ESSAY

A MISSING PIECE OF THE PUZZLE OF THE DIGNITARY TORTS

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INTRODUCTION

In their article, Professors Kenneth Abraham and G. Edward White identify a puzzle: despite the value that our society purports to place on dignity, tort law’s dignity-protecting function has been little explored.¹ Lawmakers and courts employ the term “dignity” without specifying the interests at stake. Dignitary torts—battery, false imprisonment, defamation, intentional infliction of emotional distress (IIED), and invasion of privacy—fail to thrive.

Abraham and White offer several solutions to this puzzle. First, they tell us, with notable exceptions from the mid-twentieth century, scholars have paid little attention to the dignitary torts as a category. Any project to unify these torts under the umbrella of dignity has stalled. Second, the core interests protected by the dignitary torts may be too disparate to permit unification. Here, Abraham and White perform the valuable work of identifying and disentangling the constitutive elements of dignity as a social and legal concept. They point to three interests remedied by the dignitary torts: interferences with liberty and personal autonomy; embarrassment, humiliation, and disrespect; and diminished regard of others. Each dignitary tort, Abraham and White contend, primarily responds to one of these three interests and, therefore, differs from the other torts. Third, the reach of dignitary torts has been dramatically limited over the last fifty years, as the Supreme Court has wielded the First Amendment against tort

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law. As a result, Abraham and White conclude, the concept of dignity has not increased its “legal bite.”

While their account is compelling, it misses a piece of the puzzle. At least some of the dignitary torts did not disappear, but rather came to be adjudicated under public accommodations statutes and ordinances. These laws ensure full and equal access to places open to the public and provide remedies to individuals who face refusal or insult based on a protected trait—race or religion, for example. While statutory in form, these remedies are closely linked to the dignitary torts—as Part I explains. Like the common law, state public accommodations laws prohibit harms to dignity. They relate most closely to IIED in their focus on mistreatment and humiliation in public. And, like IIED, they originate in nineteenth-century cases involving the removal of, or insult to, customers of trains, inns, theaters, and other public places.

Including public accommodations law in the universe of dignitary torts offers lessons to scholars of tort and public accommodations law alike. First, as Part II shows, the gulf between the majesty of dignity and “its translation into concrete legal rights” may not be as wide as Abraham and White suspect. Public accommodations statutes continue to give legal force to dignity, even as common law torts have receded. Human rights commissions and sometimes courts interpret, and make concrete, protections against indignity. Public accommodations laws largely have survived constitutional attack. But they increasingly seem vulnerable to free speech and free exercise claims. Abraham and White’s account of the demise of the dignitary common law torts offers a cautionary tale, but it also holds hope that the risk of constitutional limitation might yet be mitigated. The puzzle of the dignitary torts calls for scholars of public and private law to self-consciously identify and explore the interests in dignity that public accommodations laws safeguard—Part III takes some tentative steps in this direction.

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2 Id.; accord Cristina Carmody Tilley, Rescuing Dignitary Torts from the Constitution, 78 BROOK. L. REV. 65, 67 (2012) (observing that dignitary torts “languish within the constitutional scheme”).

3 Abraham & White, supra note 1, at 105.
I
PUBLIC ACCOMMODATIONS LAW AS DIGNITARY TORT

First enacted after the Civil War to ban race and color discrimination, public accommodations laws proliferated in cities and states outside the South through the first two-thirds of the twentieth century. With the great migration of African Americans to the North, demands for equality in public accommodations escalated. While the 1920s saw sporadic efforts to resist racial segregation, during World War II, African American activists and their allies demanded more from Northern cities and states. They secured the passage, amendment, and enforcement of city and state laws against discrimination in public accommodations. In the early 1960s, African Americans throughout the South held sit-ins at restaurants, hotels, and other public places, enduring bloody attacks and ultimately winning the passage of federal public accommodations law—Title II of the Civil Rights Act of 1964. Over time and in response to social movements for rights for women, people with disabilities, and LGBT people, the list of traits that could not be ground for exclusion or insult grew.

