape of constitutional rights, threatening to similarly desecrate the constitutional rights granted to other vulnerable communities.[44] Outside *Dobbs*, some Justices on the Court have appeared unequivocally hostile to grants of equal status to members of the LGBTQIA+ community and to our liberty to play.[45] Similar hostility in state laws desecrates the community's equal status often in the name of reverence for traditional sex and gender roles.[46] Transgender human beings, likely the most

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[42] *See infra* Section III (B) (indicating that the opposite of play is depression and the *Dobbs* decision immediately encroached on people's ability to play).

[43] This Article also acknowledges that cisgender women are not the only group affected by the *Dobbs* opinion as transgender, non-binary, and intersex people are also affected. *See* AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, AM. C.L. UNION (June 29, 2022), https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion [https://perma.cc/F8G2-C3QQ] (describing how *Dobbs* affects a transgender or non-binary person). However, this Article will use language employed by courts to characterize the liberties under attack, so it will refer to attacks on reproductive rights as attacks on women's liberty to autonomy over their body.

[44] Julie Moreau, *How Will* Roe v. Wade *Reversal Affect LGBTQ Rights/ Experts, Advocates Weigh In*, NBC News (June 24, 2022, 5:37 PM), https://www.nbcnews.com/nbc-out/out-news/will-roe-v-wade-reversal-affect-lgbtq-rights-experts-advocates-weigh-rcna35284 [https://perma.cc/4NR9-LJ82] (stating that "[t]he willingness of the court to overturn precedent could, some advocates fear, signal [that] other federally protected rights of minorities may be in jeopardy, such as same-sex marriage, which became the law of the land with the Obergefell v. Hodges case. Alito's opinion does give cause for caution, according to some LGBTQ advocates and policymakers. Alito, who dissented in the Obergefell ruling, has since spoken openly about his opposition to the landmark ruling.").

[45] *Id.* (stating that "Alito and Thomas released a statement expressing their disapproval of the Obergefell decision when the court declined to hear the case of Kim Davis, a Kentucky clerk who refused to issue marriage licenses to same-sex couples citing her religious beliefs.").

[46] *See The ACLU is Tracking 491Anti-LGBTQ Bills in the U.S.*, AM. C.L. UNION, https://www.aclu.org/legislative-attacks-on-lgbtq-rights [https://perma.cc/4ECQ-CNR6] (documenting states that have filed and passed bills that would prevent students from learning about LGBTQIA+ people or issues in public schools, prevented transgender people from updating their government documents, weakened nondiscrimination laws, preempted local nondiscrimination protections, and even banned same-sex marriage).

vulnerable group within the LGBTQIA+ community, are the targets of sustained assaults that insist on the alignment of anatomical sex and gender.[47]

My conclusion observes that we are likely living through something akin to a partial diminution in the traditional hostility to the LGBTQIA+ community's liberty to play as opposed to a cessation. The existence of a partial decrease means that the desecration of the community's rights is ongoing, but that desecration is not total, as implied by cases like *Obergefell v. Hodges*,[48] *Pavan v. Smith*,[49] *United States v. Windsor*,[50] and *Lawrence v. Texas*.[51] The desecration is also partial in that it is the result of prejudice denying portions of the liberty to play for members of the community, while reserving liberty for those the law reveres as a matter of tradition.

II. The Retrospective

To engage with foundational meanings of dignity, status, and the liberty to play in the states, this Section provides an overview of landmark same-sex marriage cases from Massachusetts, New Mexico, and Hawai'i to highlight how those states dealt with the human dignity of same-sex couples.[52] While some courts explicitly evoked dignity to justify their holdings in favor of same-sex marriage, others did not—all the while implying that both dignity and the liberty to play were present in their holdings. Unfortunately, the difficulty of sustaining some of these cases' constitutional rights lay in the fact that the majority of people in the states where those cases were decided tolerated at best, but did not accept, sexual minorities as equals.[53] State constitutional amendments and a federal statute thus followed to desecrate the community's liberty to play only a few years later.

A. The Core Concept of Dignity

Same-sex marriage cases from the states show that "the core concept of common human dignity" mattered, often on equal-protection grounds.[54]

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[47] *See* Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES (Jan. 30, 2023) https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html [https://perma.cc/5VCY-BYCE].

[48] 576 U.S. 644 (2015).

[49] 137 S. Ct. 2075 (2017).

[50] 570 U.S. 744 (2013).

[51] 539 U.S. 558 (2003).

[52] *See* WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 81–91, 559–60, 630–32 (2020) (providing an extensive history of the struggle for marriage equality).

[53] *See id.* at 108 (indicating that "[s]ome gay rights advocates attributed" Hawai'i's rejection of same-sex marriage to "irrational prejudice and hysterical fear of homosexuals").

[54] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

While some of the same-sex marriage cases were subsequently overturned by constitutional amendments[55] and at least one case provoked a federal response,[56] the fact that these cases upheld the dignity of vulnerable human beings is noteworthy since, "[l]ike racial minorities and women, sexual and gender minorities had been subjected to a long history of unfair state discrimination."[57] Cast in terms embraced by this Article, sexual and gender minorities had long endured the desecration of their status and of their accompanying liberty to play.

In *Goodridge v. Department of Public Health*,[58] the 2003 watershed case from Massachusetts' highest court, the Supreme Judicial Court of Massachusetts made clear that marriage was about dignity and status.[59] The *Goodridge* court held that on equal protection and due process grounds,[60] "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violate[d] the Massachusetts Constitution."[61] In reaching this conclusion that equal-protection principles were desecrated, Chief Justice Margaret Hilary Marshall twice referred to the "dignity" of same-sex couples.[62] The court indicated that "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."[63] In other words, by banning same-sex marriages, the state had endorsed the existence of first-class and second-class statuses; equality abhorred the existence of the latter.

There were other references to dignity and status in *Goodridge*.[64] The court again referred to dignity as status when it cited *Lawrence v. Texas* for the proposition that "the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult

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[55] *See, e.g.*, CAL. CONST. art. I, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[56] Baehr v. Lewin, 74 Haw. 530 (1993) (plurality opinion); *see also Defense of Marriage Act*: *Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Rep. Steve Chabot, Chairman, H. Subcomm. on the Const.) (stating that "[i]t started in Hawaii, and with a significant effort there that caused 37 or 38 States to pass a Defense of Marriage Act, and went to Vermont, where the Governor of Vermont signed the civil union bill in the middle of a Friday night and avoided the media until the following Monday or Tuesday. And we have seen what happened in the Massachusetts Supreme Court.").

[57] ESKRIDGE & RIANO, *supra* note 52, at 464.

[58] 798 N.E.2d 941 (Mass. 2003).

[59] *Id.* at 969.

[60] *Id.* at 961.

[61] *Id.*

[62] *See id.* at 948, 965.

[63] *Id.*

[64] *Goodridge*, 798 N.E.2d at 948, 965.

expressions of intimacy and one's choice of an intimate partner."[65] The government, therefore, could not revere the status of one community while desecrating that of another.[66] Chief Justice Marshall further referred to status when she noted that upholding the rights of a marginalized community did not desecrate the status of members of the majority:

> Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.[67]

Dignity means equal status, and upholding the equal status of a vulnerable community does not lessen the reverence traditionally reserved for the majority's enjoyment of the institution of marriage.[68]

That the traditional reservation of marriage for opposite-sex couples amounted to an implicit conferral of superior or supreme status was made clear in *Griego v. Oliver*,[69] another landmark case in 2013, from the Supreme Court of New Mexico.[70] *Griego* held that "[d]enying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution."[71] Writing for the majority, Justice Edward Chávez also cited to *Lawrence* for the proposition that "moral disapproval" alone could not justify the violation of equal-protection principles.[72] "It [was] not appropriate to define the state's interest as maintaining the tradition of marriage only between opposite-gender couples, any more than it was appropriate to define the State's interest in [*Loving v. Virginia*][73] as only maintaining same-race marriages."[74] To argue from tradition (i.e., marriage was traditionally reserved for an opposite-sex couple) was "to say only that the discrimination

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[65] *Id.*

[66] *See id.* 948–49 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

[67] *Id.* at 965.

[68] *See* ESKRIDGE & RIANO, *supra* note 52, at 246 ("In 2004, when the commonwealth started to issue marriage licenses to gay couples, the rate jumped to 6.5, and it held at 6.2 the next year. The divorce rate dropped.").

[69] 316 P.3d 865 (N.M. 2013).

[70] *Id.*

[71] *Id.* at 889.

[72] *Id.* at 886.

[73] 388 U.S. 1 (1967).

[74] *Griego*, 316 P.3d at 886 (citation omitted).

has existed for a long time."[75] Just like the arguments about racial supremacy that preceded *Loving*,[76] arguments about the traditional supremacy of the majority when it came to marriage sought to perpetuate the relative inferiority of a vulnerable community.[77]

Hawai'i's landmark 1993 case, *Baehr v. Lewin*,[78] implied that the liberty to play was predicated on an array of benefits that came with supremacy.[79] The *Baehr* court held that "on its face and as applied, [the state statute at issue] denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5 [of the Hawai'i Constitution]."[80] The benefits that the *Baehr* court identified directly implicated a vulnerable human being's liberty to play in their community on an equal footing to members of the majority.[81] Writing for the plurality, Judge Steven Levinson listed those statutory benefits:

> (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates . . . ; (2) public assistance from and exemptions relating to the Department of Human Services . . . ; (3) control, division, acquisition, and disposition of community property . . . ; (4) rights relating to dower, curtesy, and inheritance . . . ; (5) rights to notice, protection, benefits, and inheritance . . . ; (6) award of child custody and support payments in divorce proceedings . . . ; (7) the right to spousal support . . . ; (8) the right to enter into premarital agreements . . . ; (9) the right to change of name . . . ; (1 0) [sic] the right to file a nonsupport action . . . ; (11) post-divorce rights relating to support and property division . . . ; (12) the benefit of the spousal privilege and confidential marital communications . . . ; (13) the benefit of the exemption of real property from attachment or execution . . . ; and (14) the right to bring a wrongful death action . . . For present purposes, it is not disputed that the applicant couples would be entitled to all of these marital rights and benefits, but for the

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[75] *Id.* (quoting Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 478 (Conn. 2008)).

[76] *See* Marisa Peñaloza, *'Illicit Cohabitation': Listen to 6 Stunning Moments from* Loving v. Virginia, NAT'L PUB. RADIO (June 12, 2017, 5:00 AM), https://www.npr.org/2017/06/12/532123349/illicit-cohabitation-listen-to-6-stunning-moments-from-loving-v-virginia [https://perma.cc/U722-TA9Q] (reporting racist arguments employed in the *Loving* trial, such as a state's intention "to prevent race-mixing" in order to preserve the "racial integrity . . . of the white race").

[77] *Griego*, 316 P.3d at 886.

[78] 852 P.2d 44 (Haw. 1993) (plurality opinion).

[79] *See generally id.* at 56 (quoting Zablocki v. Redhail, 434 U.S. 374, 384–86 (1978)) (explaining that the right to enter a relationship is foundational in society, underpinning the right to procreation, childbirth, and child rearing).

[80] *Id.* at 67.

[81] *Id.* at 59.

> fact that they are denied access to the state-conferred legal status of marriage.[82]

Such rights, then, determined access to at least fourteen different statutory state benefits touching on income, property, custody of children, and the ability to institute a legal action, among others.[83] Those benefits established essential preconditions for the liberty to play in the home and in the community at large, as people who fell within the definition of traditional marriage were solely rewarded and granted access to this trove of state-sanctioned benefits. The state constrained the liberty to play as the self and it constrained that self's ability to nurture members of its community.[84]

"[T]he core concept of common human dignity" identified in *Goodridge* thus engaged with status, the legal superiority and supremacy that traditionally went with such status, and the many benefits that were the precondition for a superior or supreme liberty to play.[85] The result, then, of the landmark same-sex marriage cases from the states was to encompass within dignity's capacious expanse the members of a community that had long been denied such dignity as a matter of law.

B. A Tolerant Society

Hawai'i's *Baehr* decision did not reflect the public sentiment of voters in the state in 1998, when sixty-nine percent of voters overwhelmingly voted to give their state legislature "the power to reserve marriage to opposite-sex couples."[86] In their book on same-sex marriage, Professor William Eskridge, Jr. and Christopher Riano ask why Hawai'i, "a politically liberal, ethnically diverse state that was the first to ratify the [Equal Rights Amendment] and one of the first to repeal consensual sodomy laws and enact sexual orientation anti-discrimination laws[,] reject[ed] same-sex marriage?"[87] Among the explanations they provide for the state's rejection of the *Baehr* decision is that Hawai'i, at the time, was tolerant but not accepting of any loving commitment between two human beings of the same sex.[88] "[T]here's a drastic difference between being tolerant and legalizing something like same-sex marriage . . . Legalizing it would say: 'This is acceptable, normal, and

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[82] *Id.*

[83] *Baehr*, 852 P.2d at 59 (plurality opinion).

[84] *See generally We Have the Right to Play*, *supra* note 3, at 401–03 (demonstrating this concept through the lens of family, marriage, and procreation).

[85] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

[86] ESKRIDGE & RIANO, *supra* note 52, at 105, 107.

[87] *Id.* at 108.

[88] *Id.* ("A more nuanced explanation invokes the old distinction between toleration and acceptance.").

