
16. A dignitarian feminist jurisprudence with applications to rape, sexual harassment and honor codes

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Feminist insights, ideas, initiatives and agendas are not – and should not be – confined to a single, specific value system. Because they are amenable to various theories and ideologies, they may benefit from multiple worldviews and terminologies.

Since its modern beginnings in the nineteenth century, feminism has mastered diverse value-languages, each relevant to a particular context. Within the framework of classical liberalism and the assertion of equal rationality and thus autonomy and civil liberties, liberal feminism claimed that all women were equally rational, autonomous and deserving of civil liberties.¹ As sensitivity to dominance and the oppression of subjugated classes by hegemonic groups grew, radical feminism set out to eradicate suppressive hegemonic patriarchy and liberate dominated women as a class.² With the proud proclamation of minority distinctiveness, relational feminists began demanding that women be acknowledged and celebrated for their nurturing and caring constitution.³ The development of identity politics led to the emergence of black, lesbian, religious and numerous other feminisms, intersectionality, postmodernism, post-colonialism and neoconservatism, all inspiring lively feminist vocabularies and patterns of thought.⁴ This flexibility, versatility and adaptability has allowed feminism to become relevant to a wide range of audiences across diverse times and places, attesting to the movement's vitality.

And yet, academic feminists have largely neglected the study of human dignity as a central organizing value. This is anomalous. Across the globe, human dignity, the inherent value of humanity per se, is increasingly regarded as the basis of human rights. The United Nations declared, on 10 December 1948, that human dignity is the foundation of universal, fundamental human rights.⁵ Nourishing contemporary humanism and underlying and framing international human rights discourse, human dignity has, over the decades since, formed the basis of multiple constitutions and treaties.

¹ See Introduction to this volume.

² See chapter by Chao-ju Chen, *Catharine A. MacKinnon and equality theory*, in this volume.

³ See chapter by Robin West, *Relational feminism and law*, in this volume.

⁴ See chapters by Dorothy E. Roberts, *Critical race feminism*, and Laura A. Rosenbury, *Postmodern feminist legal theory*, in this volume.

⁵ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). For extensive reference, see THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND (Yael Danieli et al. eds., 1999).

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I believe that feminism should rethink and possibly rephrase its insights, criticisms, arguments and demands in light of this principle. First, it is crucial that feminism speak the international language of universal human rights. Second, human dignity is both fundamental and universal, hence suitable to underlie feminist arguments and demands. Third, dignity-oriented feminism avoids the problematic questions of (women's) similarity (to men) and difference (from them). Human dignity constitutes each member of the human family as equally valuable, disregarding concrete, specific similarities or differences among them. This is a solid basis for feminist claims.

In part because it is humanity's common denominator, however, human dignity is a thin concept by design. To deepen its relation to feminism, I couple the treatment of dignity in this chapter as elsewhere with the twinned concept of respect, by which I mean the recognition of the value of each individual's unique characteristics, as I explain and elaborate in the following section. The feminism I espouse is therefore based on both dignity and respect. I refer to this as dignitarian feminism.

In addition to overlooking dignity, feminist discussion, analysis and criticism of patriarchy has also failed to adequately address one of patriarchy's principal pillars – the honor system. Rather than belonging to distant, exotic cultures, honor properly defined constitutes a core element of most – if not all – patriarchal societies, past and present. Feminism must acquaint itself with honor, in order to better understand, critique and deal with its impact on the construction of masculinity and femininity and the function of gender roles and politics within patriarchal cultures.

Every type of feminism can benefit greatly from identification, analysis and critique of honor-based social constructions and conventions. Dignitarian feminism, as I attempt to construct it, is particularly alert to honor-based practices. Honor and dignity are each the foundation of the value we ascribe to individuals: one evaluates them in relation to honor codes and their competing peers, the other as equally worthy members of the human family. Honor and dignity each dictate and underlie distinct social orders that sometimes conflict and clash. From a dignitarian perspective, therefore, the underlying logic of honor and its social manifestations often offend women's human dignity and respect, infringing their dignity-and-respect-based human rights. Dignitarian feminism thus studies honor and treats it as a fundamental obstacle to the recognition of women's full and equal human dignity and respect. The detection and critique of honor-based patterns is vital to dignitarian feminism. Dignitarian feminism therefore includes the dignity-and-respect-based critique of honor patterns.

This chapter addresses dignity, respect and honor in the context of feminism and feminist jurisprudence, demonstrating the practical applications of this perspective through reference to Israeli society, culture and law. Israel's is a patriarchal culture steeped (semi-consciously) in a nationalistic form of the honor system. I claim that this 'Zionist honor,' as I call it, contrasts with Israel's (partial) bill of rights – the Basic Law of Human Dignity, Respect and Liberty, enacted in 1992 in the spirit of the United Nations' Universal Declaration.⁶ Both documents ground human rights – including women's rights – upon the fundamental notions of human dignity and respect. Yet ironically, all three concepts – honor, dignity and respect – are represented in Hebrew

⁶ Universal Declaration of Human Rights, *supra* note 5.

by a single term, *kavod*, which binds them closely together, making each indistinguishable from the others. Hebrew-speaking Israelis can hardly tell them apart.

In response to this declared allegiance to human dignity and respect, the semi-conscious commitment to patriarchal (Zionist) honor and the inherent confusion between dignity, honor and respect, I have sought over the past two decades to develop a dignity-and-respect-based and honor-sensitive feminist jurisprudential analysis.⁷ It is from this feminist perspective that I initiated and drafted Israel's 1998 sexual harassment law,⁸ which has reshaped Israeli discourse on this topic. I then drafted a new rape law along the same lines; it has been introduced to the legislature several times but not yet enacted.

Although designed in Hebrew for the Hebrew-speaking Israeli public, I believe this jurisprudential feminist model can be adopted by other societies, just as liberty- and equality-based feminisms – tailor-made for English-speaking societies – have been espoused across the world.