Today, nearly all states guarantee “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation” without regard to race, color, national origin, religion, sex, or disability. Some jurisdictions also reach marital status, gender identity, age, and sexual orientation discrimination.


9 NAT’L CONFERENCE OF STATE LEGISLATURES, supra note 8.
accommodations laws tend to apply to every place open to the public.\textsuperscript{10} Entities from restaurants and banks to theaters and barber shops fall within their scope.

State public accommodations laws have broad goals, aiming to ensure full and equal enjoyment of leisure and commercial life.\textsuperscript{11} Like the common law, they protect against dignitary harms. Structuring society, these laws express and safeguard the equal status of the disfavored group as citizens in society.\textsuperscript{12} They also offer individuals a tort-like private right of action against insult and mistreatment by places open to the public.

In remedying individual wrongs, public accommodations laws function as part of the line of modern dignitary torts. They share a common history with the intentional infliction of emotional distress (IIED). These statutes originated in and codified the same line of cases awarding damages for insult and humiliation that led to the development of IIED. Around the turn of the twentieth century, American courts increasingly recognized tort actions against proprietors who insulted, mistreated, or excluded patrons and came to sustain substantial verdicts for humiliation and mental suffering in cases lacking the physical touching required for battery or physical injury from ejection. As one court said, “That damages for mental pain, anxiety, distress, or humiliation suffered[. . .] may be recovered, though unaccompanied with physical injury, pain, or suffering, is now too well settled in this state to admit of question.”\textsuperscript{13} In the 1930s and ‘40s, William Prosser and other American commentators identified a broader move in tort law toward awarding recovery where

\textsuperscript{12} Richard H. Pildes & Elizabeth S. Anderson, \textit{Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics}, 90 COLUM. L. REV. 2121, 2204–05 (1990) (noting the ways in which discrimination in the private sphere can create a caste system, precluding full political citizenship); Nan D. Hunter, \textit{Accommodating the Public Sphere: Beyond the Market Model}, 85 MINN. L. REV. 1591, 1620 (2001) (arguing that denial of services is not merely “an ordinary civil injury” because it expresses an ideology of the disfavored group’s inferiority).
plaintiffs had suffered emotional harm without physical injury and had been humiliated or embarrassed without the loss of reputation required for defamation. Prosser looked in particular to the line of cases involving common carriers that remedied emotional damage under the gloss of breach of contract of safe carriage. Reviewing cases in a 1938 article, Fowler Harper and Mary Coate McNeely similarly pinpointed the evolution of emotional damages in cases involving accusations of theft and ordering patrons out of amusement parks, theaters, and trains. Liability of innkeepers, common carriers, theaters, amusement parks, restaurants, and other places open to the public for inflicting insult, humiliation, and distress on actual and would-be customers formed the groundwork for both IIED and public accommodations acts.

From the time of their passage, courts frequently referred to public accommodations laws as codifying the common law rule of equal treatment in public places. For example, when it struck down the federal civil rights act in 1883, the U.S. Supreme Court assumed that the common law of the states already prohibited discrimination in public accommodations.

14 William L. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874, 874 (1939); see also Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1067 (1936) (explaining that "[n]o longer is it even approximately true that the law does not pretend to redress mental pain and anguish when the unlawful act complained of causes that alone").

15 Abraham & White, supra note 1, at 127–28 (observing that most of the cases Prosser cited to show the emergence of a tort for intentional infliction of mental suffering involved "actions brought against common carriers for breach of a contract of safe passage").