OK to teach about in school.'"[89] Thus, many people in the state were tolerant of members of the LGBTQIA+ community, but they were not accepting of the community's equal dignity. Of course, many in Hawai'i and elsewhere were accepting of such equality at the time, but they were, unfortunately, not in the majority. Unfortunately, desecration of the LGBTQIA+ community's equal dignity and the accompanying liberty to play followed only five years after the *Baehr* decision. Again, in 1998 *Baehr's* recognition of equal status for same-sex couples was superseded by a constitutional amendment in Hawai'i, which provided that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."[90] Among those who opposed the state's recognition of same-sex marriage on religious grounds, Eskridge and Riano observed that the following was true:

> [The] normalization of homosexuality would inhibit shaming or even reverse its valence. In a tolerant society, there could still be a sense of shame about homosexuality—but in a society where gay people were completely accepted, shame would shift to those who did not accept them.[91]

In other words, reverence for traditional understandings of marriage meant reserving for the majority the right to desecrate with impunity (i.e., shaming) those who were different. Some members of the majority wished to reserve for themselves the right to humiliate two human beings of the same sex who loved each other as a matter of law.

Reverence for the supremacy of traditional understandings of marriage subsequently found a presidential pen sympathetic enough under William Jefferson Clinton, who held office from 1993 to 2001. In 1993, President Clinton signed into law what would become known as the "Don't Ask, Don't Tell" policy, which for the next "17 years . . . prohibited qualified gay, lesbian and bisexual Americans from serving in the armed forces and sent a message that discrimination was acceptable."[92] Only five years into that policy, a draft report from the U.S. Department of Defense revealed that "the number of homosexuals being forced out of the military under the 'Don't ask, don't tell, don't pursue' policy [was] 67 percent higher than when the policy was

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[89] *Id.* (quoting Linda Hosek, *Will Hawaii Once Again Lead the Way?* HONOLULU STAR-BULL., Sept. 10, 1996).

[90] HAW. CONST. art. I, § 23; *cf.* In re Marriage Cases, 183 P.3d 384, 452 (Cal. 2008) ("[I]nsofar as [the statutes] draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage, we conclude these statutes are unconstitutional."), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[91] ESKRIDGE & RIANO, *supra* note 52, at 110.

[92] *Repeal of "Don't Ask, Don't Tell"*, HUM. RTS. CAMPAIGN, https://www.hrc.org/our-work/stories/repeal-of-dont-ask-dont-tell [https://perma.cc/44X8-VHZ2].

adopted in 1993."[93] The same report revealed that "[i]n some egregious situations, individuals who complained about anti-gay harassment were then investigated for being gay."[94] Faced with the prospect of his reelection campaign and coupled with the request for equal rights by a disfavored minority that had given him its support, President Clinton "was reportedly 'ambivalent' about throwing this supportive minority group under the bus once again, as he had done in 1993, when he endorsed a ban on gays in the military."[95] In 1996, he signed into law the Defense of Marriage Act (DOMA), which served at least two purposes.[96] First, DOMA was meant to prevent "interstate recognition of potential Hawai'i gay marriages,"[97] and, second, the federal statute was meant to aid the president's reelection chances, by signaling strong belief in the traditional family.[98] DOMA would desecrate the liberty to play for sexual and gender minorities for seventeen years before it was overturned by *Windsor*.[99]

As part of a retrospective, then, while foundational cases from the states upheld the dignity of many vulnerable human beings, a lack of acceptance likely desecrated the equal dignity of members of the LGBTQIA+ community and our accompanying liberty to play. The reason, at least in part, was the difference between a tolerant society and an accepting one. A tolerant society is a reverent society that reserves the right to desecrate with impunity the liberty to play of those it considers inferior. An accepting society is a reverent society that has abolished its right to desecrate those it previously considered inferior. Why? An accepting society has learned to revere those it considered inferior yesterday as its equals today.

III. The Hope

When it comes to the status and liberty to play for sexual and gender minorities, hope may be found in significant changes to the LGBTQIA+ community's legal status. Recall for a moment that on October 10, 1972, the

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[93] *The Trouble with 'Don't Ask, Don't Tell'*, N. Y. TIMES (April 8, 1988), https://www.nytimes.com/1998/04/08/opinion/the-trouble-with-don-t-ask-don-t-tell.html [https://perma.cc/NB6Y-QBFT].

[94] *Id.*

[95] ESKRIDGE & RIANO, *supra* note 52, at 123–24.

[96] *Id.* at 123.

[97] *See id.* at 123–24 (explaining that political pressure following potential same-sex marriages in Hawai'i pushed President Clinton to endorse DOMA).

[98] *See id.* at 137 (stating that "[n]o one expected [President Clinton] to veto [DOMA], for reasons recalled by Richard Socarides: 'Inside the White House, there was a genuine belief that if the President vetoed the Defense of Marriage Act, his reelection could be in jeopardy. There was a heated debate about whether this was a realistic assessment, but it became clear that the President's chief political advisers were not willing to take any chances").

[99] *See infra* Section II (A).

U.S. Supreme Court released an eleven-word memorandum opinion in *Baker v. Nelson*.[100] "The appeal," the opinion read, "is dismissed for want of a substantial federal question."[101] *Baker*, in effect, upheld the Minnesota Supreme Court decision, which held that a statute prohibiting same-sex marriage did *not* violate the U.S. Constitution.[102] Fourteen years later in 1986, the U.S. Supreme Court released another opinion, this time holding that the Constitution did not recognize a right to consensual, same-sex intimacy in the privacy of the home.[103] Chief Justice Warren Burger concurred in the Court's decision, and in his reverence for traditional heterosexual supremacy, he told the nation that those who had consensual sex with members of their own sex were historically considered worse than rapists and were executed.[104]

It is noteworthy that in 1986, when the Court chose to deny members of the LGBTQIA+ community the same superior or supreme status traditionally reserved for the majority, the nation was roughly five years into the HIV/AIDS epidemic that had killed many members of the LGBTQIA+ community.[105] Indeed, only five months before the Court released its decision in *Bowers v. Hardwick*, the Center for Disease Control reported that, "on average, AIDS patients die[d] about 15 months after the disease [was] diagnosed. Public health experts predict[ed] twice as many new AIDS cases in 1986" in comparison to the numbers in 1985, which already had an eighty-nine percent increase in cases from 1984.[106] It took roughly two decades before the Court began to undo the damage it had inflicted on the LGBTQIA+ community in *Bowers*, and more than four decades before it reversed its holding in *Baker*.[107] This Section honors watershed moments in federal and state law that uphold the community's equal status, thereby implicitly affirming the community's equal dignity when it comes to play. These recent

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[100] 409 U.S. 810 (1972) (mem.), *overruled by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[101] *Id.* at 810.

[102] *See* Baker v. Nelson, 191 N.W.2d 185, 187 (1971) (holding that a statute governing marriage did not authorize marriage between persons of the same sex, and that the statute did not violate the First, Eighth, Ninth, or Fourteenth Amendments).

[103] Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled* by Lawrence v. Texas, 539 U.S. 558 (2003).

[104] *Id.* at 196–97 (Burger, C.J., concurring) (relying on Blackstone to state that consensual sex between same-sex partners was "'the infamous *crime against nature* . . . an offense of 'deeper malignity,' . . . 'the very mention of which is a disgrace to human nature'").

[105] *See generally A Timeline of HIV and AIDS*, HIV.GOV, https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline#year-1986 [https://perma.cc/62XT-LQ7N] (providing an overview of federal action taken against the epidemic as well as reports highlighting the epidemic's impact on minority communities).

[106] *Id.*

[107] *Lawrence*, 539 U.S. at 578 (overruling *Bowers*); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (overruling *Baker*).

changes in the community's status continue to be the law, even as they are threatened by the *Dobbs* opinion.

A. Play until Dobbs

Among the most striking changes in the federal case law regarding the LGBTQIA+ community and the liberty to play is, of course, the recognition of the community's dignity. Since another article has, at some length, examined what that dignity means and its implications for the community's liberty to play at the federal level,[108] this Article summarizes what I have argued elsewhere, offering new and necessary insights. By doing so, this Article elucidates why one may be tentatively hopeful about the U.S. Supreme Court's recent recognition of the community's status and liberty to play, all the while acknowledging the utility of my previous arguments, which are extended here.[109]

In *Obergefell v. Hodges*, Justice Anthony Kennedy, writing for the majority, mentioned dignity at least nine times before holding that the U.S Constitution recognizes same-sex marriage.[110] Justice Kennedy first referred to the traditional aristocratic dignity of the heterosexual couple, implying that dignity meant status.[111] The Court then referred to the "equal dignity" of women at the end of coverture, and because coverture institutionally upheld the supremacy of men, again the Court demonstrated that dignity traditionally meant status.[112] There was then a reference to the societal denial of dignity for those attracted to—and loved by—other human beings of the same sex, who were considered as not "hav[ing] dignity in their own distinct identity."[113] Indeed, this, again, referred to status.

Other references to dignity in *Obergefell* also show that dignity is aligned with status. The *Obergefell* Court referred to the denial of dignity to the LGBTQIA+ community after the Second World War, meaning that members of the community had long been cast into a state of subordinate legal status.[114] The Court referred to fundamental liberties protected by the Due Process Clause, which encompassed "personal choices central to

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[108] *See generally We Have the Right to Play*, *supra* note 3 (arguing for a more expansive, "lighthearted" understanding of dignity and developing a theory of a "right to play" that would respect LGBTQIA+ lives).

[109] *See supra* text accompanying note 3.

[110] *See Obergefell*, 576 U.S. at 657, 660, 663, 666, 674, 678, 681 (describing marriage as promising dignity to all persons and stating that certain liberties, such as the right to marry, are central to individual autonomy and dignity).

[111] *Id.* at 656 ("The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.").

[112] *Id.* at 660, 674.

[113] *Id.* at 660.

[114] *Id.* at 660–61.

individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[115] Those personal choices similarly related to status and its relationship to sex and sexuality in the privacy of the home. The *Obergefell* Court held that there was constitutional dignity in same-sex couples who wanted to marry, implying that same-sex couples now hold the same aristocratic legal status previously reserved for heterosexual couples, who made up the majority.[116] Finally, the Court referred to the dignity of a state's licensing of marriage and mentioned the legal dignity sought by same-sex couples—again signaling dignity's traditional embodiment of status.[117]

Obergefell implied the importance of the liberty to play. In its references to coverture, *Obergefell* suggested that men traditionally enjoyed an unparalleled right to do as they wished, effectively fettering women and their liberty.[118] As such, men reinforced the parameters that maintained their supremacy over women as a matter of law.[119] In its treatment of attitudes towards marriage, *Obergefell* implied that men traditionally married women; that together they constituted a heterosexual couple; that heterosexual couples were endowed with supreme status as a matter of law through the laws men had written, enacted, and enforced via other men; and that in granting those unions, men who did not marry women and women who did not marry men were denied "nobility," which amounted to supreme status.[120] *Obergefell* also suggested that those who were attracted to—and who loved and were loved by—those of the same sex could not play as themselves because of the traditional reverence men had reserved, as a constitutional matter, for their own opposite-sex couplings.[121] As such, the majority had long desecrated the liberty to play of those they deemed unlike them.

Although the Court did not mention dignity two years later in *Pavan v. Smith*, it held that a state could not refuse to register same-sex couples on state birth certificates as the parents of children conceived through artificial insemination.[122] The *Pavan* Court relied on *Obergefell's* evocation of the "constellation of benefits" that had traditionally been associated with the

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[115] *Id.* at 663.

[116] *Obergefell*, 576 U.S. at 666.

[117] *Id.* at 681.

[118] *See id.* at 660, 673 (stating that "[u]nder the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity").

[119] *See generally Dignity and the Promise of Conscience*, *supra* note 3, at 346–47 (discussing the subordination of women in coverture cases).

[120] *See Obergefell*, 576 U.S. at 656, 657,660, 671, 673.

[121] *See id.* at 657 ("To [the respondents] it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman.").

[122] Pavan v. Smith, 582 U.S. 563, 2077–78 (per curiam) (2017).

institution of marriage in the states.[123] It found that the problem was not that the state wished to identify biological parentage on its birth certificates.[124] The problem, rather, was the differential treatment, which arose when any child was conceived through "anonymous sperm donation—just as the petitioners did [in *Pavan*. The] state law require[d] the placement of the birth mother's husband on the child's birth certificate. And that is so even though (as the State concede[d]) the husband '[was] definitively not the biological father' in those circumstances."[125] By denying equal treatment to same-sex couples, the state revered traditional understandings of parenthood, desecrating the liberty of same-sex couples and their children to play in the home and in the community. As Berta Esperanza Hernández-Truyol noted, in *Pavan* "dignity prevailed over discriminatory legislation."[126]

United States v. Windsor similarly relied on dignity to hold that the Federal Government could not define marriage in a way that excluded same-sex couples from the benefits of the institution.[127] The *Windsor* Court referred to dignity roughly ten times, [128] including redundant references to the "status and dignity . . . of a man and woman in lawful marriage"[129] and to the "dignity and status" conferred by some states on same-sex couples permitted to marry;[130] references to a state's decision to "enhance[] the . . . dignity" of same-sex couples by permitting their marriage, which suggested that the state had chosen to raise the status of same-sex couples;[131] a reference to the state's decision to grant equal dignity to same-sex couples, which had previously been reserved for opposite-sex couples;[132] and finally a reference to the Federal Government's denial of "equal dignity" to same-sex couples, which implied the denial of equal legal status for same-sex couples.[133] There was both the alignment of dignity with integrity and with personhood, suggesting that the recognition of status enhances the individual's sense of moral

[123] *Id.* at 564 ("Because the differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage,' we reverse the state court's judgement.").