This chapter summarizes my formulation of dignitarian legal feminism and shows how it generated Israeli sexual harassment law. In the first section, I elucidate the concepts and world view of human dignity and respect and their feminist implications. In the remainder of the chapter, I deploy a dignitarian feminism to criticize three widespread social practices: codes of honor, which underlie many patriarchal societies; rape and rape law in common law criminal systems; and the sexual harassment of women world-wide. Thus, in Section II, I first introduce patriarchal honor and the way in which it impinges upon the human dignity and respect of women. I then offer a feminist model of a dignitarian feminist jurisprudence that reformulates familiar feminist arguments in a way that highlights women's dignity and respect and the fundamental challenges posed by honor-based social systems. As a case study I present a feminist approach to rape and rape law. In Section III, I analyze and critique social and legal constructions of rape. Section IV describes how honor-based patriarchy breeds sexual harassment and infringes upon women's dignity and respect. It then outlines the structure of Israel's dignity-and-respect-based sexual harassment law.

I. HUMAN DIGNITY, RESPECT AND FEMINISM

A. Human Dignity

Over the centuries, the English term 'dignity' has carried diverse meanings.⁹ I use it in accord with its meaning in the United Nations' Universal Declaration as the foundation

⁷ I have developed this feminist perspective in many publications, mostly in Hebrew. In Hebrew, see, e.g., ORIT KAMIR, *KVOD ADAM VE'CHAVA* [ISRAEL'S DIGNITY-BASED FEMINISM IN LAW AND SOCIETY] (2007). In English, see ORIT KAMIR, *FRAMED: WOMEN IN LAW AND FILM* (2006).

⁸ Prevention of Sexual Harassment Law, 5758-1998, *Sefer HaHukim* [SH] [Book of Israel's Statutes] No. 1661 at 166.

⁹ This has been noted by many writers. See, e.g., UNDERSTANDING HUMAN DIGNITY 1 (Christopher McCrudden ed., 2014).

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of human rights. The declaration's preamble states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'¹⁰ Article 1 adds: 'All human beings are born free and equal in dignity and rights.'¹¹

According to this founding narrative, all human beings belong to a single universal family, sharing its embedded value. From birth to death, each and every person is equally and inherently endowed with this inalienable ethical quality. Human dignity is thus innate, absolute, equally and universally embedded in every member of our species. The preamble to the UN declaration stresses that global recognition of this internationally accepted axiom is the foundation of freedom, justice and peace.¹²

Stamped upon every individual and forming an integral and essential normative part of being human, dignity is an ethical prescriptive rather than an empirical descriptive. The metaphorical stamp of dignity determines and constitutes individuals as worthy by virtue of their humanity, rather than merely describing them as such. Dignity's attributes – value, worth, virtue and merit – pertain to an innate, sacrosanct ethical quality. They convey the antithesis of measurable price.

The focus on human dignity reflects the Kantian paradigm of human beings as subjects – autonomous, moral, thinking, feeling and living creatures. Kantian moral philosophy stipulates that, in contrast to objects, which are a means or vehicle, human subjects contain and determine their own ends.¹³ This constitutes their unique, specific, inherent value. They are not – and must never be treated as – a means to another subject's ends. Rather, they must always also be viewed as ends in their own right, cherished and valued on this basis. This ethical substance of human dignity comprises the value ascribed to humanity and human beings in the world constituted by the UN declaration.

Human dignity is thus the inherent, absolute and inalienable value of human subjects (non-objects) who, by definition, comprise and determine their own ends. As such, it must always be acknowledged, preserved and upheld fully and unconditionally. Violation of this quality or the treatment of any human being in such a way as to disregard it objectifies individuals, reducing them to a means to an end in breach of their innate value. The universal human family must always acknowledge, protect and punish the denial of any person's human dignity – even if that person does not acknowledge his or her own – or other people's – human dignity.

According to the Universal Declaration, fundamental human rights are the concretization of international universal norms designed to ensure reverence of each and every person's human dignity. In line with this, fundamental human rights are those that safeguard the value of each individual's subjectivity. Enslavement, silencing, rape and the withholding of food, clothing, family and education all compromise human dignity by failing to acknowledge or cherish the victims' autonomous subjecthood. Basic

¹⁰ Universal Declaration of Human Rights, *supra* note 5, Preamble.

¹¹ *Id.* at Art. 1.

¹² *Id.* at Preamble.

¹³ See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 40 (Mary Gregor and Jens Timmermann eds., 2012) (1785). For interpretation, see MICHAEL ROSEN, *HUMAN DIGNITY: ITS HISTORY AND MEANING* 19–31, 80–90, 142–156 (2012).

human rights, therefore, include the right not to be enslaved, starved, raped, silenced or deprived of education, a family and sexual autonomy.

Within this framework, feminism rightly demands that women be recognized as integral and inviolable members of humanity on a par with all other members, imbued with the same innate dignity as subjects rather than objects. Any social, cultural, legal and religious structures or paradigms that deny women this status and its full recognition are violations of human rights and must be fought and resisted. For example, the interpretation of Judeo-Christian religious dogma, according to which man alone is made in God's image, women being responsible for the introduction of sin into the world, sets the stage for women to be treated as second-class people whose fate it is to be ruled and subjugated by men.¹⁴ It thus directly affects women's human dignity and their basic human rights. The view that male babies are a precious gift and female babies a cursed burden similarly impinges upon the human dignity of girls and women and has historically encouraged the killing of baby girls, their enslavement and forced marriage.¹⁵

These two examples illustrate the power but also the minimalistic scope of both human dignity and the feminism it inspires. Under a feminism founded on dignity, it is the negation of women's full human worth that is unacceptably offensive. While such a human-dignity-based view propounds that human value – including that of women – must be revered, it limits the scope of gender-based offenses that may be defined as unacceptable. The idea that women should be accorded separate but equal treatment in line with their special abilities, needs or capacities, for example, does not expressly denounce women's full human worth and may thus elude human-dignity-based feminist criticism.