17 See, e.g., Chi., St. L. & P. R. Co. v. Holdridge, 20 N.E. 837, 839 (Ind. 1889) (compiling cases allowing recovery for the "humiliation and degradation" of wrongful denial of carriage by a common carrier); De Wolf v. Ford, 86 N.E. 527, 530 (N.Y. 1908) (noting that "the guest . . . has affirmative rights which the innkeeper is not at liberty to willfully ignore or violate," including a right not to be subjected to insults or "distress of mind"); Saenger Theatres Corp. v. Herndon, 178 So. 86, 87–88 (Miss. 1938) (discussing duties imposed on theaters); Davis v. Tacoma Ry. & Power Co., 77 P. 209, 210–11 (Wash. 1904) (discussing duties imposed on amusement parks and resorts); Boyce v. Greeley Square Hotel Co., 126 N.E. 647, 648–49 (N.Y. 1920) (noting public resorts bore duties toward patrons); Odom v. E. Ave. Corp., 34 N.Y.S.2d 312, 316 (1942) (observing that that restaurants held such duties under common law).

18 The Civil Rights Cases, 109 U.S. 3, 25 (1883) ("Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation[s] to all unobjectionable persons who in good faith apply for them.").
In 1890, the Michigan Supreme Court described that state’s newly enacted statute as “only declaratory of the common law,” which “gave to the white man a remedy against any unjust discrimination to the citizen in all public places”; now a state citizen, an African American man was entitled to the same “right of action for any injuries arising from an unjust discrimination.” Other state supreme courts agreed. Throughout the twentieth century, courts observed that public accommodations statutes were cumulative of the common law, permitting plaintiffs to plead both common law and statutory causes of action when they experienced insult and humiliation in public places.

Common law and statute both recognized that the denial of equal access rarely inflicts physical injury and often imposes minimal or indirect economic effects. In the cases identified by Prosser and other scholars in the 1930s, courts reasoned that humiliation damages were essential because otherwise, the plaintiff would receive mere contract damages—the cost of the ticket, for example—which did not adequately reflect the injury. Courts and legislators imported this common law concept of “humiliation damages” into public accommodations statutes.

These statutes have long functioned, partly, as torts.

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20 Decuir v. Benson, 27 La. Ann. 1, 5 (1875) ("In truth [sic] the right of the plaintiff to sue the defendant for damages would be the same, whether [the act] existed or not,"); Hall v. DeCuir, 95 U.S. 485 (1877); Donnell v. State, 48 Miss. 661, 680–81 (1873) (noting the common law had “always” demanded that inns, common carriers, “and public shows and amusements be open to all “unless sufficient reason were shown”). For a more recent case, see Orloff v. Los Angeles Turf Club, Inc., 227 P.2d 449, 453 (Cal. 1951) ("The enactments are declaratory of existing equal rights.").
22 Chi. & Nw. Ry. Co. v. Williams, 55 Ill. 185, 190 (1870) (holding that where a common carrier inflicts delay, vexation, and indignity by excluding a passenger from the first-class car, the actual pecuniary damages sustained "would, most often, be no compensation at all").
While early public accommodations laws often allowed criminal penalties, they also provided civil remedies to individuals.\textsuperscript{24} Hearing a case under the state public accommodations statute, the 1921 Washington Supreme Court observed that race discrimination by a movie theater “was a tort, and an action founded thereon lies in tort.”\textsuperscript{25} The theater argued that its policy of racial segregation and denial of a floor seat to the plaintiff inflicted no personal injury and that recovery was limited to breach of contract.\textsuperscript{26} The court drew on common law cases going back to the 1890s and held:  

[T]his is not the rule. The act alleged in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering are elements of actual damages for which a compensatory award may be made. This we have held since the early history of the court.\textsuperscript{27}

More recently, the same court described public accommodations law as “similar to dignitary torts.”\textsuperscript{28} Even as it vindicates public policy against unjust discrimination, an individual claim of discrimination in public accommodations function as “a prototypical tort, an injury to one person by another.”\textsuperscript{29}