[124] *Id.* at 567.

[125] *Id.* (citation omitted).

[126] Berta Esperanza Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, 10 NE. U.L. REV. 654, 683 (2018).

[127] *See* United States v. Windsor, 570 U.S. 744, 763, 768, 769, 770, 772, 774, 775 (2013).

[128] *Id.* at 763, 768, 769, 770, 772, 775.

[129] *Id.* at 763.

[130] *Id.* at 768.

[131] *Id.*

[132] *Id.* at 769.

[133] *Windsor*, 570 U.S. at 770.

completion.[134] As a result, status had many "incidents," as Professor Waldron has observed.[135]

Consistent with the cases discussed above, *Windsor* implied that a greater liberty to play came with superior or supreme status.[136] First, legal status meant that a couple existed as a matter of law, and that couple was endowed with legal benefits and responsibilities.[137] As Justice Kennedy wrote, "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person."[138] If a couple belonged to the only community that granted such rights and responsibilities, that community and its members were, as a result, singular and superior in their status, granting them an aura of legal supremacy.[139] If legal benefits and responsibilities were solely reserved for that community, then it was easier for that community to amass power and resources consistent with its supreme status, which permitted that community to play and enjoy itself. At the time of the *Windsor* decision, over one thousand federal statutes were associated with the heteronormative community's monopolistic hold on the institution of marriage.[140] The liberty to play was strengthened by the community's access to resources, where individual access was determined by belonging to the majority community.

In 2015, the *Lawrence* Court displayed a more meager but equally powerful understanding of dignity.[141] The *Lawrence* Court overruled *Bowers*, which had authorized states to criminalize private, intimate, sexual contact between two individuals of the same sex, with up to twenty years of imprisonment.[142] The *Lawrence* Court noted that the status of two individuals of the same sex was equal to that of an opposite-sex couple who similarly engaged in acts of private consensual sexual play in the home:

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[134] *See id.* at 772, 775 (stating that the statute in question places same-sex couples as "less worthy" as other married couples).

[135] WALDRON, *supra* note 28, at 18. ("I will actually argue against a reading of the dignity idea that makes it the goal or *telos* of human rights. I think it makes better sense to say that dignity is a normative status and that many human rights may be understood as incidents of that status. (The relation between a status and its incidents is not the same as the relation between a goal and the various subordinate principles that promote the goal.)").

[136] *Windsor*, 570 U.S. at 775.

[137] *Id.* at 772.

[138] *Id.*

[139] *See id.* at 763 ("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."). *See also id.* at 775 ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage *is less worthy* than the marriages of others.") (emphasis added).

[140] *See id.* at 752 ("The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.").

[141] *See* Lawrence v. Texas, 539 U.S. 558, 567, 574, 575 (2003) (mentioning dignity three times).

[142] *Id.* at 578; *see also* Bowers v. Hardwick, 478 U.S. 186, 188 n.1 (1986).

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[143]

Since dignity is associated with freedom ("free persons"), the implication is that dignity is related to liberty.[144] *Lawrence* also referred to "personal dignity and autonomy" and to the dignity of those charged with a criminal offense solely for expressing themselves sexually in the freedom of their homes.[145] Thus, the liberty to play in *Lawrence* was about the freedom to be one's self in the home, to engage freely in consensual sex with someone of the same sex, and to take reciprocal pleasure in the privacy of such a consensual sexual act.[146] As Justice William Brennan had previously stated in a different context, "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[147]

Although admittedly tentative, another source of hope at the federal level is the Respect for Marriage Act of 2022.[148] Congress passed it in response to the U.S. Supreme Court's opinion in *Dobbs*, in which the Court desecrated women's liberty to control their bodies and the Court surrendered such liberty to the states.[149] The *Dobbs* opinion was assailed by members of Congress as "outrageous and heart-wrenching"[150] and as having unleashed chaos and cruelty by "wip[ing] out a half-century of constitutional protections for the reproductive rights—and thus the equal citizenship—of women in America."[151] The *Dobbs* opinion's aftermath "include[d] tragedies

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[143] *Lawrence*, 539 U.S. at 567.

[144] *Id.*

[145] *Id.* at 575 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

[146] *See generally We Have the Right to Play*, *supra* note 3 (exploring the right to play throughout one's life).

[147] Roth v. United States, 354 U.S. 476, 487 (1957).

[148] Pub. L. No. 117–228, 136 Stat. 2305 (2022).

[149] *See generally Dobbs*, 142 S. Ct. at 2284–85.

[150] *See* Press Release, Nancy Pelosi, Speaker of the House of Representatives, Pelosi Statement on Supreme Court Overturning *Roe v. Wade* (June 24, 2022), https://pelosi.house.gov/news/press-releases/pelosi-statement-on-supreme-court-overturning-roe-v-wade. [https://perma.cc/739R-8RD9].

[151] Laurence H. Tribe, *Deconstructing Dobbs*, N. Y. REV. (Sept. 22, 2022), https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/ [https://perma.cc/2XFQ-5QMZ].

like that of the ten-year-old rape victim in Ohio forced to travel across state lines to avoid compelled motherhood."[152]

The Respect for Marriage Act is imperfect.[153] On the one hand, it does nothing to uphold a woman's liberty to control her body, but on the other, it requires states to recognize marriages between two human beings of the same-sex and of different races that are entered into in other states.[154] The Respect for Marriage Act repeals the federal statute at issue in *Windsor*, which had reserved the federal benefits attached to marriage for opposite-sex couples.[155] In addition, it provides a remedy for enforcement of its provisions.[156] Tentatively linking dignity and hope in his statement after the House of Representatives had passed the Act, President Joseph Biden's administration noted that:

> After the uncertainty caused by the Supreme Court's *Dobbs* decision, Congress has restored a measure of security to millions of marriages and families. They have also provided hope and dignity to millions of young people across this country who can grow up knowing that their government will recognize and respect the families they build.[157]

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[152] *Id.*

[153] *See, e.g.*, Dorian Rhea Debussy, *The Respect for Marriage Act Has a Few Key Limitations*, OHIO STATE NEWS (Dec. 22, 2022), https://news.osu.edu/the-respect-for-marriage-act-has-a-few-key-limitations/#:~:text=One%20key%20issue%20is%20that,disabilities%20–%20regardless%20of%20their%20sexuality [https://perma.cc/Z4X3-L3RR] (pointing out that the Respect for Marriage Act does not prevent states from passing anti-LGBTQIA+ laws or provide marriage equality for people with disabilities, but it does give religious non-profits exemptions).

[154] 28 U.S.C. § 1738C; 1 U.S.C. § 7 ("[A]n individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into a State."); *see also* Michael C. Dorf, *Will the Supreme Court Respect the Respect for Marriage Act?*, VERDICT (Nov. 21, 2022), https://verdict.justia.com/2022/11/21/will-the-supreme-court-respect-the-respect-for-marriage-act [https://perma.cc/7A5M-YKTH] (arguing that the Act should provide a hedge against an aggressive Supreme Court); *cf.* James Esseks, *Here's What You Need to Know About the Respect for Marriage Act*, AM. C.L. UNION (July 21, 2022), https://www.aclu.org/news/lgbtq-rights/what-you-need-to-know-about-the-respect-for-marriage-act [https://perma.cc/LNU9-3HMH] ("If the Supreme Court overturns *Obergefell v. Hodges* . . . the Respect for Marriage Act would not stop any state from once again refusing to issue marriage licenses to same-sex couples. . . . [A] state that wanted to get out of the business of issuing marriage licenses to same-sex couples would not violate the Respect for Marriage Act.").

[155] U.S. v. Windsor, 570 U.S. 744, 775 (2013) (holding that the Defense of Marriage Act's definition of marriage was unconstitutional).

[156] 28 U.S.C. § 1738C (providing for the Attorney General and any person to bring a civil action for declaratory and injunctive relief).

[157] Press Release, White House, Statement by President Joe Biden on Bipartisan House Passage of the Respect for Marriage Act (Dec. 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/08/statement-by-president-joe-biden-on-bipartisan-house-passage-of-the-respect-for-marriage-act/ [https://perma.cc/KNY9-G9DK].

The relationship between dignity and status is implicit in President Biden's statement, which also honors "LGBTQI+ and interracial couples who are now guaranteed the rights and protections to which they and their children are entitled."[158] The liberty to play is similarly implicit in the statement since the President acknowledges that the Federal Government is legally committed to guaranteeing the security of members of the LGBTQIA+ community.[159] As such, security—an essential precondition for equal play for the community—is now assured under federal law.[160]

Even *Dobbs* itself may appear to be a source of hope. The *Dobbs* Court provides assurances that the constitutional protection of same-sex marriage is untouched by the Court's holding desecrating a woman's constitutional right to control her body.[161] Writing for the majority in *Dobbs*, Justice Samuel Alito stated that "[n]othing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion."[162] Justice Alito later expounded on this point, noting that "rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.'"[163] This Article will further engage with the apparent disingenuity of Justice Alito's remarks, but it is helpful to ask the following question here: after *Dobbs*, how can there be hope for one vulnerable community when another vulnerable community has just seen its liberty desecrated, including the precedents for which it has fought (and many of its members have died)?[164] The question also matters because those precedents, over decades, have given rise to other powerful constitutional precedents protecting the rights of other vulnerable communities, including their liberty to play.[165]

The *Dobbs* Court's assurances ring hallow to the LGBTQIA+ community as this Article discusses further below.[166] On the one hand, the Court appears to say to a community that was compelled to accept the inferior status cast upon it by men for a millennia (including a wholly derivative liberty to play): "Your constitutional right to control your body, which was granted to you only fifty years ago, no longer exists. In fact, you should not

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[158] *Id.*

[159] *See id.* ("[Millions of young people's] government will recognize and respect the families they build.").

[160] *See id.* ("After the uncertainty caused by the Supreme Court's *Dobbs* decision, Congress has restored a measure of security to millions of marriages and families.").

[161] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).

[162] *Id.*

[163] *Id.* at 2280.

[164] *See infra* Section II (B).

[165] *See id.*

[166] *See id.*

have been given that right because the decision granting you that liberty was 'egregiously wrong from the start.'"[167] Let us restate that: "The decision granting you constitutional control of your body "was . . . egregiously wrong and deeply damaging."[168] On the other hand, the same Court appears to say to another community that was similarly subjected to millennia of desecration as part of a long history of judicial reverence for traditional masculinity: "We have just desecrated the rights of an historically more vulnerable community, but your rights are safe because that community's rights affect 'potential life' while yours do not.[169] Thus, today we are not desecrating your rights, only the rights of the other community, which we should have done decades ago. In the meantime, ignore the fact that your rights, which were granted to you over the past three decades, very much depend on the now desecrated rights we had previously granted to that other community, which should not have had such rights in the first place."[170]

In sum, continuing hope for sexual and gender minorities' liberty to play originates, at least in part, from recent federal opinions in *Obergefell*, *Pavan*, *Windsor*, and *Lawrence*—among others.[171] A bracketed hope is found in the Respect for Marriage Act, but the *Dobbs* opinion leaves open whether vulnerable communities should be hopeful about retaining their liberty to play in the states. The Article will now turn to current sources of hope when it comes to the liberty to play in the states.

B. Play in the States

When it comes to the liberty to play for members of the community in the states, hope can be found in several areas. The Human Rights Campaign's 2022 State Equality Index indicates that thirty-eight states allow transgender human beings to change their name and the gender marker on their driver's license and twenty-seven states allow them to change their name and the gender marker on their birth certificates.[172] At least thirty-two states prohibit employment discrimination against members of the LGBTQIA+ community and a least thirty states prohibit housing discrimination based on LGBTQIA+

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[167] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

[168] *Id.* at 2265.

[169] *See generally supra* text accompanying notes 161–63.

[170] *See id.*

[171] *See also* Romer v. Evans, 517 U.S. 620, 623 (1996) (holding that a state constitutional amendment repealing protections against discrimination on the basis of sexual orientation violated the Equal Protection Clause).

[172] SARAH WARBELOW ET AL., HUM. RTS. CAMPAIGN, 2022 STATE EQUALITY INDEX (2023), https://reports.hrc.org/2022-state-equality-index?_ga=2.98543583.1986070369.1674767679-1750380816.1674767679 [https://perma.cc/LLQ7-VT9T].

status.[173] At least twenty-seven states proscribe discrimination against members of the community when it comes to public accommodations.[174] Twenty-five states prohibit discrimination against transgender human beings seeking healthcare, and only twenty-one states restrict conversion therapy.[175] Twenty-one states prohibit discrimination against members of the community in accessing credit, and twenty states proscribe discrimination against members of the community in education.[176] Only ten states prohibit discrimination when it comes to jury selection.[177]

Protections that honor status are implicit in some states' statutory language. As early as 1999, California amended its Fair Employment and Housing Act (FEHA) to prohibit discrimination on the basis of sexual orientation in employment and housing accommodations.[178] California's statues were amended again in 2003 to prohibit discrimination on the basis of gender.[179] On its face, FEHA would appear indifferent to status as the statute is apparently concerned with public order and economic development:

> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general.[180]

Thus, concerns about economic development, public safety, and personal safety appear to justify the amendments in California. Status, nevertheless, is implicit in FEHA's protections. As a dissenting opinion in a housing case that arose under the statute acknowledged, "[t]he refusal to provide housing on grounds made unlawful by FEHA is invidious not simply because the applicant is denied housing, but also because the act of discrimination itself demeans basic human dignity."[181]

Differential status, thus, which desecrates human dignity, likely bears upon personal and public safety because differential status discriminates

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[173] *Id.* (reporting that thirty-one states had statutes to protect against housing discrimination based on sexual orientation and thirty states had statutes to protect against housing discrimination based on gender identity).