B. Respect

In order to expand the scope of a dignitarian feminism, human dignity must be broadened to include another value – namely, respect, that is, the acknowledgment of the value of each individual's unique identity. Personal identity combines numerous elements. Some of these are dictated, encouraged or promoted by sociocultural norms, while others are idiosyncratic. Some involve social interaction or cultural affiliation; others are private and discrete. Personal identity forms over time; it is labile, fluid and ever-changing. It reflects a measure of self-determination – the concrete manifestation of our human autonomy under any given circumstances. Contemporary liberal societies cherish and encourage personal identity and the human achievements unique to each individual, championing individual manifestations of human potential as part of the pluralistic framework. Yet what value do we assign to distinctive personal identity

¹⁴ For classical feminist theological discussion of such constructs, see GERDA LERNER, *THE CREATION OF PATRIARCHY* 16, 201 (1986); JOHN A. PHILLIPS, *EVE: THE HISTORY OF AN IDEA* 27 (1984).

¹⁵ From China to India and the Arab world, treatment of daughters as a curse has led to female infanticide. For the devastating impact of combined cultural and economic factors on the lives of women in these parts of the world, see Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. TIMES (Dec. 20, 1990) <http://www.nybooks.com/articles/1990/12/20/more-than-100-million-women-are-missing/>.

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per se? I suggest that this is summed up in the term 'respect.' Although the verb carries a broad range of meanings, the noun conveys the distinctive value of individuality, which, I submit, we should adjoin to the concept of dignity.

By attributing human dignity to humanity itself, we associate it with a fundamental, generic factor common to all human beings. Human dignity constitutes the innate ethical family trait shared by all members of the human family. By definition, this is a 'thin' abstract quality, none of us being summed up by it. It does not recognize the diverse, rich personalities that we develop on the foundation of our core common humanity. It does not revere the characteristics, abilities, desires, choices and strivings that each individual develops and realizes, configuring him- or herself as a specific, complex, multifaceted human creature embodying a unique personal identity. To enrich a dignitarian approach, we must acknowledge not merely the worth of our common human denominator but also the value of every individual's unique, exclusive identity, which dignity overlooks. I call the value we attribute to such individual compositions respect. It addresses and cherishes each person's fulfillment of his or her perceptive compassion or force of determination, every individual's execution of his or her athletic skill, musicality, mathematical talent or passion for dancing. It highlights specific achievements of self-determination, celebrating the colorful pluralism of self-manifestation. It values human diversity and its free expression.

Respect belongs to the same universalistic, humanistic, liberal and secular worldview as human dignity. Whereas dignity celebrates an abstract idea of an underlying generic human structure, respect requires positive recognition of concrete individual identities and each of their components. While human dignity implies full reverence and safeguarding of generic human merit, respect is the relative, provisional and conditional value of the countless specific manifestations of human plurality. In their endless variability, these are prone to clash with one another, each thus restricting the other. For respect to value this multitude of conflicting human manifestations, no single manifestation can enjoy it fully; each singular individuality and any of its components can only claim and receive partial, tentative respect. Respect is, therefore, necessarily and inherently a relative attribute.

Consequently, respect-based human rights pertain to a far greater variety of concrete, particular human needs, preferences, choices and aspirations. Yet they are necessarily more tenuous than those guaranteeing human dignity. The respect-based right to study and practice a beloved game, dance, tune or sport is more tenuous than the absolute dignity-based rights not to be sold into slavery and to express one's sexual identity.

The widespread confusion between human dignity and respect blurs a crucial distinction between the absolute nature of human-dignity-based fundamental human rights and relative respect-based rights. Using the examples mentioned above, this confusion leads some to mistakenly claim that if the right not to be sold into slavery is absolute, so also must be the right to study a beloved dance; it may not be restricted under any circumstances. It leads others to claim that if the right to practice a beloved sport is tenuous, so also must be the right to express one's sexual identity; it may be restricted when clashing with other peoples' feelings. In order to prevent such confusion, the two value terms must remain conceptually distinct even when employed jointly to formulate a comprehensive humanistic ideology.

A robust dignitarian feminism must focus on the human dignity women inherently and innately possess as members of the human race and must further demand that women be respected as unique, self-determining individuals. This combined value system forms a broad foundation for feminist critique and intervention. Gender-based restriction of women's choices may infringe on their respect-based rights even when not denying their human dignity. Thus, for example, while the gendered social practice that requires women to choose between a family and a career does not necessarily always impinge upon their human dignity, it does detract from their right to self-materialization, negatively affecting their respect. Gendered glass ceilings that thwart women's advancement encroach upon their respect, even though not transgressing their human dignity. All these – and many other – patriarchal practices may be analyzed, conceptualized and criticized in terms of a dignity-and-respect-based feminism.

As discussed below, Israel's sexual harassment law is based on dignity-and-respect feminist jurisprudence. It protects both dignity and respect by prohibiting types of sexual advances that may offend them.

II. HONOR AND PATRIARCHY¹⁶

The honor-based social structures endemic to traditional patriarchal societies inherently contravene women's dignity and respect. Feminists should thus seek to study honor and expose its underlying logic and the psychology that drives many patriarchal gender biases.