Dignitary tort protections that apply broadly and antidiscrimination statutes that target particular types of exclusions might seem far apart, but they share this common history and overlap in function. After the Civil War, racial minorities often invoked common law and statute to seek remedies for race discrimination.\textsuperscript{30} Many of the train cases
were brought by black men and women who had been mistreated and denied the accommodations they had purchased. As historian Barbara Welke has shown, from 1865 to 1880, African American women not-infrequently sued when excluded from the ladies’ car of the train, a more comfortable and safer compartment designated for women and their escorts or servants. Many of these women won damages for the race discrimination they faced. That is not to say that the treatment of race under the rubric of dignitary torts has always inclined toward equality. But during this period, the common law sometimes proved a tool to resist racial inequality.

By the end of the nineteenth century, however, this line of tort law receded. Southern state legislatures abrogated the common law right of action and eventually required segregation by law under Jim Crow. Some courts in other states began to interpret the common law to authorize separate but equal facilities. By contrast, where public accommodations statutes existed, claims against segregation and exclusion in streetcars, restaurants, inns, and other public places proved more effective. By the mid-twentieth century, these statutory protections of dignity had occupied the field.

II

opinions and reports of other cases).

31 Id.
32 Id.
33 Id.
34 Barbara Y. Welke, Beyond Plessy: Space, Status, and Race in the Era of Jim Crow, 2000 UTAH L. REV. 267, 287–88 (2000) (discussing the many cases brought by whites as “the result of being wrongly identified as black or for being required to ride in the “colored” coach”); see also John Stephenson, Race Distinctions in American Law, 43 AM. L. REV. 547, 547–48 (1909) (recounting that calling a white person African American was slander (sometimes per se)).
35 See supra note 30 and accompanying text.
36 See Singer, supra note 4, at 1439 (ascribing the lack of common-law decisions on the obligations of business to serve the public to these statutory frameworks).
37 Legislative Attempts to Eliminate Racial and Religious Discrimination, 39 COLUM. L. REV. 986, 1000 (1939) (“This inability of the common law duty to deal effectively with discrimination in public places was one of the factors which led to the enactment of the equal accommodation statutes, commonly known as civil rights acts.”).
38 Singer, supra note 4, at 1348–49.
THE CONSTITUTION AND DIGNITARY TORTS

This persistence of statutory remedies against dignitary harm complicates the puzzle of the dignitary torts. Abraham and White argue that, as the Supreme Court began to impose constitutional limits on common law dignitary torts in 1964, it reduced opportunities to protect dignity and arrested the formation of robust socio-cultural understandings of dignity.\(^{39}\) Since 1964, they suggest, our societal commitment to human dignity has dulled and maybe even deadened.\(^{40}\)

But, unlike the common law torts, statutory protections against the denial of equal access and the infliction of public humiliation have not been much diminished through constitutional scrutiny.\(^{41}\) Indeed, the Supreme Court frequently has turned back constitutional attacks on public accommodations laws, first in 1907 and most recently in 2018.\(^{42}\) Public accommodations law still offers individuals tort remedies against the indignity of discrimination in public.

Contrary to Abraham and White’s hypothesis, over the last sixty years, people increasingly have been safeguarded from, rather than exposed to, “the risk of having their dignity violated.”\(^{43}\) While dignitary torts shrunk in common law, they flourished in statutory form. The 1950s and ‘60s saw states across the country enact and amend with public accommodations laws. Human rights commissions became active, investigating, conciliating, and educating businesses on compliance with these acts. 1964 saw not only the start of retrenchment of dignitary torts but also the enactment of the Civil Rights Act—a statute that provided many more Americans a cause of action against violations of their dignity. Since that time, legislatures have extended remedies for exclusion,