[174] *Id.* (reporting that twenty-eight states had statutes that prohibited public accommodation discrimination based on sexual orientation, compared to twenty-seven states for gender identity).

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] A.B. 1001, 1999 Leg., Reg. Sess. (Cal.) (codified at CAL. GOV'T CODE § 12940).

[179] A.B. 196, 2003 Leg., Reg. Sess. (Cal.) (codified at CAL. GOV'T CODE § 12926).

[180] CAL. GOV'T CODE § 12920.

[181] Walnut Creek Manor v. Fair Emp. & Hous. Comm'n., 814 P.2d 704, 730 (1991) (Kennard, J., dissenting).

against vulnerable individuals while privileging the person or entity doing the discrimination. Similarly, when discriminating, the person or entity that reveres traditional understandings of sex and gender likely does so for reasons that uphold the superior or supreme status of that person or entity and for others in the same position. And yet, when such discrimination happens, the people or entities experiencing the desecration of their liberty to play may respond in a manner that desecrates the wider public interest.

Delaware underscored the importance of statutory status in 2009. At that time, Delaware's legislature included protections on the basis of sexual orientation in parts of its statutes governing employment, housing, insurance, public accommodations, and public works.[182] The enacted Delaware bill clarified that "[t]he inclusion in this Act of the words 'sexual orientation' is intended to ensure equal rights and not to endorse or confer legislative approval of any unlawful conduct."[183] Roughly four years later, Delaware amended the same provisions to prohibit discrimination on the basis of gender.[184] The amendment included the earlier caveat regarding the protection of "equal rights," which shows that the bill targets differential status given its focus on equality.[185] Echoing similar concerns regarding status to those in California's FEHA, Delaware's gender protections stated that "gender identity" meant "a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth."[186] In other words, a human being's legal status under the law is not predicated on external expectations regarding that human being's sex. At least when it comes to employees of Delaware's executive branch, such legal status is based on what is internally "sincerely held as part of a person's core identity."[187] Indeed, other Delaware laws imply the connection between dignity and equal status, like requiring nurses for example, to "[r]espect the dignity and rights of clients regardless of social or economic status, personal attributes or nature of health problems."[188]

Virginia's more recent amendments to its Human Rights Act in 2020 show similar concerns about the noisome effects of differential status. Virginia amended its laws to include protections on the basis of sexual

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[182] S.B. 121, 145th Gen. Assemb., Reg. Sess. (Del. 2009) (codified in scattered sections of DEL. CODE ANN. tit. 6, 9, 11, 18, 25, and 29).

[183] *Id.*

[184] S.B. 97, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (codified in scattered sections of DEL. CODE ANN. tit. 6, 9, 11, 18, 25, and 29).

[185] *Id.*

[186] *Id.*; DEL. CODE ANN. tit. 6 § 4502 (2022).

[187] DEL. DEP'T OF HUM. RES., GENDER IDENTITY POLICY AND PROCEDURES 1 (2022), https://dhr.delaware.gov/policies/documents/gender-identity.pdf [https://perma.cc/ZBE5-4CGP].

[188] DEL. ADMIN. CODE tit. 24 § 1900-7.4.1.8 (2023).

orientation and gender in housing and employment.[189] The policies that justify the protections include "public safety, health, and general welfare; and . . . [f]urther[ing] the interests, rights, and privileges of individuals within the Commonwealth."[190] Like the provisions regarding gender in both Delaware and California, the General Assembly of Virginia defined "gender" as "the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[191]

The relationship to status is implicit in the changes to Virginia law, since the state disrupted the traditional requirement that sex and gender be synonymous. Indeed, the relationship to status is also present in the state's prohibition of discrimination on the basis of sexual orientation, which amounts to differential treatment on the basis of status.[192] That the reasons provided for the amendments are public health, safety, and welfare shows that in Virginia, too, unequal status may result in the desecration of the public peace.[193] Virginia courts may also consider dignity's relationship to status, since one court has "refuse[d] to give more dignity to Virginia's traffic laws than to Virginia's policy of nondiscrimination."[194] In other words, the status of one legal provision would not be held superior to that of another.

While California, Delaware, and Virginia do not mention the liberty to play in their anti-discrimination statutes, the liberty to play is implicit. At least one California case relied on the state constitution to authorize the recognition of new rights for a vulnerable individual, in *Melvin v. Reid*.[195] In California's first privacy case, Gabrielle Darley Melvin brought a suit against individuals who had, without her consent, taken publicly available details of her life and turned them into a movie whose advertisements had identified her by her maiden name.[196] Melvin, who had previously worked as a sex worker, had been tried for murder and had been acquitted.[197] She had ceased sex work, had gotten married, and had put her past behind her by the time a movie was made based on her public trial records, effectively revealing Melvin's past to her friends.[198] The court held that the legal wrong in the case

[189] VA. CODE ANN. § 2.2-2901.1 (2022).

[190] *Id.* § 2.2-3900(B).

[191] *Id.* § 2.2-3901(B).

[192] *See id.* § 2.2-3900(B)(2).

[193] *See* VA. CODE ANN. § 2.2-3900(B)(3).

[194] Holmes v. Tiedeken, 36 Va. Cir. 491, 491 (1995).

[195] 112 Cal. App. 285 (Cal. Dist. Ct. App. 1931).

[196] *Id.* at 286–87.

[197] *Id.* at 286.

[198] *Id.* at 286–87.

was identifying Melvin by her maiden name in the advertisements, violating the state constitution's protection of the pursuit of "safety and happiness."[199] In the court's dated and gendered language from 1931, Melvin had "abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society."[200]

The court's language clarifies the relationship between status, dignity, and the liberty to play in *Melvin*. Since there was no cognizable cause of action under existing state law, the *Melvin* court relied on the state constitution to create a cause of action when the court concluded that:

> We find, however, that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others.
>
> Section 1 of article 1 of the Constitution of California provides as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."
>
> The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation.[201]

Melvin's right to privacy was based upon a change in her status. Previously a sex worker who was treated as a human being treated with a low status,[202] Melvin subsequently married, raising her status in the process by living "an exemplary, virtuous, honorable, and righteous life . . . [with] a place in respectable society."[203] Melvin's legal dignity—a judicial assessment and confirmation of status—depended on other human beings' evaluations of her relationship to her body and sexuality within the accepted confines of a woman's morally acceptable marriage to a man given social expectations at that time. As commentators have noted, the *Melvin* case is about the dignity of those who live a righteous life.[204]

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[199] *Id.* at 291 ("They went further and in the formation of the plot used the true maiden name of appellant. If any right of action exists it arises from the use of this true name in connection with the true incidents from her life . . . .").

[200] *Id.* at 292.

[201] *Melvin*, 112 Cal. App., at 291.

[202] *See id.* at 286 (describing her time as a sex worker as a "life of shame").

[203] *Id.* at 286–87.

[204] *See* Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 254 (1999) ("She therefore

The liberty to play is implicit in the *Melvin* court's alignment of status and happiness. For the *Melvin* court, "[a]ny person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation."[205] "Rectitude" is a moral word that has religious bases, meaning that, in *Melvin*, those whose lives approached something approximating a sacred ideal were entitled to state constitutional protections of their happiness, the result of which, for them, was the grant of novel protection for their privacy rights.[206] As professors Anita L. Allen and Erin Mack have noted, the fact that *Melvin* involved a woman who wished to put her past behind her was legally significant.[207] The *Melvin* court implies that if Melvin had remained a sex worker, her constitutional right to pursue her happiness—her liberty to play—might not have been upheld.[208] Put another way, her abased status as a sex worker would have disqualified her from harvesting the legal benefits associated with the liberty to play at least in part because the court saw its work in the case as including the necessity "to lift up and sustain the unfortunate, rather than tear him down."[209]

Melvin is helpful in identifying constitutional guarantees under California law that might intervene to uphold the liberty to play in cases when no other remedy is present. As a case representing the application of constitutional principles governing happiness to privacy cases, *Melvin* "based its decision on the California Constitution as it existed at that time, and specifically on a person's 'inalienable right' recognized in the constitution to 'pursu[e] and obtain[] happiness.'"[210] California's current constitution retains much of the earlier language, though the state constitution has been amended to include protection for privacy in its guarantee that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining

deserved protection for her dignity as a 'proper' woman. The case afforded women a measure of empowerment even as it forced them to submit to paternalistic social norms.").

[205] *Melvin*, 112 Cal. App., at 291.

[206] *See generally Rectitude*, OXFORD ENGLISH DICTIONARY (3d ed. 2022) (providing the etymology of "rectitude" as "Middle French *rectitude*, *rettitude* (French *rectitude*) honesty, moral uprightness (1370), straightness (c. 1377) and its etymon post-classical Latin *rectitude* straightness (Vetus Latina), equity, justice (3rd century), righteousness (4th century; frequently from 11th century in British sources)").

[207] Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 470 (1990).

[208] *See Melvin*, 112 Cal. App., at 286–87 (discussing her elevated status by no longer being a sex worker).

[209] *Id.* at 292.

[210] Ignat v. Yum! Brands, Inc., 154 Cal. Rptr. 3d 275, 280 (Cal. Ct. App. 2013).

safety, happiness, and privacy."[211] The Supreme Court of California has since linked dignity to the constitutional right to privacy, indicating that the liberty to play may be at stake in cases involving privacy, whose contours have changed since *Melvin*.[212]

Another source of hope comes from Delaware. As early as the period between 1969 and 1975, Delaware was one of twelve states that repealed their statutes criminalizing consensual intimacy among human beings of the same sex.[213] The state has since recognized a range of rights for members of the LGBTQIA+ community.[214] While there is still some way to go, hope also comes from the existence of what the Human Rights Campaign has identified as an absence of anti-equality laws and policies in the state, except for statutory religious exemptions to anti-discrimination prohibitions.[215] Religious exemptions matter, but the idea is to acknowledge the work that the state has done to facilitate Delawareans' liberty to play. As the National LGBTQ Task Force observed when Delaware became the seventeenth state to protect transgender human beings from discrimination in 2013, a national survey at the time "showed that 26 percent of transgender people ha[d] lost a job due to bias, 50 percent ha[d] been harassed at work, 19 percent ha[d] been denied a home/apartment, and 19 percent were homeless at some point due to bias, with higher rates for transgender people of color."[216] Greater protections for vulnerable human beings means that their legal status improved and those human beings enjoyed a greater liberty to play as themselves as a result.

Another source of hope comes from Virginia. In the Supreme Court of Virginia's 2015 case, *In re Brown*,[217] two transgender women, whom the court identified as "Steven Roy Arnold" and "Robert Floyd Brown" (likely their names while their chosen names—Ashley Jean Arnold and Alicia Jade Brown—were pending approval of their petitions), petitioned for a name change while they were incarcerated in a federal prison.[218] The lower-court

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[211] CAL. CONST. art. I, § 1.

[212] *See, e.g.*, Heller v. Norcal Mut. Ins. Co., 876 P.2d 999, 1006 (1994) (explaining that privacy is dependent on circumstances, such as advance notice of an impending lawsuit that can "limit [an] intrusion upon personal dignity and security that would otherwise be regarded as serious").

[213] William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 663 (1999).

[214] *See State Scorecards: Delaware*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/state-scorecards/delaware-4 [https://perma.cc/R8K6-7PN3] (reporting twenty-nine statutes or polices that are friendly towards the LGBTQIA+ community).

[215] *Id.*

[216] *Delaware Becomes the 17th State with Nondiscrimination Protections for Transgender People*, NAT'L LGBTQ TASK FORCE, https://www.thetaskforce.org/delaware-becomes-the-17th-state-with-nondiscrimination-protections-for-transgender-people/ [https://perma.cc/WD39-F9Z9].

[217] 770 S.E.2d 494 (Va. 2015).

[218] *Id.* at 495.

judge refused to grant the petition, and the Supreme Court of Virginia ordered the lower court to permit the name change.[219] Again, the lower-court refused to grant the petition, citing a negative impact on the community if it were to do so.[220] Ms. Arnold and Ms. Brown appealed again to the Supreme Court of Virginia, but "the day before the Court was to render its opinion in [Ms.] Arnold's case as a combined opinion with [Ms.] Brown's appeal, the Court was notified that [Ms.] Arnold had committed suicide while incarcerated in federal prison."[221] That detail matters because it not only signals the end of a legal claim, but, even more significantly, it signals the end of a vulnerable life and its quest for dignity, status, and an equal liberty to play.