Human dignity and respect, together with the universalistic, humanistic value system of which they form the foundation, are inseparable from contemporary Enlightenment-based civilization. Other cultures accord value to their members on the basis of other principles. The most successful of these is the honor-and-shame system, which operates in most traditional societies, as well as many modern ones, across the globe. In honor-and-shame societies, honor governs the relative value attributed to and felt by a member of society vis-à-vis his peers (I use the male pronoun here because honor systems are designed for men). This type of value is neither universal nor innate to all human beings per se. On the contrary, it implies comparative social status, prestige, rank and standing in the hierarchical structure of a specific group. It is esteemed and

¹⁶ The section on honor relies on and summarizes some of the vast literature. For classical literature, see J. K. CAMPBELL, *HONOUR, FAMILY AND PATRONAGE: A STUDY OF INSTITUTIONS AND MORAL VALUES IN A GREEK MOUNTAIN COMMUNITY* (1964); *HONOR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY* (John G. Peristiany ed., 1966); JULIAN PITT-RIVERS, *THE FATE OF SHECHEM OR THE POLITICS OF SEX: ESSAYS IN THE ANTHROPOLOGY OF THE MEDITERRANEAN* (1977). For contemporary analysis of honor, see ANN GOLDBERG, *HONOR, POLITICS, AND THE LAW IN IMPERIAL GERMANY, 1871–1914* (2010); KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* (2010); ROBERT L. OPRISKO, *HONOR: PHENOMENOLOGY* (2012); NICOLE POPE, *HONOR KILLINGS IN THE TWENTY FIRST CENTURY* (2012). I rely most closely on the formulations of Prof. William Miller in WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW AND SOCIETY IN SAGA ICELAND* (1990); WILLIAM IAN MILLER, *HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT AND VIOLENCE* (1993).

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sought after because it testifies to one's superiority over others and promises better living standards and greater prospects of survival and prosperity. Referring to dignity, I have stressed above that value, worth, virtue and merit pertain to an innate, sacrosanct ethical quality and convey the antithesis of measurable price. In contrast, within the world of honor, these terms in fact convey measurable quality. In honor-based societies, shame is dishonor – the absence of honor due to inherent lack or circumstantial loss. Like honor, shame too is considered measurable, comparable with that of others.

In most honor-and-shame societies, honor is partially bequeathed and mostly gained by means of careful and disciplined adherence to the norms defined by the social code. A meticulous observance of the appropriate honor norms entitles a person to honor; failure bestows shame. Honor is ceaselessly sought, accrued and inevitably lost; shame is dreaded and avoided at all costs. Peers in these worlds are in perpetual competition for honor, always measuring themselves up each against all others. As Professor William Miller aptly notes, the logic of the honor competition is that of a zero-sum game.¹⁷ Social hierarchy forming a pyramid structured upon a scale of honor, one person's advance comes at the expense of another's fall in rank. Each player's every move thus affects the honor of every other and his relative standing.

Despite the fact that anthropological literature on honor and shame typically focuses on traditional, remote and rural societies, the honor mentality is very much alive in contemporary social groups across the globe. It is explicitly evident in formally hierarchical institutions such as the military, police force and penitential systems, where ranks are symbolic badges of honor. It also exists more subtly – albeit no less ubiquitously – in academic institutions, public settings, private organizations and the international arena.

Although structured quite differently from each other, many people around the world are intimately familiar with both the honor-based and the dignity-and-respect-based paradigms, combining them or oscillating between them to various degrees. This is true of groups from classrooms and sports teams to countries, nations and international organizations. Yet the prevailing confusion of relevant concepts and terms, intertwined with an unwarranted dismissal of honor, have all but precluded any contemporary serious discussion of it. It thus goes unnoticed, unscrutinized and uncriticized. This is particularly consequential for the feminist movement because an honor mentality typically implies strict gender differences and roles.

Honor societies ascribe very different meanings to male and female honor and shame. Gender distinction is perhaps one of this system's most studied aspects.¹⁸ A founding father of this field, Pitt-Rivers, describes the difference as follows:

¹⁷ MILLER, HUMILIATION, *supra* note 16, at 116.

¹⁸ *See, e.g.*, LILA ABU-LUGHOD, VEILED SENTIMENTS: HONOR AND POETRY IN A BEDOUIN SOCIETY (1986); JOSEPH GINAT, BLOOD REVENGE: FAMILY HONOR, MEDIATION AND OUTCASTING (1997); MEN AND VIOLENCE: GENDER, HONOR AND RITUAL IN MODERN EUROPE AND AMERICA (Pieter Spierenburg ed., 1998); ROBERT A. NEY, MASCULINITY AND MALE CODES OF HONOR IN MODERN FRANCE (1998); HERMENEUTICS AND HONOR: NEGOTIATING FEMALE 'PUBLIC' SPACE IN ISLAMIC/ATE SOCIETIES (Asma Afsaruddin ed., 1999); SONYA LIPSETT-RIVERA & ANN TWINAM, PUBLIC LIVES, PRIVATE SECRETS: GENDER, HONOR, SEXUALITY AND ILLEGITIMACY IN COLONIAL SPANISH AMERICA (1999); JAN GOODWIN, PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD (2003).

The honor of a man and of a woman ... imply quite different modes of conduct ... A woman is dishonored, loses her *vergüenza*, with the tainting of her sexual purity, but a man does not. While certain conduct is honourable for both sexes, honor-shame requires conduct in other spheres, which is exclusively a virtue of one sex or the other. It obliges a man to defend his honor and that of his family, a woman to conserve her purity ... Thus restraint is the natural basis of sexual purity, just as masculinity is the natural basis of authority and the defence of familial honour ... Masculinity means courage whether it is employed for moral or immoral ends ... The honour of a man is involved therefore in the sexual purity of his mother, wife and daughters, and sisters, not in his own ... *La mujer honrada, la pierna quebrada y en casa* (the honorable woman: locked in the house with a broken leg), the ancient and still popular saying goes ...¹⁹

As this description demonstrates, traditional honor societies are deeply gendered. In most – perhaps all – honor is closely associated with manhood, shame with femininity. Typically, the honor game is played exclusively by men. Many societies offer their players two routes to honor and status: one is competition against one's peers in manly activities (for example, warfare, sports, accumulation of wealth); the other is conquering and exerting sexual and familial control over women. The first route relies on adherence to the group's honor code, accurate reading of social situations, appropriate exposure of other men (that is, effective shaming), firm public deterrence and the bold redress of shame-inducing insults. The second enables the avoidance of shame through strict domination, restraint and disciplining of one's women folk.