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39 Abraham & White, supra note 1, at 158; accord Tilley, supra note 2, at 74 (discussing the ways in which the Supreme Court has shrunk dignitary torts).
40 Abraham & White, supra note 1, at 158.
41 See W. Turf Ass’n v. Greenberg, 204 U.S. 359, 363–64 (1907) (rejecting constitutional challenges to application of state public accommodations law of a place of entertainment); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1732 (2018) (emphasizing that gay people not be subjected “to indignities when they seek goods and services in an open market but finding that the state commission had shown animus toward religion).
42 See W. Turf Ass’n, 204 U.S. at 363–64 (rejecting constitutional challenges to application of state public accommodations law of a place of entertainment); Masterpiece Cakeshop, 138 S. Ct. at 1732 (emphasizing that gay people not be subjected “to indignities when they seek goods and services in an open market” but finding that the state commission had shown animus toward religion).
43 Abraham & White, supra note 1, at 158.
subordination, and insult linked to sex, sexual orientation, disability, and more to ensure dignity.\textsuperscript{44}

There are also signs that our culture has continued to value dignity, and that public accommodations law has shaped, and been shaped by, a commitment to human dignity. In recent years, the mistreatment of racial, religious, and sexual minorities in public accommodations has been made vivid by viral videos. In perhaps the most high-profile instance, Starbucks faced condemnation when a Philadelphia shop called the police to arrest two black men merely sitting in the shop.\textsuperscript{45} When a Manhattan restaurant excluded unaccompanied women from the bar, the public recognized the practice as an injury.\textsuperscript{46} Moreover, Americans overwhelmingly support the enactment of public accommodations laws to protect LGBT people, and six in ten oppose allowing religiously based refusals of service.\textsuperscript{47} Presumably, the damage to human worth, not physical injury or economic loss, from denial of service provokes these reactions.

Nevertheless, many of the issues that Abraham and White identify with the common law dignitary torts hold true for public accommodations laws. Like their common law cousins, these laws have received inadequate scholarly attention since the civil rights movement. Legal scholarship’s bias for federal law and constitutional adjudication has led to the neglect of this body of law made in states and cities and primarily resolved by human rights commissions, not courts.\textsuperscript{48} Despite the regularity of reports of racial, religious, and sexual

\textsuperscript{44} The amendment of statutes to reach sexual orientation sometimes explicitly invoked the importance of human dignity. E.g., ME. REV. STAT. ANN. tit. 5 § 4552 (West 2008); OR. REV. STAT. ANN. § 659A.003 (West 2008).


orientation discrimination, few people file complaints.\textsuperscript{49} And in resolving complaints, courts and commissions have not always carefully defined the interests at risk when a business denies service.\textsuperscript{50} Likewise, scholars, myself included, have often invoked dignity without exploring more deeply the nature of the interests that public accommodations law protects.\textsuperscript{51}

Abraham and White offer a message—and warning—relevant to policymakers, courts, and scholars engaged in ongoing debates over the construction of public accommodations statutes and constitutional challenges to those statutes based on free speech and free exercise. Their account demonstrates that without a robust construction of dignitary interests, the Supreme Court will find it easier to limit the power of public accommodations law.\textsuperscript{52} The corollary is that such articulation might turn back or at least alleviate constitutional attacks by “supply[ing] a powerful, and increasingly resonant, rationale for using tort law to provide redress for persons who found themselves offended, embarrassed, or humiliated by the purposive conduct of others.”\textsuperscript{53} It might remind the public and the justices of the insult to human dignity engendered by the refusal of equal

\textsuperscript{49} See, e.g., Christy Mallory & Brad Sears, Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014, WILLIAMS INST. (Feb. 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf [https://www.perma.cc/JJM9-ER2K] (documenting paucity of complaints filed alleging race, sexual orientation, gender identity, and sex discrimination); Jim Norman, Nearly Half of Blacks Treated Unfairly ’in Last 30 Days,’ GALLUP (Aug. 22, 2016), https://news.gallup.com/poll/194750/nearly-half-blacks-treated-unfairly-last-days.aspx?g_source=link_NEWSV9&g_medium=TOPIC&g_campaign=item_&g_content=Nearly%2520Half%2520of%2520Blacks%2520Treated%2520Unfairly%2520%27in%2520Last%252030%2520Days%27 [https://www.perma.cc/85CE-7JNE] (reporting almost a quarter respondents having been treated unfairly while shopping in the previous thirty days because they were black); Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism, 42 U. MIAMI L. REV. 127, 128–29 (1987) (describing author’s reaction to being refused entry to a clothing store).