Although the Supreme Court of Virginia neither mentioned dignity nor status in *In re Brown*, status is implicit in the case. Indeed, the case might seem like it has nothing to do with status and the liberty to play. After all, Ms. Brown, the surviving claimant in the consolidated case, was incarcerated in a federal prison in the state.[222] By definition, Ms. Brown's liberty was curtailed, and, further, prison does not readily come to mind as a protected location for the liberty to play. The lower court even appears to have focused, at least in part, on such facts when it found that Ms. Brown's status as an incarcerated person disqualified her from seeking a name change in state court.[223] Specifically, the lower court found that Ms. Brown's "stated reasons for the name change d[id] not outweigh the potential negative impact on the community. Given that the name change reflect[ed] a shift in the gender identity of a federal prisoner, the court decline[d] to accept the application."[224]

And yet, *In re Brown* is concerned with status. In the case, the Supreme Court of Virginia indicates that Ms. "Brown refers to herself using the feminine pronoun. Th[e] opinion . . . therefore also adopt[ed] usage of the feminine pronoun when referring to Brown."[225] The Supreme Court of Virginia stated that Ms. Brown was "diagnosed with Gender Identity Disorder ("GID") and [at the time was] transitioning from the male gender to the female gender."[226] Before the court held that the trial court abused its discretion by refusing to change Ms. Brown's name, it remarked that "the fact that an applicant is transgender and is changing their name to reflect a change in their gender identity cannot be the sole basis for a finding by a trial

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[219] *Id.*

[220] *Id.* at 496.

[221] *Id.* at 495.

[222] *Id.*

[223] *In re* Brown, 770 S.E.2d 494, 497 (Va. 2015).

[224] *Id.* at 496.

[225] *Id.* at 495 n.1.

[226] *Id.* at 495.

court that such an application is frivolous and lacks good cause."[227] The Supreme Court of Virginia also stated that under the relevant state statute, "[t]here is also no evidence in this record that would support the trial court's holding that this name change would have any negative impact on the community. The fact that [Ms.] Brown is a federal prisoner is also not a reason to deny the name change application."[228]

Thus, neither Ms. Brown's status as an incarcerated person nor her status as a transitioning transgender woman was sufficient to deny her a name change.[229] Indeed, this appears true no matter the possible severity of the crimes for which Ms. Brown was convicted.[230] In a case involving a name change request, therefore, Ms. Brown's status as a transgender human being was what mattered, not her status as an incarcerated person. It makes sense, then, that the Supreme Court of Virginia deferred to Ms. Brown's own sense of her own status, specifically indicating, as noted above, that it adopted Ms. Brown's pronoun choice when identifying her.[231]

The liberty to play is also implicit in *In re Brown*. Consider the importance of and everything associated with a name. In the absence of cases in Virginia that explicitly discuss the importance of a name, *Sacklow v. Betts*,[232] a New Jersey case involving a transgender youth, explains why a transgender human being might request a name change.[233] Of course, the state, context, and age of the New Jersey plaintiff are different from those in the Virginia case. Indeed, moving from a case involving the incarceration of an adult for unknown crimes to a case involving the request of an adolescent for a name change may appear jarring. Yet, both cases deal with the request for a name change by vulnerable human beings. Further, both cases imply that the free and the incarcerated possess dignity, status, and, in some measure, the liberty to play. That is, even those who appear to be the lowliest among us, since they are imprisoned for crimes committed, matter.

The *Sacklow* court states the following about the importance of a name change for a transgender minor:

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[227] *Id.* at 497.

[228] *Id.*

[229] *In re* Brown, 770 S.E.2d 494, 497 (Va. 2015).

[230] The Supreme Court of Virginia does not mention Ms. Brown's offenses. Of course, not mentioning Ms. Brown's offenses is not intended to condone her crimes but to focus on her status as an incarcerated transgender woman and what that implies in a discussion of dignity, status, and the liberty to play.

[231] *In re* Brown, 770 S.E.2d at 495 n.1.

[232] Sacklow v. Betts, 163 A.3d 367 (N.J. Super. Ct. Ch. Div. 2017).

[233] *See id.* at 375 ("To force [Trevor] to legally keep the feminine name 'Veronica' would not be in his best interest. Therefore, plaintiff's motion to legally change Veronica's name to Trevor is granted.").

> [A] name change sends an important message to the world, a message solidified and made official with a court's approval. Our State has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth. Recognizing the importance of a name change is one of the ways to help protect the well-being of a transgender minor child. This name change allows the transgender minor child to begin to fully transition into their chosen gender and possibly prevent them from facing harassment and embarrassment from being forced to use a legal name that may no longer match his or [her] gender identity.[234]

The New Jersey case helps us understand that a name change, even as early as adolescence, is not only about status ("sends an important message to the world"), but it is also about the liberty to play as the self ("to begin to fully transition into their chosen gender").[235] The Virginia case involving an adult helps us understand that, even as late as adulthood, the liberty to exist as the self remains important. Ms. Brown appears to have chosen to change her name and begin her transition later in life, possibly because the ability to do so was unavailable to her when she was younger.

Both cases have at least one additional thing in common. They likely reflect safety concerns—one for the free adolescent and the other for the incarcerated adult. Given those safety concerns, a name change is especially important since transgender individuals, according to a study by the Williams Institute at the University of California Los Angeles School of Law, "are over four times more likely than cisgender people to experience violent victimization, including rape, sexual assault, and aggravated or simple assault."[236] For a transgender human being at any age and in any context, then, a hostile world may become a little less so when something as simple—and as important—as a name change upholds that human being's status and ability to thrive on the self's most authentic terms.

Other laws in the states similarly protect the liberty to play for members of the LGBTQIA+ community, and, in the process, they spur hope.[237] In 2022, California decriminalized loitering to engage in sex work.[238] As Governor Gavin Newsom noted in his letter to the California State Senate,

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[234] *Id.* at 373 (internal citation and quotation marks omitted) (alteration in original).

[235] *Id.*

[236] Press Release, UCLA Sch. of L. Williams Inst., Transgender People over Four Times More Likely Than Cisgender People to Be Victims of Violent Crime (Mar. 23, 2021), https://institute.law.ucla.edu/press/ncvs-trans-press-release/ [https://perma.cc/X2V7-GX4C].

[237] *See generally Legislation Affecting LGBTQ Rights Across the Country*, AM. C.L. UNION (Dec. 2, 2022), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022?redirect=legislation-affecting-lgbtq-rights-across-country [https://perma.cc/39BH-YJTZ] (reviewing specific legislation affecting LGBTQIA+ rights in the United States by state).

[238] CAL. PENAL CODE 653.22, *repealed by* Stat. 2022, ch. 86, § 4.

"[t]he author brought forth this legislation because the crime of loitering has disproportionately impacted Black and Brown women and members of the LGBTQ community. Black adults accounted for 56.1% of the loitering charges in Los Angeles between 2017–2019, despite making up less than 10% of the city's population."[239] Relatedly, in his pathbreaking work on sexual and gender minorities, Professor William Eskridge has shown that, as early as the late nineteenth century, cities "prohibited vagrancy and loitering, prostitution and keeping a disorderly house, lewd acts or words, and indecent dress and exposure of the body."[240] Professor Eskridge explains that those laws were applied to desecrate the liberty of members of the community, and until the Second World War, anti-loitering laws were one of many tools used to target members of the community.[241] The fact that versions of such laws persisted in California until 2022 underscores the variety of tools traditionally available to the majority to target the ability of vulnerable individuals to exercise the liberty to exist as themselves.

In sum, there is much about which the LGBTQIA+ community can be hopeful. At the federal level, there is greater constitutional protection for the community's dignity than there has ever been, and the same is true at both the federal and state statutory levels. Nevertheless, as the Section IV shows, threats loom from a variety of sources, including the U.S. Supreme Court's *Dobbs* opinion and what that case may portend for the community's status in the years ahead.

IV. The Threat

The threat to the liberty to play of sexual and gender minorities comes, at least in part, from the *Dobbs* Court's undoing of a core, constitutional right that existed for half a century.[242] In addition, some Justices on the Supreme Court appear perpetually hostile to sexual and gender minorities and to the liberty to play.[243] The Justices appear unwilling to recognize a liberty to play for sexual and gender minorities that is wholly equivalent to that of other communities.[244] In the states, some legislatures have taken actions inimical

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[239] Letter from Gavin Newsom, Governor of the State of Cal., to the Members of the Cal. State Senate (July 1, 2022), https://www.gov.ca.gov/wp-content/uploads/2022/07/SB357-Signing-Message-7.01.2022.pdf?emrc=14a4d2 [https://perma.cc/56CX-QEJU].

[240] WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 19 (2009).

[241] *Id.* at 43.

[242] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022) (reviewing the legal history of the right to an abortion and its resulting history, which has allegedly "embittered our political culture for a half century").

[243] *See id.* at 2301–02 (Thomas, J., concurring) (calling for the Court to review cases in which substantive due process questions expanded civil rights, such as the right to same-sex marriage).

[244] *See id.*

to the liberty of sexual and gender minorities to play as equal human beings.[245] Such threats matter because, as Congress has recognized,[246] if the U.S. Supreme Court can desecrate a woman's constitutional liberty to control her own body—overturning, in the process, the Court's half-century-old precedent—the rights of sexual, gender, and even racial minorities are also at risk.[247] This Section begins with an evaluation of the federal threat to the liberty of sexual and gender minorities to play followed by an evaluation of the state threat.

A. Play After Dobbs

For all its assurances that its holding had no implications for same-sex marriage, the *Dobbs* Court undermined the constitutional foundations on which the ability of same-sex couples to play rested. First, *Dobbs* desecrated women's liberty. In its reverence for the supremacy of traditional masculinity, *Dobbs* overlooked landmark precedent that may have required the Court to uphold the dignity of women as part of an equal-protection analysis that focused on status.[248] The result of the Court's preferred approach was to strip women of their constitutional choice to decide whether they wanted to become mothers,[249] on substantive due process grounds. Keeping in mind that substantive due process cases involving women's liberty were the foundation on which same-sex intimacy and marriage rights rested, "*Dobbs* signaled an abrupt reversal of course" in the extension of constitutional substantive due process rights.[250] Indeed, *Dobbs* placed constitutional rights to contraception, same-sex intimacy, and same-sex marriage at risk.[251] If the Court were to overturn constitutional protection for same-sex marriage, dormant laws in roughly seventy percent of the states

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[245] *See* Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been Introduced This Year*, CNN (Apr. 6, 2023), https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/5829-HR5X] (reporting that at least four hundred seventeen anti-LGBTQIA+ bills have been introduced in states since the beginning of 2023).

[246] *See* Respect for Marriage Act, Pub. L. No. 117–228, 136 Stat. 2305 (2022).

[247] *See supra* Section II (A).

[248] Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 76–79 (2023).

[249] *See id.* at 80 ("Abortion bans historically and practically compel resistant women to continue pregnancy and to become mothers against their will, without recompense or support.").

[250] Amy Gajda, *How* Dobbs *Threatens to Torpedo Privacy Rights in the US*, WIRED (June 29, 2022, 11:09 AM), https://www.wired.com/story/scotus-dobbs-roe-privacy-abortion/ [https://perma.cc/SLB8-XQNS].

[251] *Id.*; *see also* I. Glenn Cohen, Melissa Murray, and Lawrence O. Gostin, *The End of* Roe v. Wade *and New Legal Frontiers on the Constitutional Right to Abortion*, 328 J. AM. MED. ASSOC. 325–26 (2022) (pointing out that other constitutional rights were in jeopardy as indicated in Justice Thomas's concurrence).

would awaken to desecrate the liberty of sexual and gender minorities to play when it comes to marriage.[252]

The liberty to play matters because it goes to status and its fruits in the states. Superior or supreme status has traditionally meant that members of the majority were able to marry wherever they chose while enjoying the abundant state and federal benefits of their marriages, including the right to celebrate their marriages in any forum without fearing hostility.[253] Play goes to the ability of human beings to pursue and enjoy each other's company in an atmosphere that nurtures their interest in each other.[254] The concept of play speaks to a couple's ability to imagine hypothetical futures they might enjoy.[255] It addresses a couple's ability to share a home in which they might be at liberty to engage in consensual sexual intimacy, and it also goes to a couple's ability to participate in the life of their chosen community bereft of fear for its safety and wellbeing.[256] Play includes and transcends a human being's ability to procreate as a traditional condition precedent to participation in the community as a full citizen.[257] Play, then, is about the preconditions for a fulfilling personal, professional, and public life.

Dobbs eviscerated a woman's liberty to play by commanding her to become a mother since the state can commandeer her body and compel her to produce a child.[258] The *Dobbs* opinion paved the way for Justice Clarence Thomas's equally horrific concurring opinion, which envisaged the end of same-sex couples' constitutional liberty to play.[259] In his concurring opinion in *Dobbs*, Justice Thomas shared his willingness to desecrate other unenumerated substantive due process rights under the Fourteenth Amendment, since he found their application "demonstrably erroneous."[260]

> [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold [v. Connecticut]*,[261] *Lawrence*, and *Obergefell*. Because any substantive due process

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[252] *See generally Same-Sex Marriage, State by State*, PEW RSCH. CTR. (June 26, 2015), https://www.pewresearch.org/religion/2015/06/26/same-sex-marriage-state-by-state-1/ [https://perma.cc/97YK-UAM6] (reporting the states that had banned or legalized gay marriages leading up to 2015).

[253] *See generally We Have the Right to Play*, *supra* note 3 (exploring the right to play throughout one's life).

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] Siegel, Mayeri & Murray, *supra* note 248, at 80.

[259] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring).

[260] *Id.*

[261] 381 U.S. 479 (1965).

> decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.[262]

It is noteworthy that Justice Thomas targeted those forms of sexual expression and intimacy that do not traditionally result in the birth of a child. The *Griswold* Court, whose opinion Justice Thomas mentioned, held that a state violates a constitutional, penumbral right to marital privacy if it prohibits the use of a contraceptive or the aiding and abetting of the use of a contraceptive.[263] This right to marital privacy has been long-recognized as sacred to a marital relationship.[264] The *Lawrence* opinion subsequently relied on *Griswold* and held that the Constitution's proffer of liberty embraced the dignity of consensual, same-sex intimacy in the sanctity of the home under the Fourteenth Amendment's Due Process Clause.[265] The *Obergefell* opinion relied on *Lawrence* and *Griswold* in its expansion of dignity's province to encompass the licensing and recognition of same-sex unions in the states.[266] As Justices Sonia Sotomayor, Elena Kagan, and Stephen Breyer noted in their dissent in *Dobbs*, "[i]f the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too."[267]

Although Justice Thomas might seem like an outlier in *Dobbs*, the dissenting Justices pointed out that despite the majority's reassurances to the contrary, there was reason to doubt the sincerity of the majority's "too-much-repeated protestations"[268] that its decision was "a restricted railroad ticket, good for this day and train only."[269] Justice Thomas's concurrence showed that at least one member of the *Dobbs* majority "was planning to use the ticket of today's decision again and again and again."[270]

The Court's *Dobbs* opinion is likely a ticket that might permit it to overrule other substantive due process precedents because several other cases—including *Griswold*, *Lawrence*, and *Obergefell*—upheld protections for rights not recognized in the nineteenth century, the majority's chosen

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[262] *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring) (citations omitted).

[263] *Griswold*, 381 U.S. at 485.

[264] *Id.*

[265] Lawrence v. Texas, 539 U.S. 558, 564–65, 579 (2003).

[266] Obergefell v. Hodges, 576 U.S. 644, 663, 665, 666, 681 (2015).

[267] *Dobbs*, 142 S. Ct., at 2332 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[268] *Id.* at 2331.

[269] *Id.* (quoting Smith v. Allwright, 421 U.S. 649, 669 (1944)).

[270] *See id.*

century of focus in *Dobbs*.[271] That being the case, "[i]t [was] impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even 'undermine'—any number of other constitutional rights."[272] And even if the majority were to be trusted, "law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines."[273] In other words, desecrating a women's liberty to play consistent with her own choices regarding her body would likely have both foreseeable and unforeseeable "catastrophic" effects on other rights and areas of the law.[274]

Congress apparently took the threat posed by *Dobbs* seriously enough, and it enshrined the ability of same-sex couples to play as a federal statutory matter.[275] While Congress did not use the language of play explicitly in the Respect for Marriage Act, Congress mentioned dignity in its findings justifying the enactment of the statute.[276] Likely mirroring Justice Kennedy's emphasis on dignity in *Lawrence* and *Obergefell*, Congress found that "[m]illions of people, including interracial and same-sex couples, have entered into marriages and have enjoyed the rights and privileges associated with marriage. Couples joining in marriage deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children."[277] The language of play is implicit in the phrase "enjoyed the rights and privileges associated with marriage."[278] The phrase shows not only that marriage is the foundation upon which the law has traditionally predicated the ability of the human individual to harvest legal benefits, but the phrase also suggests the pleasure accompanying the reception of legal benefits specifically bestowed on those who participate in the institution of marriage.[279] Congress's tacit alignment of dignity and play confirms that

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[271] *See id.* at 2333 ("As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. . . . Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command.").

[272] *Id.* at 2332.

[273] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2332 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

[274] *See id.* at 2333 ("[T]oday's decision, taken on its own, is catastrophic enough.").

[275] *See supra* Section II (A).

[276] *See* Respect for Marriage Act, Pub. L. No. 117–228, 136 Stat. 2305 (2022).

[277] *Id.* § 2.

[278] *Id.*

[279] *See generally We Have the Right to Play*, *supra* note 3 (exploring the right to play throughout one's life).

status has many benefits and, from the congressional point of view, status comes with stability.

An editorial by Senators Tammy Baldwin and Susan Collins expressly listed the many benefits attending superior or supreme status conferred on marriage.[280] Recalling the history of nonacceptance of same-sex marriages in *Baehr* and *Windsor*,[281] the Senators urged Congress to pass the Respect for Marriage Act:[282]

> While a wedding ceremony and party are rites of passage that everyone should be able to enjoy if they wish, a legally binding marriage comes with another set of amazing rights and responsibilities. Married Americans are afforded tax benefits, often paying a lower rate. Married couples are able to receive earned benefits for spouses, such as Social Security, Medicare, disability and those from the armed services. Those who are legally married are able to visit their spouses when they are ill, while others are often not and are considered strangers under the law. In a dire circumstance when a spouse is incapacitated and unable to make their own medical decisions, their better half has the right and responsibility to make those tough decisions for them, as it should be.[283]

The Senators thus alluded to the creativity and fun in the ceremony uniting two human beings as a matter of law ("enjoy if they wish"),[284] recalling Justice Kennedy's opinions for the Court in *Obergefell* and in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.*[285] In those opinions, Justice Kennedy celebrated marriage as an institution, implying that play was traditionally the entitlement of those holding superior or supreme status.[286] Senators Baldwin and Collins similarly pointed to the "amazing rights and responsibilities" inherent in the institution of marriage, implying that those couples permitted to marry will have more resources available to them to

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[280] Tammy Baldwin & Susan Collins, *The Senate Must Stand Together on Marriage Equality*, WASH. POST (Sept. 6, 2022, 5:35 PM), https://www.washingtonpost.com/opinions/2022/09/06/tammy-baldwin-susan-collins-marriage-equality-overdue/ [https://perma.cc/6L6F-WVCP].

[281] *Id.* (stating that in 1996, only twenty-seven percent of the American population supported same-sex marriages, compared to more than seventy percent in 2022).

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *See generally* Obergefell v. Hodges, 576 U.S. 644, 656–59 (2015) (characterizing marriage as the foundation for the development of societies and governments); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (referencing marriage).

[286] S*ee Obergefell*, 576 U.S. at 656–59 (discussing the importance of marriage); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723 (2018) ("The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services.").

play since they "often pay[] a lower [tax] rate." [287] That is, they are able to love and be loved as themselves given the benefits they may receive from the state.

As discussed in Section II, the Respect for Marriage Act is imperfect.[288] In addition to being imperfect—or, the reason that the statute is likely imperfect—is that the Act is a compromise. Compromise means that there are "limits on the legislation, including restrictions, exceptions, and cumbersome procedures that afford interested parties the ability to contest or delay the implementation of the legislation's effects. These provisions often compromise the legislation's purpose in the sense that they make it harder to achieve the law's purported goals."[289] A key compromise for the passage of the Respect for Marriage Act was a provision carving out aspects of same-sex couple's liberty to play as equals under federal law.[290] Specifically, the Act enshrined First Amendment protections for religious liberty and conscience, since the statute allows religious organizations, institutions, and places of worship to refuse "to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage."[291] The religious exemption likely echoes the U.S. Supreme Court's holding in *Masterpiece Cakeshop*. The Court in *Masterpiece Cakeshop* concluded that a state agency, which ruled against a religious baker's conscientious refusal to bake a wedding cake for a same-sex couple, had violated the baker's First Amendment rights in a case in which the baker argued, "he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation."[292] The liberty to play was implicit in *Masterpiece Cakeshop* given the creativity involved both in the act of baking and in the preparations surrounding marriage, to which the Court was attentive.[293]

The Respect for Marriage Act further fails to guarantee the liberty to play of members of the LGBTQIA+ community in other respects. The Act relies on the Full Faith and Credit Clause in Article IV of the U.S. Constitution, which empowers Congress to enact laws that determine, among other things, the effects of the judicial proceedings of one state in others.[294]

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[287] Baldwin & Collins, *supra* note 280.

[288] *See supra* Section II (A).

[289] Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 703 (2006).

[290] *See* Baldwin & Collins, *supra* note 280.

[291] Pub. L. No. 117–228, § 6, 136 Stat. 2305, 2306 (2022).

[292] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1728, 1732 (2018).

[293] *See id.* at 1728; *see also We Have the Right to Play*, *supra* note 3.

[294] U.S. CONST. art. IV, § 1.

States must honor and respect the public acts and records, including the judicial proceedings, of other states, and they may not interfere in the laws and legal proceedings of other states by projecting the reach of their laws beyond their borders.[295] While the Respect for Marriage Act requires the states to recognize marriages entered into between two individuals in other states, the statute does not require a state to issue marriage licenses to same-sex couples subject to its jurisdiction.[296] In other words, if the Supreme Court were to desecrate the constitutional protection granted to same-sex marriages in *Obergefell*, then whether same-sex couples could get married in a particular state would be determined by each state, with the majority of state laws being hostile to the equal liberty of same-sex couples to marry.[297] States are not required to give effect to the laws of other states, and the Full Faith and Credit Clause may not require states to surrender their own understandings of marriage to privilege those of other states.[298] Even if the Clause did require states to honor marriages entered into in other states, states might object on public policy grounds.[299] Indeed, the Respect for Marriage Act anticipates that legal challenges will be brought against it, and it includes a severability clause.[300]

Beyond *Dobbs* and Congress's response through the Respect for Marriage Act, dissenting opinions from previous cases by current Justices show the hostility they feel toward the equal legal status of LGBTQIA+ individuals and their liberty to play. There have been at least four recent landmark cases touching on the rights of sexual and gender minorities in the states. As indicated above, they are *Pavan*, *Obergefell*, *Windsor*, and *Lawrence*.

In those cases, ten dissenting opinions were filed.[301] In *Obergefell*, Chief Justice Roberts and Justices Scalia, Thomas, and Alito filed dissenting opinions.[302] In *Pavan*, Justices Gorsuch, Thomas, and Alito filed dissenting

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[295] *See id.*; *see also* Hughes v. Fetter, 341 U.S. 609, 612 (1951) (holding that the Full Faith and Credit Clause required Wisconsin to apply Illinois' wrongful death act for a fatal injury that occurred in Illinois); Ord. of United Com. Travelers of Am. v. Wolfe, 331 U.S. 586, 589 (1947) (holding that South Dakota was required to apply Ohio's laws).

[296] Pub. L. No. 117–228, § 4, 136 Stat. 2305, 2305–06 (2022).

[297] *See generally* PEW RSCH. CTR., *supra* note 252; Dorf, *supra* note 154.

[298] *See* Steve Sanders, *Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 96 (2014) (discussing conventional wisdom regarding the Full Faith and Credit Clause).

[299] Dorf, *supra* note 154.

[300] Pub. L. No. 117–228, § 8, 136 Stat. 2305, 2307 (2022).

[301] *See also* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

[302] *See* Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., joined by Scalia & Thomas, JJ., dissenting); *id.* at 714 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 721 (Thomas, J., joined by Scalia, J., dissenting); *id.* at 736 (Alito, J., joined by Scalia & Thomas, JJ., dissenting).

opinions.[303] In *Windsor*, Chief Justice Roberts and Justices Scalia and Alito filed dissenting opinions.[304] In *Lawrence*, Justices Scalia and Thomas filed dissenting opinions.[305] In other words, Justices Thomas, who has been on the U.S. Supreme Court since 1991, and Alito, who has been on the Court since 2006, have dissented in every case that upheld the status of LGBTQIA+ individuals and the liberty to play that has come before the Court.[306] Chief Justice Roberts, who has been a member of the Court since 2005, has dissented in all but *one* case granting the LGBTQIA+ community rights (i.e., *Pavan v. Smith*),[307] and Justice Gorsuch has dissented in one case since his elevation to the Court in 2017.[308]

To explore the kinds of arguments raised in those dissenting opinions, this Section will focus on one dissenting opinion in each case that rejects the equal dignity of members of the LGBTQIA+ community as a constitutional matter. Of course, each case raises a different constitutional question. Therefore, I proceed with caution when assuming that just because a Justice dissented in one case—often several years ago—the same Justice will dissent on the same grounds in any case involving sexual and gender minorities in the years ahead. However, it is almost certain, given the record, that Justice Thomas—and likely Justice Alito—will reject equal status and an equal liberty to play for members of the LGBTQIA+ community in any case that comes before them, no matter the Court's protestations to the contrary in *Dobbs*.[309]

Beginning with *Obergefell*, the *Obergefell* Court held that the Fourteenth Amendment upheld the dignity of same-sex couples when it came

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[303] *See* Pavan v. Smith, 582 U.S. 563, 567 (2017) (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting).

[304] *See* U.S. v. Windsor, 570 U.S. 744, 775 (2013) (Roberts, C.J., dissenting); *id.* at 778 (Scalia, J., joined by Thomas, J. & Roberts, C.J. in part, dissenting); *id.* at 802 (Alito, J., joined by Thomas, J. in part, dissenting).

[305] *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting); *id.* at 605 (Thomas, J., dissenting).

[306] *See Romer*, 517 U.S. at 636 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting); *Obergefell*, 576 U.S. at 721 (Thomas, J., joined by Scalia, J., dissenting); *id*. at 736 (Alito, J., joined by Scalia & Thomas, JJ., dissenting); *Pavan*, 582 U.S. at 567 (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting); *Windsor*, 570 U.S. at 802 (Alito, J., joined by Thomas, J. in part, dissenting); *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting).