Although the specific ways in which women cause shame differ in diverse honor societies, many – if not all – regard women as carrying an inherent shame potential. Women are viewed as shame accidents waiting to happen. Only their firm supervision by males prevents them from staining their patriarch's – hence family's – honor. Averting feminine shame from erupting is a badge of honor – or at the very least a way of warding off dishonor. In traditional honor societies, women are thus a means by which men may lose honor and gain shame. On rare occasions they can bring honor: a bride's dowry may include her father's status; a daughter can increase her father's honor by marrying an honorable man; a wife may increase her husband's reputation by acting submissively, behaving modestly, bearing many sons, running the household effectively and within its means, or simply being young or attractive. But more typically women serve as a potential source of dishonor, being expected first and foremost to obey their fathers or husbands and thus hopefully preventing their shame from erupting and staining the men.

A woman's potential for shame lies first and foremost in her sexuality, which must be concealed and veiled and reserved exclusively for its titleholder – the husband. The honor-duty to safeguard it lies with the woman's father, brothers, uncles, husband and sons, depending on circumstances and the specific code. The degree to which it must be sequestered also varies. In most traditional honor societies, failure in this regard brings immeasurable shame upon the male guardians. The public exposure of female sexuality, which is divergently defined in different honor societies, is frequently the most shameful disgrace a man may suffer, serving as proof that he is not man enough to control his own household and contain his woman's shame. In many traditional

¹⁹ Pitt-Rivers, *supra* note 16, at 42–45.

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honor societies, it justifies – and even requires – bloodshed. In this context, men are subjects – players – and women objects – the currency of honor and shame.

In traditional Mediterranean and Middle Eastern societies, the shame attributed to female sexuality was – and often still is – associated first and foremost with virginity. This is the physical embodiment of shame-in-the-making. The father's duty – together with that of his sons and brothers – is to ensure that any shame only occurs after his daughter has been handed over to her next rightful owner, her husband. If a woman loses her virginity outside wedlock, the father's honor is impugned so drastically that only the offender's blood can somewhat redeem his reputation.²⁰ If he guards his daughter strictly until wedlock, however, the avoidance of shame becomes his badge of honor.

When a woman's shame is properly unleashed – when her virginity is 'taken' by her husband – he covers her shame with his honor, as it were drawing his manly roof or umbrella of honor over the bloody wound of shame he has exposed. Having lost her natural potential shame and gained his shielding honor, her duty – as well as self-interest – becomes that of safeguarding and enhancing his honor, which is the only thing concealing her shame. As a daughter, her duty is to uphold her father's honor by preserving her virginity; as a wife, she must uphold her husband's honor by manifesting his domination over her and ensuring that he alone enjoys her sexually.

Both honor and shame are experienced as real in such societies. The woman who loses her virginity improperly is regarded – and often feels herself to be – damaged goods. In traditional Mediterranean or Middle Eastern cultures, the distinction between adultery and rape is thus irrelevant. When a woman's virginity is taken by any man not her husband, her spoiled goods tarnish her father's (and perhaps fiancé's) honor. Once she is married, if her sexuality is 'exposed' by any man not her husband, her husband's honor is ruined. In either case, the woman's will or consent is almost completely immaterial.

By this logic, in father–daughter incest a father offends against himself and his own honor, violating no other man's rights. Similarly, if a husband forcefully penetrates his wife, no one's honor is injured and therefore no offense is regarded as having been committed. If a woman speaks publicly of such acts, she is guilty of betrayal and disloyalty. Further, if a woman without any male relatives is sexually assaulted, no harm has been caused because no male honor has been impugned. Since remaining under her father's roof and honor becomes shameful after a certain age, a woman's best interest lies in maintaining her marital status at all costs, this being the only shield protecting her from other men. This makes every married woman a hostage to her husband, at his mercy.

In many honor societies, honor therefore does not merely prescribe divergent male and female conduct but also defines and constructs masculinity and femininity as binary opposites. Honor underlies, forms and organizes many aspects of what are

²⁰ Manar Hasan claims that fathers who hesitate to take the lives of the male offenders against their honor for fear of blood feuds take the lives of their own daughters instead. This is a 'cheaper' way of avenging male honor, as it prevents retaliation. Manar Hasan, *The Politics of Honor: Patriarchy, The State, and Honor Killings of Women*, in *SEX, GENDER, POLITICS: WOMEN IN ISRAEL 267* (Dafna Izraeli et al. eds., 1999) in Hebrew.

traditionally considered sexual differences. It molds manhood as active, assertive, aggressive, dominating and superior and femininity as passive, submissive, servile, vulnerable and inferior. In the world of honor, men are agents, and women are playthings and sexual objects to be subjugated and kept from other men.

From a human-dignity-and-respect-based point of view, this configuration of men as players in the honor game (that is, as active subjects) and women as the vehicles of honor to be maintained and shame to be avoided (objects) denies the equal, universal, absolute human dignity of women. It fundamentally violates the imperative that every human being must always be cherished as an autonomous, self-determining subject. Simultaneously, through implementation of strict rules of modesty, the honor-based binary dichotomy between masculine and feminine also drastically undermines women's respect-based human rights. In the name of honor and in fear of shame, women are prohibited from dressing as they please, dancing and singing as they wish, going out alone, seeing people they wish to see, smoking, speaking out and many other activities that would constitute their personalities and respect. Although most stringent in traditional societies, remnants of this mentality are evident in many social settings around the world.

Human-dignity-and-respect-based feminism regards the honor-based value system that underlies many – if not all – patriarchal societies as offensive to women's dignity and respect. Bringing attention to honor-based norms, conventions and social constructions, it seeks to replace them with dignity-and-respect-based principles.