\textsuperscript{50} Compare the majority opinion in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (observing only that “[t]he Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments’) with Justice Goldberg’s concurring opinion, which explains the meaning of dignity. Id. at 292–93.


\textsuperscript{52} Abraham & White, supra note 1, at 152–53.

\textsuperscript{53} Id. at 153.
access, an insult that Americans in the 1960s and ’70s recalled so vividly. A deeper exploration of dignitary interests could enrich scholarly and doctrinal discussion of issues around same-sex weddings, transgender people’s access to bathrooms, and subordination of racial minorities in coffee shops, swimming pools, and beyond. We might be better positioned to weigh competing claims to dignity. For example, in cases involving religiously motivated refusals to serve same-sex couples, vendors and same-sex couples both assert a claim to vindicate their respective dignities. Abraham and White’s careful analysis invites scholars to evaluate whether the parties might be asserting different interests under an identical label. Their account instructs scholars, courts, and commissions to more carefully define the interests at risk when a business denies service. Using the framework they provide, the next Part offers some preliminary thoughts.

III
A TENTATIVE SKETCH OF DIGNITY INTERESTS IN PUBLIC ACCOMMODATIONS LAW

Today, while public accommodations law fosters market access and eliminates search costs, it primarily vindicates a dignitary interest. A functioning market—or access to the product—has never sufficed. Thus, in 1917, a business could not contend that black plaintiffs barred from sitting in the center aisle of a theater “had just as good an opportunity to see the pictures or vaudeville performance . . . seated on the right hand side, as if they were seated in the center section.”

Decades later, “the hardship Jackie Robinson suffered when on the road with the Dodgers was not an inability to find some hotel that would have him; it was the indignity of not being allowed to stay in the same hotel as his white teammates” in the South prior to the Civil Rights Act. By the 1970s, legislatures amended their laws to include “sex,” because they recognized that “men’s grills” imposed harm when they turned women away from business lunches, despite the existence of alternative venues where women could dine. From the civil

56 Elizabeth Sepper & Deborah Dinner, Sex in Public, at Part III (manuscript
rights era to the present day, the Supreme Court has responded to constitutional challenges by recognizing the “deprivation of . . . dignity” at the heart of public accommodations laws.57

So how might we determine what dignity means in practice? Like the European statutes authorizing dignitary torts which Abraham and White discuss, six of the forty-five state public accommodations acts explicitly state their purpose in terms of “dignity”58; one further specifies individuals’ “interest in personal dignity and freedom from humiliation.”59 While phrased as “an abstraction,”60 the operation of the statutes in commissions and courts might show that the concept of dignity under U.S. law is more advanced than it first appears.61

This Part tentatively sketches out the various interests we might discover that public accommodations laws protect under the label of dignity. Abraham and White provide scholars a roadmap for this task. They distinguish three interests underlying invocations of dignitary torts: freedom from embarrassment, humiliation, and disrespect; avoiding the diminished regard of others; and liberty and personal autonomy. Taking each in turn, this Part offers some tentative observations on how their taxonomy might inform and be informed by public accommodations law.