[307] *See Romer*, 517 U.S. at 636 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting); *Obergefell*, 576 U.S. at 686 (Roberts, C.J., joined by Scalia & Thomas, JJ., dissenting); *Windsor*, 570 U.S. at 775 (Roberts, C.J., dissenting); *Lawrence*, 539 U.S. at 586 (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

[308] *Pavan*, 582 U.S. at 567 (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting).

[309] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring) (encouraging the Court to revisit cases involving substantive due process issues).

to marriage,[310] and Chief Justice Roberts dissented.[311] For Chief Justice Roberts, only democratically elected legislators could uphold the status of same-sex couples if they were inclined to do so.[312] For the Court to do so was to usurp the role of the legislator.[313] In his reverence for traditional understandings of marriage, Chief Justice Roberts wrote:

> [T]he Court invalidate[d] the marriage laws of more than half the States and order[ed] the transformation of a social institution that ha[d] formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?[314]

For Chief Justice Roberts, marriage was, above all, a legal institution protecting the liberty of heterosexuals to produce children and raise them in a grand gesture of altruistic service to humanity:

> The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.[315]

Constitutional recognition of marriage and the accompanying liberty to play were formulaically reserved, then, for those whose (1) anatomical sex (i.e., male, female) and (2) gender (i.e., man, woman) brought them together (3) in a "lasting bond" (4) in which they had heterosexual intercourse to (5) produce a child (6) to ensure the survival of society and the species (7) by raising the child together. American constitutional law revered heterosexual couples, and *only* heterosexual couples, by granting them all the benefits and protections associated with the institution of marriage. This is what Chief Justice Roberts considered a noteworthy, ancient, and global history universally shared with other heterosexual communities in Africa, Asia, and North America.[316]

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[310] *Obergefell*, 576 U.S., at 675.

[311] *Id.* at 686–713 (Roberts, C.J., dissenting).

[312] *Id.* at 686 ("[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.").

[313] *Id.*

[314] *Id.* at 687.

[315] *Id.* at 689.

[316] *See* Obergefell v. Hodges, 576 U.S. 644, 689 (2015) (Roberts, C.J., dissenting) (referencing the Kalahari Bushmen, Carthaginians, Han Chinese, and Aztecs).

After *Obergefell*, the *Pavan* Court held that a state could not refuse to place the names of a child's same-sex parents on a birth certificate when the children had been born through artificial insemination.[317] The Court reached that holding "[b]ecause that differential treatment infringe[d] *Obergefell*'s commitment to provide same-sex couples the constellation of benefits that the States have linked to marriage."[318] Justice Gorsuch rejected the Court's summary reversal of the state supreme court's decision for several reasons, but most notably because he believed that "nothing in *Obergefell* indicate[d] that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offend[ed] the Constitution."[319]

Justice Gorsuch's rejection of the Court's extension of *Obergefell* deferred to tradition. *Pavan* was about which parents can play, under what circumstances they might do so, and what benefits they and their children might draw from the states when they did so.[320] In their amicus brief, Lambda Legal Defense and Education Fund and GLBTQ Advocates and Defenders indicated the stakes in *Pavan*, arguing that "[b]irth certificates convey an array of practical benefits that affect every American's day-to-day life. Identification on a child's birth certificate 'is the basic currency by which parents can freely exercise . . . protected parental rights and responsibilities.'"[321] As early as the beginning of a human life, status is present, and when the state decides to place one set of parents on its birth certificates but not another, the state is discriminating by choosing to reinforce and publicly announce its discrimination at the birth of each child.

The Court in *Windsor* held that the Federal Government violated equal protection under the Fifth Amendment when a federal statute restricted the definition of marriage to "a legal union between one man and one woman as husband and wife, and the word 'spouse' [as referring] only to a person of the opposite sex who is a husband or a wife."[322] In his dissent, Justice Alito argued that the Constitution did not recognize a right to same-sex marriage.[323]

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[317] Pavan v. Smith, 582 U.S. 563, 567 (2017).

[318] *Id.* (quotations omitted).

[319] *Id.* at 568 (Gorsuch, J., dissenting). Justice Gorsuch raised other issues that he believed disqualified the application of the "strong medicine of summary reversal," including the petitioners not actually challenging a portion of the statute. *Id.* at 569.

[320] *Id.* at 564; *see generally We Have the Right to Play*, *supra* note 3 (discussing the right to play in relationships).

[321] Brief for Lambda Legal Def. & Educ. Fund, Inc. & GLBTQ Legal Advocs. & Defs. as Amici Curiae Supporting Petitioners at 15, Pavan v. Smith, 582 U.S. 563 (2017) (No. 16-992) (citing Henry v. Himes, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388, *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015)).

[322] U.S. v. Windsor, 570 U.S 744, 752 (2013) (citing 1 U.S.C. § 7).

[323] *Id.* at 807 (Alito, J., dissenting).

Justice Alito indicated that the majority appeared to rely on substantive due process arguments in support of its holding, which meant that *Washington v. Glucksberg*[324] required fundamental rights, like those involving marriage, to be "rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty."[325]

According to Justice Alito, it was "beyond dispute that the right to same-sex marriage [was] not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution."[326] The Justice then went on to note that "[t]he family [was] an ancient and universal human institution."[327] Justice Alito was concerned about what "the long-term ramifications of widespread acceptance of same-sex marriage will be."[328] He also noted that judges "are certainly not equipped to make such an assessment."[329] In other words, the Court should defer to the Federal Government when it came to same-sex marriage and to state definitions of marriage, both of which venerated and deferred the traditional right of heterosexuals alone to play.

Finally, the Court in *Lawrence* held that the arrest and conviction of two men engaged in a private and consensual sexual act in the sanctity of the home violated their liberty rights under the Due Process Clause of the Fourteenth Amendment.[330] Justice Thomas opened his dissent by agreeing with Justice Scalia.[331] Justice Scalia opened his own dissent with a discussion of what stare decisis required to overturn a case like *Bowers v. Hardwick*, which had left the regulation of sexual intimacy between individuals of the same sex to the states.[332] Justice Scalia explained that "[w]e have held repeatedly. . . that *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition.'"[333]

For Justice Scalia, states could rely on morality to provide a constitutionally rational basis for their legislation targeting the liberty of sexual minorities to play.[334] The Court, as an apparently neutral arbiter, could

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[324] 521 U.S. 702 (1997).

[325] *Windsor*, 570 U.S. at 808.

[326] *Id.*

[327] *Id.* at 809.

[328] *Id.* at 810.

[329] *Id.*

[330] Lawrence v. Texas, 539 U.S. 558, 564 (2003).

[331] *Id.* at 605 (Thomas, J., dissenting).

[332] *Id.* at 586–87 (Scalia, J., dissenting).

[333] *Id.* at 593 (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)).

[334] *See id.* at 599–601.

not intervene to protect those whom states had chosen to desecrate when states insisted on "enforcement of traditional notions of sexual morality."[335] To these arguments, Justice Thomas appended his own insight that the state law in *Lawrence* was "uncommonly silly" and a waste of legislative resources because it punished consensual, non-commercial, sexual conduct.[336] Ever the literalist, Justice Thomas could not find a general right of privacy or the "liberty of the person both in its spatial and more transcendent dimensions" in the Bill of Rights or any other part of the Constitution.[337] When he reads the Federal Constitution, therefore, Justice Thomas might find no mention of dignity, status, or the liberty to play for members of sexual and gender minorities.

In *Dobbs*'s wake, the threat to the liberty to play for members of the LGBTQIA+ community in the states comes from federal compromises that have weakened the protections that could have been embodied in the Respect for Marriage Act. An additional threat comes from some Justices' traditional hostility to recognizing the equal status of members of the LGBTQIA+ community. This next Section and the Article closes with an examination of the evolving threat in the states to the status and liberty to play for sexual and gender minorities.

B. The Opposite of Play

Commentators have noted that the opposite of play is depression.[338] When a human being experiences a profound sense of hopelessness, that individual is less likely to engage in pursuits that allow them to abandon themselves to the pleasures of the moment without any expectation of themselves, except their own enjoyment. They are, under the circumstances, less likely to thrive. This Section provides an overview of state legislative and other state actions targeting the LGBTQIA+ community. This Section shows that vulnerable human beings in several states face a hostile social and legal environment that desecrates their liberty to play.

For an opening assessment of the precarity of LGBTQIA+ rights in the states, a United Nations official in 2022 issued a warning about the threat to the community's liberty to play in the states, stating that he was:

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[335] *Id.* at 601.

[336] Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965)).

[337] *Id.* at 606.

[338] *See* Jennifer A. Vadeboncoeur & Artin Göncü, *Playing and Imagining Across the Life Course*, *in* THE CAMBRIDGE HANDBOOK OF PLAY 263 (Peter K. Smith & Jaipaul L. Roopnarine eds., 2019) ("As Sutton-Smith (1979) famously argued, 'the opposite of play . . . is not work . . . it is depression'.").

> [D]eeply alarmed by a widespread, profoundly negative riptide created by deliberate actions to roll back the human rights of LGBT people at state level [*sic*] . . . [T]hese include deeply discriminatory measures seeking to rebuild stigma against lesbian and gay persons, limiting comprehensive sexual and gender education for all, and access to gender-affirming treatment, sports, and single-sex facilities for trans and gender diverse persons. The evidence shows that, without exception, these actions rely on prejudiced and stigmatising views of LGBT persons, in particular transgender children and youth, and seek to leverage their lives as props for political profit.[339]

The official, Victor Madrigal-Borloz, was a guest of the United States, and his visit occurred after the Supreme Court's *Dobbs* opinion.[340] Noting *Dobbs*'s perverse impact in the states, Madrigal-Borloz described *Dobbs* as "a regression that [was] already impacting women's health and lives, [and it was] a devastating action for the human rights of lesbian and bisexual women, as well as trans men and other gender diverse persons with gestational faculties."[341] Madrigal-Borloz underscored the importance of dignity when he stated that "[t]he opening words of the Universal Declaration of Human Rights are unequivocal: 'All human beings are born free and equal in dignity and rights.'"[342] The equal status of members of the community in the states was under attack, which was therefore visible to international officials.

The United Nation's visit occurred before the most recent State Equality Index by the Human Rights Campaign was released, and the United Nation's findings appear consistent with those of the State Equality Index.[343] Recall that in 2022: forty states lacked protections for members of the community when it came to jury selection; thirty states lacked protections for members of the community when it came to education; twenty-nine lacked protections for members of the community when it came to credit; twenty-nine states lacked prohibitions against conversion therapy; twenty-five states lacked protections for transgender human beings from discrimination when it came to healthcare; twenty-three did not permit transgender human beings to change their name and gender on the birth certificates; twenty-three lacked

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[339] Press Release, U.N. Hum. Rts. Off. High Comm'n, United States: UN Expert Warns LGBT Rights Being Eroded, Urges Stronger Safeguards (Aug. 30, 2022), https://www.ohchr.org/en/press-releases/2022/08/united-states-un-expert-warns-lgbt-rights-being-eroded-urges-stronger [https://perma.cc/86B8-VJKW].

[340] *See* VICTOR MADRIGAL-BORLOZ, UNITED NATIONS, MANDATE OF THE UNITED NATIONS INDEPENDENT EXPERT ON PROTECTION FROM VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY ¶ 1 (2022).

[341] *Id.* at ¶ 8.

[342] *Id.* at ¶ 9.

[343] *See generally* WARBELOW, *supra* note 172; *see supra* Section II (B).

protections for members of the community in public accommodations; twenty lacked protections when it came to housing; eighteen states lacked protections for members of the community when it came to employment; and twelve did not permit transgender human beings to change their name and gender on their driver's license.[344]

If those facts did not shock the conscience enough, consider a change of the community's identity to underscore the nature of the threat posed by those facts from 2022. Assume that we lived in a world in which members of the LGBTQIA+ community were in the majority, and the following facts were true for the previous year, on which a report was based: Forty states lacked protections for heterosexuals when it came to jury selection; thirty states lacked protections for heterosexuals when it came to education; twenty-nine lacked protections for heterosexuals when it came to credit; twenty-nine states lacked prohibitions against conversion therapy that would try to "cure" heterosexuals of their heterosexuality; twenty-five states lacked protections for heterosexuals when it came to healthcare; twenty-three states did not permit heterosexual human beings to change their information on the birth certificates to reflect their true identities; twenty-three states lacked protections for heterosexuals in public accommodations; twenty states lacked protections for heterosexuals when it came to housing; eighteen states lacked protections for heterosexuals when it came to employment; and twelve states did not permit heterosexuals to change their name and gender on their driver's license to reflect their true identity. Would those facts not be shocking to the conscience? Indeed, that is not the world in which we live—nor should it be. The idea is to make the point in a discussion of dignity, status, and the liberty to play that no human being ever should be compelled to have their liberty to play desecrated just because they are part of a minority group that has traditionally been vilified for no other reason other than the majority's archaic choice to desecrate it.

Consider Florida Governor Ron DeSantis, who believes a state devoid of "woke ideology" is a mark of philosophical sanity and normalcy.[345] In 2022, Governor DeSantis signed a bill that restricted references to sexual orientation and gender in the educational curriculum.[346] Florida now

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[344] WARBELOW, *supra* note 172.

[345] Matt Dixon & Gary Fineout, *"Where Woke Goes to Die": DeSantis, with Eye Toward 2024, Launches Second Term*, POLITICO (Jan. 3, 2023, 2:24 PM), https://www.politico.com/news/2023/01/03/desantis-2024-second-term-00076160 [https://perma.cc/4PGQ-2MDJ] ("'We reject this woke ideology. We seek normalcy, not philosophical lunacy. We will not allow reality, facts, and truth to become optional,' DeSantis said . . . 'We will never surrender to the woke mob. Florida is where woke goes to die.'").

