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Disciplinary Note

## **SEXUAL VIOLENCE AND SEXUAL DIGNITY**

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In his Theology Brief *Justice and Rights*, Professor Wolterstorff explores the idea of *first-order justice* from a Christian perspective, including the place of considerations of justice in disciplinary subject matter. Wolterstorff rejects the term “distributive justice” for the type of justice which consists of agents acting justly in their ordinary affairs. However, although such justice can often be seen in terms of ways benefits and/or burdens are distributed, that is not always the case. Consider rape, which Wolterstorff characterizes as “a profound violation of justice, a profound wrong. But what fundamentally makes it wrong is not that benefits and burdens have been mal-distributed – though they have been. What makes it wrong is that the victim has been violated, *treated with indignity*” (emphasis added).

In a forthcoming article in the *Yale Journal of Law & Feminism*, I explore this idea at quite some length—that dignity is an organizing principle or idea underpinning the crime of rape. My starting point is the observation that dignity has been deployed by judges, in jurisdictions from America to Zimbabwe, to do both expressive work (e.g. as a normatively powerful value which is useful for condemning the multiplicity of rape’s harms) and doctrinal work (e.g. to ground arguments about how the doctrines of rape law should evolve) in relation to the criminalization of sexual violence. As Professor Wolterstorff notes, dignity has achieved the status of an assumed norm in international human rights. Christopher McCrudden (2008) has mapped the emergence of human dignity as the hallmark of international human rights law since the second half of the twentieth century, in resilement from the horrors of the Second World War. The atrocities committed in that war by their nature denied the inherent, equal excellence and worth of various people groups. “Dignity” as a political and legal value affirms the equal, inalienable worth of all people (McCrudden refers to this as dignity’s “ontological claim”) and resulting “relational claims” as to how people can and cannot be treated.

“Dignity talk” is now prevalent in law, not only in jurisdictions like German, Israel and South Africa which have enacted dignity as a constitutional norm of the highest order; but also in jurisdictions the constitutions of which make no direct reference to dignity. For example, in the United States, some of the Supreme Court’s most seminal decisions—relating to abortion, same-sex marriage, capital punishment—turn on dignity.

In my work, I trace the permeation of dignity talk into the legal sub-discipline of sexual violence. My work is “bottom up”, in that I seek to understand how and why judges use dignity in caselaw. To establish a framework for that analysis, I first map the broad contours of a feminist understanding of “sexual dignity” in sexual violence theory; in that body of work, it is possible to identify an emerging consensus on the meaning of dignity as a thick, multidimensional concept, capacious

enough to express the multiplicity of rape's wrongs. That feminist theory of sexual dignity is then applied to review the use of dignity in sexual violence caselaw from multiple jurisdictions.

One key point I explore is the distinction made by Jean Hampton between diminishment of dignity and degradation. Hampton is cited by Wolterstorff as explicating quite clearly the wrongfulness of dignity-defying acts: "A person wrongs another, treats them as they have a right not to be treated, 'if and only if (while acting as a responsible agent) she treats him in a way that is objectively ... demeaning, that is disrespectful of [that person's] worth'". Importantly, Hampton has elsewhere argued that there is an important distinction between "diminishment (the mere portrayal of someone as lower) and degradation (the actual lowering of a person's value)" (Hampton 1999, 138). The distinction is important, argues Hampton, because

[w]e need a way of understanding when sex can be wrong, even while holding to the idea that its wrongfulness is never something that can lessen a woman's worth as a person, no matter what her society (or her psychologists) might tell her (or do to her) in the aftermath of the experience. The point of distinguishing between diminishment ... and degradation ..., then linking wrongdoing only with diminishment, is that we are able to affirm that the value of the victim always persists after the crime.

Diminishment may be subjectively experienced as degradation; indeed, rape is "a kind of event that seeks to make that diminished status a reality. The woman is used as though she is an object, and so she is thought to be one" (Hampton 1999, 135). But importantly, dignity as it is understood in secular Western law and philosophy is assumed to be permanent, a point that the diminishment/degradation highlights well.

For Christians a sacred conception of dignity premised on *imago Dei* is even more fundamentally understood as inalienable and permanent. Because our dignity derives from being made in God's image, it cannot be taken away, even by the most harmful of acts. It can only be denied. This can, of course, be subjectively experienced by the rape victim as an actual degradation of selfhood or the "cessation of selfhood" (West 1999, 109); but her dignity-bearing self, her *imago Dei* self, endures.

Professor Wolterstorff's Brief centres justice in dignity. This Note has elaborated by highlighting one way in which a feminist understanding of sexual dignity – a key concept underpinning the criminal justice response to sexual violence – resonates with a Christian understanding of the *imago Dei*-derived dignity of all humankind as permanent and inalienable. Human dignity may be denied but it cannot be extinguished.

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## References

Hampton, Jean. *Defining Wrong and Defining Rape, in A Most Detestable Crime: New Philosophical Essays on Rape* 135 (Keith Burgess-Jackson ed., 1999), using the concepts of diminishment and degradation to understand morally wrongful sex.

High, Anna. *Sexual Dignity in Rape Law*, \_\_ Yale J. L. & Feminism \_\_ (2021), exploring the idea of sexual dignity in feminist legal theory and comparative case law on sexual violence.

McCrudden, Christopher. *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int'l L. 655 (2008), for discussion of the emergence, meaning and function of human dignity as a legal value in international and comparative human rights law.

West, Robin. *Caring for Justice* (1999), for a feminist account of the harms to selfhood involved in being treated as a sexual object.

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