Like IIED, public accommodations statutes most clearly protect against embarrassment, humiliation, and disrespect. As the Supreme Court has said, public accommodations laws “[r]emove the daily affront and humiliation involved in discriminatory denials of access.”62 State courts further have described “the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them.”63 More generally, the existence of “humiliation damages”

60 Abraham & White, supra note 1, at 116.
61 Id. at 118–19 (arguing that European tort laws have given more operation to dignity).
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confirms the centrality of this meaning of dignity. The protection against humiliation, however, is not simply a matter of individual offense. As Bruce Ackerman has argued, the eradication of “institutionalized humiliation” was the central harm of discrimination, and its eradication the primary aim of antidiscrimination law.64 Where a public accommodation denies a person access because of, for example, his sexual orientation, it has inflicted relevant harm—even if the specific individual feels little or no embarrassment or humiliation. In describing dignitary harm as “community-wide stigma,”65 the Supreme Court has underscored that public accommodations discrimination works structural subordination, “not merely an injury to the feelings of the affected group.”66

Public accommodations laws, however, equally seem to safeguard a second interest: avoiding the diminished regard of others. The public nature of the insult frequently features in cases whether under statute or common law. As Abraham and White observe, the “dignity” cases surveyed by Harper and McNeely in 1938 involved almost uniformly “incidents that occurred in public” including accusations of theft and ordering of patrons out of amusement parks, theaters, and of course trains.67 The New York Court of Appeals has said, “it is the publicity of the thing that causes the humiliation.”68 In theaters, amusements, and the like, courts take the size of the crowd of witnesses to increase the injury.69

The public nature of the invasion of dignity underscores the connection between the interest against humiliation and

64 3 Bruce Ackerman, We the People: The Civil Rights Revolution 138 (2014).
67 Abraham & White, supra note 1, at 130 (citing Fowler V. Harper & Mary Coate McNeely, A Re-Examination of the Basis for Liability for Emotional Distress, 1938 Wis. L. REV. 426 (1938)).
68 Aaron v. Ward, 96 N.E. 736, 738 (N.Y. 1911).
69 See, e.g., Weber-Stair Co. v. Fisher, 119 S.W. 195, 197 (Ky. 1909) (noting that theater employees showed “a disposition to oppress and disgrace” a customer made worse by the “presence of a number of persons”); Odom v. E. Ave. Corp., 34 N.Y.S.2d 312, 314 (N.Y. Sup. Ct.), aff’d, 264 A.D. 985 (N.Y. App. Div. 1942) (“[P]laintiffs were subjected to humiliation, inconvenience and grossly insulted by the defendant in the presence of a number of people.”); Kelly v. Dent Theaters, Inc., 21 S.W.2d 592, 592–93 (Tex. Ct. App. 1929) (nothing that when an orderly theatergoer was ejected and threatened with jail a crowd “filled the whole sidewalk in front of the building” to watch).
the interest against disregard of others. The etymology of “regard”—meaning to watch and also to esteem—suggests the spectacle created by public refusal affects one’s status before one’s fellows. Avoiding disregard explains why, for example, legislatures barred the practice of businesses putting up signs to indicate preferred classes of patrons—and courts emphasized that “words as ‘selected clientele’ connote in the public mind that colored persons, Jews and others who are not lily-white need not apply.”

Humiliation, by contrast, seems not quite to capture why public accommodations laws treat this act as an offense to dignity. Likewise, conceptualizing of public accommodations discrimination as a “stigmatizing injury” indicates the significance of the esteem of one’s community. Public accommodations laws thus may respond not to one interest primarily, but to at least two interests equally and simultaneously.

Equal access to public accommodations also furthers an interest in liberty and autonomy. Freedom of movement is a central goal of public accommodations law. Courts’ and legislators’ concern for the “uncertainty” of whether one can enter a public place gestures to this interest. For racial minorities and women, who were once unwelcome in public space, equality in public accommodations meant not having to call ahead. More broadly, courts have articulated “the injury to an individual’s sense of self-worth and personal integrity”—a concern that sounds in autonomy. This last conception of dignity often finds articulation today, by not only individuals denied access to public accommodations, but also business owners who object to serving particular patrons or events for religious reasons. These various interests ultimately may be secondary goals of public accommodations law (or perhaps other dignitary torts) but are worth further exploration.