[346] Jo Yurcaba, *DeSantis Signs 'Don't Say Gay' Expansion and Gender-Affirming Care Ban*, NBC NEWS (May 17, 2023, 12:30 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-signs-dont-say-gay-expansion-gender-affirming-care-ban-rcna84698# [https://perma.cc/ZH3A-V8DM].

prohibits "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity . . . [to] occur in prekindergarten through grade 8 . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards."[347] As the American Civil Liberties Union of Florida explained after the 2022 bill became law, "[b]ecause of this anti-LGBTQ+ law, teachers and students will be silenced from speaking and learning about LGBTQ+ siblings, family members, friends, neighbors, and icons."[348] Of course, it might be contended that the bill is neutral; not even heterosexuality may be mentioned under the bill since heterosexuality is also a sexual orientation.[349] However, the bill is almost certainly not meant to eliminate discussions of heterosexuality from the classroom.[350] The law is meant to desecrate the liberty of LGBTQIA+ individuals by preventing us and our allies from talking about our lives, our history, and by preventing us and our allies from learning about those like us.[351]

The Florida law not only threatens members of the community in the state, but it also puts teachers at risk. Both tenured and untenured teachers in Florida could lose their jobs under the law.[352] The National Education Association warned the public about a school district's following duties:

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[347] FLA. STAT. ANN. § 1001.42(8).

[348] Press Release, Am. C.L. Union Florida, ACLU of Florida Denounces 'Don't Say Gay' Bill (HB 1557), Signed into Law by Governor DeSantis (Mar. 28, 2022), https://www.aclufl.org/en/press-releases/aclu-florida-denounces-dont-say-gay-bill-hb1557-signed-law-governor-desantis [https://perma.cc/NUC4-W43L].

[349] *See* Kate Cohen, *'Don't Say Gay' Says 'Don't Say Straight,' Too. Let's Exploit It.*, WASH. POST (Apr. 15, 2022, 8:00 AM), https://www.washingtonpost.com/opinions/2022/04/15/florida-dont-say-gay-says-dont-say-straight-too/ [https://perma.cc/BHV4-BH89] (arguing that LGBTQIA+ advocates should enforce the prohibition for all mentions of sexuality, including discussions or depictions of heterosexual relationships).

[350] *See* Arwa Mahdawi, *Florida's 'Don't Say Gay' Law May Sound Vague – But Its Purpose Is Clear*, GUARDIAN (July 2, 2022 9:00 AM), https://www.theguardian.com/commentisfree/2022/jul/02/dont-say-gay-florida-week-in-patriarchy [https://perma.cc/9VEV-HC59] (discussing the clear purpose behind the bill and its anticipated unequal enforcement).

[351] *See* ABBIE E. GOLDBERG, UCLA SCH. L. WILLIAMS INST., IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA (2023), https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents/ [https://perma.cc/4UCY-XYH7] (reporting that LGBTQIA+ students and students with LGBTQIA+ parents have experienced increased harassment in schools and have been forced to not talk about their identities as a result of the bill).

[352] NAT. EDUC. ASSOC., WHAT YOU NEED TO KNOW ABOUT FLORIDA'S "DON'T' SAY GAY" LAW 1 (2022), https://www.nea.org/sites/default/files/2022-06/FL%20Dont%20Say%20Gay%20KYR%20-%20Updated2022.06.pdf [https://perma.cc/GJC2-7QFA].

> School districts are "primarily responsible" for ensuring compliance with the law. See Fla. Stat. § 1008.32. A school could decide that discipline or termination is appropriate for violations of the law. The danger of enforcement against individual educators is amplified by the fact that they enjoy few job protections. For educators hired after 2011, tenure protections are nonexistent, and they can be dismissed at the end of their annual contracts without cause. Id. § 1012.335. And, while tenure protections are available for those hired before 2011, schools may still attempt to portray violations of the law as "gross insubordination" or "willful neglect of duty" that would provide cause for discipline or dismissal. Id. § 1012.33.[353]

School is the place where a young human being learns the rules governing play, learns to play with others, and learns how play is part of society at large. As a result of such laws, school is diminished in its provision of essential, educational freedom both for the student and the teacher.[354] Students and teachers are both restricted in their freedom to discuss what they see in their lives, communities, and in the nation. Silence replaces speech, and fear reigns over freedom, asphyxiating the liberty to play at school in the process, with untold effects for the society and nation at large.

Significantly at risk are transgender and non-binary human beings in the states. In 2022, one hundred fifty-five anti-transgender bills were filed in state legislatures.[355] "More legislation has been filed to restrict the lives of trans people so far in 2022 than at any other point in the nation's history, with trans youth being the most frequent target of lawmakers."[356] When it comes to non-binary human beings, Oklahoma now requires each human being born in the state to identify as male or female on state birth certificates.[357] Oklahoma Governor Kevin Stitt implicitly noted the relationship between dignity and status and the sacred and unsacred. Governor Stitt said, "I believe that people are created by God to be male or female. . . . There is no such thing as nonbinary sex."[358] If a human being born in Oklahoma wants legal recognition of their truth as a non-binary human being, the state requires that

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[353] *Id.*

[354] *See We Have the Right to Play*, *supra* note 3, at 375–76.

[355] Anne Branigin & N. Kirkpatrick, *Anti-Trans Laws Are on the Rise. Here's a Look at Where — and What Kind.*, WASH. POST (Oct. 14, 2022, 8:00 AM), https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/ [https://perma.cc/Z2VP-Q2YF].

[356] *Id.*

[357] Kimberly Kindy, *Okla. Stakes Out New Battleground on LGBTQ Rights: Birth Certificates*, WASH. POST (Apr. 30, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/04/30/oklahoma-birth-certificate-ban-nonbinary/ [https://perma.cc/AX5L-D93G].

[358] *Id.*

human being to fall into one of two traditionally permitted categories to enjoy the liberty to play, with all of the state's benefits.

Finally, consider bills targeting the quintessential playful act of social and political commentary—drag shows. Drag has a long history, and it plays with gravity and levity; status and irreverence; and liberty and status, among other concepts.[359] Drag compels people to evaluate what society holds sacred, and the performance art requires reflection upon and a celebration of the exuberance of gender.[360] Explaining how drag is about the "perversion of our understanding of gender, and by extension, ourselves," RuPaul Charles, possibly the best-known drag performer,[361] revealed, "We queens take on identity, and it is always a social statement. . . . It's all nudge, nudge, wink, wink. We never believe this is who we are. That is why drag is a revolution, because we're mocking identity. We're mocking everyone."[362] Drag plays with our expectations of gender and our performance of both sex and gender.[363] As RuPaul implied, we are all performers of sex and gender.[364] In some sense, every human being interprets and reflects their relationship to sex and gender in the manner in which they choose to show up as themselves in the world.[365] Of course, some might find RuPaul's insight objectionable, holding on to traditional understandings of sex and gender in the process as fixed and unyielding, but that does not undermine the power of RuPaul's insight that we are all performing gender.[366]

Perhaps that is the point of the fourteen bills targeting drag shows, which were presented in eight states in the first two months of 2023 alone.[367]

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[359] *See generally* Eir-Anne Edgar, Xtravaganza!*: Drag Representation and Articulation in* RuPaul's Drag Race, 34 STUD. POPULAR CULTURE 133 (2011) (discussing how drag shows plays with many themes as a form of cultural expression).

[360] *Id.* at 138 ("*Drag Race* illustrates that drag is much more than a man putting on a dress. Instead, we see a constellation of feminine performances that help us better understand the constructed nature of gender.").

[361] *See* Micaela Pérez Vitale, *RuPaul: The Journey from Drag Queen to Emmy-Winning TV Icon*, MOVIEWEB (June 29, 2022), https://movieweb.com/rupaul-drag-queen-tv-icon/ [https://perma.cc/BGS7-PN9Z] (proclaiming that RuPaul is widely known as the most famous drag queen around the world).

[362] Jenna Wortham, *Is "RuPaul's Drag Race" the Most Radical Show on TV?*, N.Y. TIMES MAG. (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/magazine/is-rupauls-drag-race-the-most-radical-show-on-tv.html [https://perma.cc/5JWE-RKPS].

[363] *Id.*

[364] *Id.*

[365] *See id.*

[366] *See also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 8 (1990) ("If gender is the cultural meanings that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way. Taken to its logical limit, the sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders.").

[367] *See* Kate Ruane et. al, *Laws Restricting Drag Shows Should Scare Everyone Who Believes in Free Expression*, PEN AM. (Jan. 19, 2023), https://pen.org/drag-show-laws/

Proponents of the bills would like to return society to a time when the performance of sex and gender was governed by prurient understandings of human expression.[368] One bill attempts to align drag with the corruption of minors when it turns the attendance of a minor at a drag show into a felony, and other bills treat a drag performance as a performance that is "adult or sexually oriented."[369] If those bills became law, the liberty to play when it comes to something so personal to every human being as the performance of gender would be desecrated in the name of reverence for traditional sex and gender understandings. Sacrificed in the process would be our ability to understand and question why we revere the things we do when it comes to sex and gender and whom those traditional understandings have benefited as a matter of law.

In sum, the liberty to play for members of the LGBTQIA+ community is depressed in several states. And that depression is the result of attacks on key rights on which the community depends to thrive, including the liberty to express itself and thrive as itself. My conclusion follows.

V. Partial Lessening and Play

In conclusion, the present moment likely represents a partial lessening in the intensity of the traditional opposition to the community's liberty to play. The lessening is partial in at least two senses.

First, it is not an outright cessation of the traditional hostility to members of the community. It is, instead, a decrease in that ancient hostility, which is memorialized and rejected in constitutional precedents like *Pavan*, *Obergefell*, *Windsor*, and *Lawrence*. The reduction in hostility is also visible in the Respect for Marriage Act and in the assurances in *Dobbs*—however dubious—that constitutional protections for same-sex marriage are untouched by the opinion. That the *Dobbs* Court would make such protestations shows how extraordinary the desecration of women's rights was in the case and how potentially venomous the case was when it came to the rights of other traditionally vulnerable communities. The lessening of the traditional hostility is only partial because the assessment acknowledges that, while federal hostility to members of the community is less strident and overarching than it used to be, powerful voices remain on the U.S. Supreme Court and in the states, and these voices are committed to completely desecrating the liberty to play of members of the community in the name of

[https://perma.cc/LE2Q-DELF] (compiling state bills that prohibit drag shows and interactions with minors).

[368] *See generally id.* ("These attacks on drag shows and performers strike at the heart of our rights to gather, read, and perform together.").

[369] *Id.*

tradition. Indeed, those committed to wounding the community's rights in the states appear renewed in their vigor.[370]

The reduction in the traditional hostility is also partial in the sense that opposition to the community's equal status is the result of prejudice. Discrimination against members of the community, which injures the community's liberty to play, is the result of reverence for traditional understandings of sex and gender to which Justices on the Court and actors in the states appear betrothed. Such partiality means that the liberty to play for sexual and gender minorities is still at risk, and, indeed, what the Justices expressed in *Dobbs* shows that if women's constitutional rights may be sacrificed on the altar of reverence to traditional understandings of sex and gender, then no vulnerable community's rights are constitutionally sacred.[371] Being partial to tradition and its implications for bodies, sexuality, and self-expression means that tradition may return at any moment to shackle and repel the liberty to play for those it did not historically permit to play as a matter of law.[372]

The question, then, becomes what the response should be—what to do when others are committed to desecrating the self's liberty to play and thrive as the self? Elsewhere, I have focused on the relationship between dignity, reverence, and desecration, and I have observed that desecration has several meanings.[373] First, desecration is the experience by those holding superior or supreme status in our legal system that the people and objects they have traditionally venerated are not being sufficiently revered.[374] In response, they target for destruction or indifference everything that matters to those they consider irreverent or insufficiently reverent.[375] Desecration is also the response of those deemed insufficiently reverent to the requirement that they revere what is considered sacred by their legal superiors.[376]

Consider, here, the plight of transgender human beings. In some states, transgender human beings are considered unsacred—anathema even—and, they are, therefore, considered fit subjects for regulation. Why? Because transgender human beings appear to reject what the state traditionally believes people should do as either men or women. And yet, transgender human beings cannot flourish without being their true themselves, which is, of course, true for everyone. So, even if they are believed to desecrate what

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[370] *See supra* Section III (B).

[371] *See Dignity. Reverence. Desecration.*, *supra* note 3, at 1208; *We Have the Right to Play*, *supra* note 3, at 424.

[372] *See generally Dignity. Reverence. Desecration.*, *supra* note 3.

[373] *See id.* at 1195.

[374] *Id.*

[375] *Id.*

[376] *Id.*

others hold sacred just by being themselves, transgender human beings, if they are to honor themselves, must themselves uphold the liberty to play as themselves, and they should emphatically be allowed to do so.

As such, the response to desecration is desecration. The response to desecration is the liberty to play. For, what is the liberty to play if not the right of every human being to show up and play as their utmost self simply by existing as themselves? Indeed, what is the liberty to play if not each human being's freedom to thrive in the present unchained by traditions that ancient men wrote to serve their own pleasures and appetites, which others, in our time, would gladly resuscitate to appease their own predilections and purposes?