III. APPLICATION OF DIGNITARIAN FEMINIST JURISPRUDENCE TO RAPE

A legal feminism predicated upon dignity and respect, and particularly one that is sensitive to patriarchal honor, can cast in a new light one of the most compelling and familiar of feminist legal arguments – Catharine MacKinnon's critique of the criminal definition and prohibition of rape.²¹ Let me begin by rephrasing this fundamental feminist argument as following a four-step model. Step one identifies the prevailing legal norm. The second step presents the feminist critique of the social convention. The third step juxtaposes the norm and convention in order to expose the specific means of women's subjugation; and the fourth step presents a feminist alternative to the norm and/or convention.²²

To express the logic of dignitarian feminism – including the critique of honor – my reframing of MacKinnon's analysis of rape and critique of rape law is twofold. One is an addition of an honor test to the second step of the familiar argument recited above, and the other is the addition of a dignity-and-respect focus to the fourth. This multi-sectional expanded model builds on the insights of a prevailing form of American legal feminism (in this example, MacKinnon's feminism of dominance), adding feminist insights gained through attentiveness to honor and commitment to the

²¹ CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 85–92 (1987).

²² For a full presentation of this model, see KAMIR, *FRAMED*, *supra* note 7, at 2213 .

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principles of dignity and respect. It thereby demonstrates the logic and the power of a dignity-and-respect-based, honor-sensitive legal feminism.

- (1) The model's first step identifies the accepted working definition of the legal norm. In the case of rape, both civil statutes and common law stipulate that (heterosexual) intercourse is unlawful when it involves forced, non-consensual (vaginal) penetration.
- (2) The second step presents a feminist analysis of a relevant social convention not commonly associated with the legal norm. In the case of rape, MacKinnon's feminist theory contends that legitimate intercourse is conventionally defined as involving a significant amount of male force (predicated on the roles of hunter and warrior) and not necessarily based on the woman's consent. The conventions of patriarchal society notoriously preclude a clear-cut definition of consent in this context, simply because women are raised to please men and thus assumed to be inherently inclined to be compliant.
- (3) The third step then critically juxtaposes the accepted definition of the legal prohibition of rape with the feminist analysis of the social convention. In the case of rape law, placing the legal definition of rape (forced, non-consensual sexual intercourse) alongside the feminist analysis of the social convention (legitimate intercourse perceived as consisting of the use of masculine force and not predicated upon the woman's free consent) leads to a new understanding: within the framework of contemporary society and culture, the traditional legal definition of rape, which attempts to distinguish it from legitimate intercourse (thus making it criminally punishable), is self-contradictory and meaningless. This explains much of the criminal system's failures to address rape.
- (4) The fourth step is the conclusion that the existing legal definition of rape must be revised to consciously challenge the conventional construction of legitimate sexual intercourse – a construction within which men are conquerors and women fundamentally compliant, and therefore male force and female compliancy are unavoidable. A reconstructed, feminism-informed legal norm must distinguish rape from a definition of legitimate sex that does not associate it with presuppositions regarding male force and female compliancy.

How might a dignitarian feminism elucidate the power of this critique? First, consider, or reconsider, honor in this context. The social convention at stake – legitimate intercourse that consists of the masculine use of force, with the woman's free consent not necessarily being taken into account – derives from an honor-based worldview. Under an honor-and-shame moral system, the only form of sexual intercourse that is considered legitimate – that is, not offensive to male honor – is that in which a man penetrates his wife, whose sexuality he rightfully controls. It is irrelevant whether or not the wife consents. And, extramarital sexual contact stains the honor of the gatekeepers of the woman's sexuality (her father and/or husband) – again, whether or not the woman consents. Signifying their failure to perform their duty, it brings immeasurable shame and dishonor upon them and their family. The vengeance this calls for often demands not merely the life of the offending man but also that of the woman in question.

In honor cultures, therefore, neither the woman's freely given consent nor the use of force by the penetrating man are pertinent to the definition of rape and its distinction from legitimate intercourse. When a man penetrates a woman to whose sexuality he is rightfully entitled, the intercourse is legitimate, irrespective of whether he uses force or whether she freely consents. Likewise, according to the rules of honor, penetration of a woman by a man to whom she does not rightfully belong is unacceptable, irrespective of whether he uses force or she freely consents. The critical distinction lies not between the 'carnal knowledge of a women against her will with the use of force,' on the one hand, and other forms of intercourse, on the other, but rather between intercourse that upholds the honor code (any marital intercourse) and intercourse that does not (fornication or adultery).

The honor system thus blurs the distinction between consensual or unforced intercourse and forced, non-consensual intercourse. In honor societies, the traditional common law legal definition of rape as forced, non-consensual intercourse clashes with the conventional honor-based perception of legitimate intercourse, rendering the criminal prohibition paradoxical. In contemporary Western cultures not having distanced themselves greatly from their honor-based origins, the confusion of honor-based and legal standards may be a remnant of an honor-based era. The marital rape exemption is one such remnant; fornication laws are another.

The significance of the honor test is not merely theoretical, academic or descriptive. Its greatest pertinence lies in the proposal of an alternative formulation of the legal norm. Here, the honor test prompts the careful construction of a new normative definition that rejects the logic of honor and replaces it with dignity and respect.

Finally, let me phrase the new norm suggested in the fourth step of MacKinnon's account in terms commensurate with dignitarian feminism. I hope thereby to illuminate the way human dignity can serve as the basis of a new socio-legal understanding of both sex and rape. From a dignity-based point of view, the distinguishing criterion between legitimate and illegitimate sexual intercourse is whether the parties treat one another as human beings rather than as a means of one-sided sexual gratification. In human-dignity terms, sexual contact is only legitimate when each party recognizes the humanity and value of the other. Rape then represents a denial and violation of the other's fundamental humanity and dignity. From this perspective, the rapist treats the other as less than human – an object for sexual use. In terms of dignity-based human rights, rape contravenes the most fundamental dignity-based rights to bodily integrity and control, fundamental self-definition and self-determination, protection against aggression and the transgression of intimate personal boundaries.

Under this dignity-based conceptualization of sex and rape, both the social convention and the legal norm regarding rape must be reformulated to accord and express mutual concern for the human dignity of participants in sexual conduct. Rather than focusing on the measure of violence exerted by the accused and/or the victim's demonstration of non-consent, new legal parameters must prohibit the use of any person as a sexual object. Simultaneously, prevailing honor-based conventions that underlie common reference to sexual conduct must be challenged with dignity-oriented terminology and discourse. Through these, sexual conduct must be constructed as mutual human acknowledgment and regard.