Finally, Abraham and White’s analysis of the historical roots of dignity signals yet another intriguing interest:

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preservation of individual status or rank. While Abraham and White assign this interest to the dustbins of history, common law cases and their contemporary forms in public accommodations could be understood as protecting individual status. It is no coincidence that path-breaking plaintiffs tended to be upper- or middle-class, whether they were African Americans bringing race claims, Jews pleading religious discrimination, or white women protesting sex discrimination. Thus, in the nineteenth century, elite black women sought to be treated as ladies by railroad companies—asserting, Welke observes, “the status hierarchy of gender against that of race.” In the first half of the twentieth century, Jews secured laws against discrimination at vacation resorts for the upper class. In the 1970s, professional white women used public accommodations law as a tool to integrate business lunches in restaurants, clubs where networks formed, and, in a notable anecdote, United Airline’s men-only “executive flight”—all of which denied these women their status as businesspeople.

As a recent complaint by a same-sex couple denied a room on vacation put it, the harm was—in part—“being treated as inferior and unworthy of equal treatment in even a routine business transaction.” Under common law and statute, individuals asserted a concept of dignity tied to recognition of, and treatment consistent with, their self-defined class. While not the rank and nobility of past dignitary claims, this conception of dignity as status merits scrutiny.

Abraham and White’s *The Puzzle of the Dignitary Torts* invites scholars of public and private law to think deeply about values inscribed in invocations of dignity. This reply calls for

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75 Abraham & White, supra note 1, at 107–09.
76 Fruchey v. Eagleson, 43 N.E. 146, 150 (Ind. App. 1896) (discussing humiliation of an African American “young man of correct habits, gentlemanly and polite in his deportment, and of much more than ordinary intelligence; being a junior in the State University, at the age of 18 years”).
77 Welke, supra note 30, at 296.
78 Sepper & Dinner, supra note 56, at 20.
scholars to also think broadly about the category of dignitary torts. Given the relationship between dignitary tort and public accommodations law, torts scholars might study the interpretation of dignity under these statutes. The larger set of cases and circumstances to be found in the records of human rights commissions across the country might allow the identification of other interests at play where dignity is at stake. Perhaps, it might show that interests protected by the dignitary torts overlap or align more than they diverge. While Abraham and White are probably right that a project of unifying dignitary torts was always doomed to failure, torts scholars might consider whether—and, if so, how—public accommodations laws’ enactment affected the elaboration of dignitary protections under the common law. Scholars might examine not only public accommodations statutes but also other regimes that award damages for humiliation and embarrassment. They might study how dignitary torts have remedied discrimination in the past and whether they might do so again. Public and private law scholars alike should interrogate how providing a private remedy for denial of human dignity regulates and shapes our society.

CONCLUSION

Today, the gulf between the majesty of dignity and “its translation into concrete legal rights” may not be as wide as Abraham and White suspect. Public accommodations statutes continue to give legal force to dignity, even as common law torts have receded. Human rights commissions and courts provide protection against indignity. Public accommodations laws largely have survived constitutional challenge.

But these laws stand on the precipice. Abraham and White’s account offers a cautionary tale. Unless courts and commentators articulate clearly and concretely what dignity means, the Supreme Court may cut back public accommodations protections as it has other dignitary torts. As claims under the Free Speech and Free Exercise Clauses of the

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(82) Abraham & White, supra note 1, at 105.
First Amendment burgeon, Abraham and White’s article underscores the urgency of this task. If in future years the Court carves out free exercise exemptions from public accommodations laws or strikes down their application in the name of free speech, its decisions will affect not only doctrine but dignity itself. A constitutional privilege against public accommodations law would, quite literally, “reduce[] the space” for the dignity of individuals out in public. As Abraham and White warn, it might call into question our societal commitment to equal human dignity.

83 Id. at 159.
84 Id.