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One outcome of this analysis is the criminal definition of rape I co-drafted with MK Merav Michaeli.²³ In a private legislative bill she introduced in April 2014, we defined (in Hebrew) prohibited sexual coercion as ‘usage of a woman’s body or her presence for the sexual gratification of the actor or another person under circumstances of threats, extortion, use of force, fundamental deceit, or abuse of authority, trust, dependency or vulnerability.’²⁴ According to this formulation, ‘usage of a woman’s body or her presence’ consists of a unilateral sexual act that does not regard the woman’s choice, well-being or rights and is engaged upon without her free choice. Mutual, consensual sexual interaction between two parties of their own free choice does not constitute ‘usage of a woman’s body or her presence’; it is a legitimate form of sex not regulated by criminal law. We specified that rape is sexual coercion that involves bodily penetration. In the preamble to the proposed bill, we stated that it was designed to prohibit sexual coercion in order to protect women’s dignity, respect, liberty and privacy, and promote equality between the sexes, noting that ‘woman’ included man.

The proposed legislation – which includes numerous other sections – represents one way in which dignitarian feminist jurisprudence can be applied to current social conventions and criminal law. Although the proposed dignitarian rape law is yet to be enacted, a like-minded bill, similar in structure and phraseology, was passed by the Israeli Knesset in 1998 – the highly influential sexual harassment law.

IV. DIGNITARIAN SEXUAL HARASSMENT LAW

Honor-based societies encourage men to demonstrate their manhood. The more virility they express, the more honor and thus prestige and social status they may demand, acquire and attain. There is no shortage of ways by which you may display your manhood: you can expose your sculptured muscles, exhibit your expensive watch, car or smart phone, work out vigorously, punch another man, drink more alcohol than anyone else around you or make sexual advances to a woman. In all these courses of action and many others, you publicly announce your boldness, self-assuredness, fearlessness, strength and machismo. You play a hand in the local honor game, stake your claim for honor and rank within patriarchy and dare other men to defy you.

The stakes are particularly high for a man who chooses to assert himself and gain honor via his sexual exploits. Such acts openly challenge the honor of the men who rightfully possess any woman to whom he makes advances – her father, fiancé or husband. To protect themselves from such shaming, these latter must exhibit dominance and even violence, defending their turf and proving their manly superiority. Sexual advances are thus both very rewarding and very risky. Genuine interest in the woman

²³ The first draft of the proposed rape law was published in Hebrew in Orit Kamir, *A Different Kind of Sex: Rape Law Between Equality, Dignity and Honor*, 7 MISHPAT UMIMSHAL L.J. 669 (2004). The version drafted with MK Merav Michaeli was introduced to the Knesset as the Proposed Law for the Prevention of Sexual Coercion, 2014, and received the number 560300.

²⁴ Proposed Law, *supra* note 23, Art. 3a.

and her consent to or rejection of such advances are not necessarily relevant to the honor men seek to acquire, just as enjoyment of alcohol or of an expensive watch are immaterial to the honor gained through their consumption. Like the alcohol and the watch, the woman serves as an object through which honor may be obtained.

I suggest that this honor-based social convention underlies prevalent male conduct that today we consider sexual harassment. In the world of honor, you make sexual advances to show off your manliness and gain honor. Losing – backing down, showing weakness, cowering or submitting in an open confrontation – is shameful. As long as the man stands his ground, he preserves his honor and most likely enhances it. So if your sexual advances were refused, you continue, insist and show your manly determination. The prevalent notion that ‘boys will be boys’ conceals the premise that ‘men will always play their honor games in which women serve as sexual objects; it is inevitable’.

The fact that traditional legal systems do not prohibit or penalize sexual harassment may well be a function of the honor system to which they adhere. Where addressing women sexually and continuing despite their refusal is regarded as a natural honor-based manly act – no laws are deemed needed to regulate it. A woman is understood to be protected by her male guardian, who intervenes to defend and assert his honor. If her father or husband is greatly esteemed, his reputation will deter others from seeking to win honor by making advances to her. If she has no guardian, no honor is stained by other men’s attentions and thus no damage is done and no legal intervention is required.

From the perspective of dignity and respect, unwanted sexual advances – in other words, sexual harassment – sometimes objectify a woman, denying her fundamental human dignity. At other times, they infringe upon her ability to fully realize her unique human potential, discouraging her from dressing as she would like to, dancing freely, speaking up in public, attending classes, working for a living, using public transport or participating in social gatherings. In so doing, they violate her respect and derivative rights.

Adopting this feminist jurisprudential approach, in 1998 the Israeli Knesset enacted a law to prevent sexual harassment.²⁵ The preamble declares that sexual harassment is prohibited in order to guarantee human dignity and respect as well as liberty and privacy and promote equality between the sexes.²⁶ The law is thus directly linked to Israel’s Basic Law of Human Dignity and Liberty of 1992²⁷ and the UN Universal Declaration of Human Rights,²⁸ asserting that sexual harassment offends dignity-and-respect-based human rights. Since sexual harassment is defined as offensive to human dignity and/or respect, the law protects these values by prohibiting sexual harassment not merely in the workplace but everywhere and anywhere, between any two (or more) individuals, be they women or men.

The explanatory notes to the law specify that the set of values laid out in the Preamble ‘shall guide the courts when they are required to construe the provisions of

²⁵ Prevention of Sexual Harassment Law, *supra* note 8.

²⁶ *Id.*, Art. 1.

²⁷ Basic Law of Human Dignity and Liberty, 5752-1992, SH No. 1391 at 150.

²⁸ Universal Declaration of Human Rights, *supra* note 5.

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the proposed law.²⁹ The courts are thus instructed to interpret the law as part of the legal protection afforded by the Israeli legal system to human dignity and respect. The courts are nevertheless also instructed to draw upon US judicial experience and feminist jurisprudential scholarship in addressing sexual harassment as an issue of sexual equality and discrimination.

Taking an integrated approach, the law defines sexual harassment and any vindictive treatment ensuing from it as both a civil wrong and a criminal offense. It further lays out specific guidelines for the treatment of employees who experience work-related sexual harassment. This was meant to empower women by allowing them to choose whether to confront the sexual harassment they experienced through the tort law, criminal procedure or – if the harassment occurred in the workplace – disciplinary means and/or the labor courts. If the enforced division of law into branches is patriarchal, encouraging each woman to frame her injury as well as her legal response is feminist, celebrating both women's dignity and their respect.

The law's Article 3 defines precisely and in great detail the types of conduct that may be considered sexually harassing. This was meant to make the new statutory norm clear both to the general public and those charged with enforcing it:

(3)(A) Each of the following acts constitutes sexual harassment:

- (1) Blackmail by way of threats, as defined in section 428 of the Penal Law, where the act demanded to be performed by the person is of a sexual character;
- (2) Indecent acts, as defined in sections 348 and 349 of the Penal Law;
- (3) Repeated propositions of a sexual character to a person who has shown to the harasser that he is not interested in the said propositions;
- (4) Repeated references directed towards a person which focus on his sexuality, where that person has shown to the harasser that he is not interested in the said references;
- (5) Degrading or humiliating reference directed towards a person concerning his sex (or gender) or sexuality, including his sexual tendencies;
- (6) Propositions or references as described in subsections (3) or (4) directed towards one of those enumerated in subsections (a) to (c), in such circumstances as specified in these subsections, even where the person harassed has not shown to the harasser that he is not interested in the said propositions or references:
 - (a) A minor or a helpless person, where a relationship of authority, dependence, education or treatment is exploited;
 - (b) A patient undergoing mental or medical treatment, where a relationship of authority between the patient and the person treating him is exploited;
 - (c) An employee in the labor relations sphere or person in service, where a position of authority is exploited.

(B) Vindictive treatment is any harmful act the source of which is sexual harassment or a complaint or court action filed in relation to sexual harassment.³⁰

Article 2, the 'definitions' section, determines that a 'reference' means 'reference in writing, orally, by way of visual or vocal medium, including computer or computer material, or by conduct.'

²⁹ Prevention of Sexual Harassment Law, *supra* note 8, Explanatory Notes.

³⁰ Prevention of Sexual Harassment Law, *supra* note 8, Art. 3 (translation from 1998 by the Israeli Ministry of Justice).

The law has been amended on several occasions. The most significant amendment was the inclusion of revenge porn as a form of conduct that may constitute prohibited sexual harassment.³¹ Now, any demeaning public sharing of a person's sexual image without his or her consent is legally prohibited as sexual harassment.

Over the course of the past 20 years, the law has revolutionized Israeli norms regarding unwarranted sexual advances. In my opinion, it has also helped chip away at the Israeli patriarchal honor system and advanced human-dignity and respect-based values, the human rights discourse and feminist ideology and jurisprudence.

V. CONCLUSION

This chapter advances two claims: that feminist theory and jurisprudence should adopt the universal dignity-and-respect discourse and that they should look out for remnants of honor mentality in social conventions and legal norms. These two claims are intertwined in the chapter's presentation of a dignitarian feminist jurisprudence that is critically sensitive to traces of honor and addresses them as offenses to women's dignity and respect.

Adopting the human dignity presented by the UN's 1948 Declaration on Human Rights, this chapter views dignity as the inherent value of what we consider to be the universal common denominator of every member of the human family. This notion of dignity gives rise to absolute – if relatively few – fundamental human rights. To expand the scope of this humanistic vision, the chapter couples the narrow notion of human dignity with respect, which affords value to every individual's diverse identity and the autonomous realization of diverse human potential. Respect gives rise to a greater variety of rights, but unlike dignity-based rights, these are tentative and conditional.

In dignity-and-respect discourse, feminism aims to establish women's full dignitarian value and the worth of each woman's autonomous self-determination and materialization. Feminist sensitivity to honor requires comprehension of the gender implications of the honor-and-shame system that underlies patriarchy. Honor is the foundation of a value system that determines men's worth based on their manly competition against their peers, and their control of their women relatives who may impact their honor and threaten it with shame. Within this system of meaning, men are actors and women are the means through the control of which they can avoid dishonor and shame.

From a dignity-and-respect point of view, honor-based social conventions and legal norms deny the value of women's full subjectivity, violating human dignity. Modesty codes, meant to discipline women and prevent them from bringing shame upon their male relatives, restrict women's autonomous self-determination, violating their respect. Dignitarian legal feminism exposes the way that prevailing social conventions regarding sexual conduct reflect remnants of honor mentality that infringe on women's dignity and fundamental human rights. In honor societies, the legitimacy of any sexual

³¹ Prevention of Sexual Harassment Law, *supra* note 8, Art. 3A (5a).

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interaction depends entirely on whether it upholds the honor code or undercuts it, that is, on whether the sexual conduct offends the honor of the woman's father or husband. From this point of view, neither the man's use of force nor the woman's consent are crucial factors in distinguishing rape from sex. Dignitarian feminism demands that both social and legal norms be reformulated to express the full and absolute value of women's subjecthood.

Similarly, conduct that is now viewed as sexual harassment often derives from honor-based manly conduct. In honor societies, men may gain honor by expressing their manhood; one way of achieving this is by making sexual advances to women. The welcomeness of such advances is immaterial to the manly conquest of honor. The proposed dignitarian feminism claims that unwelcome sexual advances violate women's respect and should therefore be prohibited. Israel's sexual harassment law reflects this feminist jurisprudential perspective. Over the course of 20 years the law has had a dramatic impact on social norms. It has greatly increased public awareness of women's dignity and respect, curbing honor-based social conventions. This chapter proposes that, although developed in the context of Israeli society and law, the dignitarian feminist jurisprudence described here can be useful for other societies as well.