ARTICLES

GETTING BACK TO BASICS: SOME THOUGHTS ON DIGNITY, MATERIALISM, AND A CULTURE OF RACIAL EQUALITY

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INTRODUCTION

For nearly three decades, critical theorists have worked to lay bare and disrupt the structure of racial oppression and its tragic manifestations in the lives of racial minorities. The first generation of critical theorists focused predominately on the symbolic and stigmatic features of racial subordination that undermine the ability of racial minorities to live on a free and equal basis in American society. More recently, a second wave of critical scholars have begun to focus attention on the material and economic dimensions of racial subordination, accenting the scope of material impoverishment and injustice produced and sustained over time by racially subordinating institutions and practices. For some scholars, this analytical turn marks a long overdue attempt to get back to basics–to re-center critical attention on the necessary, but all too often overlooked, preconditions for the exercise of basic freedoms and human flourishing.

In this article, I wish to join this second wave of critical scholars by offering some thoughts on what I believe to be the crucial preconditions for racial progress. In particular, I want to

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focus on perhaps the most fundamental obstacle to racial progress–the entrenched culture of racial inequality. Racial inequality is marbled into the flesh of American culture. If the founding of the Republic exemplifies the grand ideological triumph of liberal ideals–freedom, equality, and democracy over exploitation, oppression and aristocracy–then it also represents the birth of a deeply compromised cultural aesthetic that simultaneously proclaims vital liberty for all and devastating racial repression for some. In the beginning, this embedded culture of racial inequality was an explicit, hard lesson in brute racism–invidious intent, operationalized in the form of slavery, genocide, segregation, and thoroughgoing discrimination, and grounded in a firm belief in white supremacy and concomitant color-cued inferiority. In the modern era, brute racism has been largely replaced with subtle, insidious forms of racial bias–dislike, disdain or evasion, evidenced by enduring housing segregation, suspicious hiring decisions, curious associational preferences, and armchair assessments as to the purported link between minority "subcultures" and poverty, crime, and other social problems. Racial discrimination has been formally declared illegal and, to be sure, there has been substantial, meaningful racial progress. Yet for all its pronouncements regarding the primacy of freedom and equality, America remains a culture that is strangely tolerant of, or at least minimally responsive to, racial inequality.

For nearly half a millennium, the culture of racial inequality has worked the magic of blunting our collective sense of outrage over the profoundly uncivil and unequal treatment of racial minorities in America. Evidence of racial disparities in health, wealth, and society is often met with complacency or indifference because our culture has taught us that such disparities are, for better or worse, part of the natural order of American life. Indeed, racial disparity has become so normalized that we often express surprise and perhaps even a touch of suspicion when confronted with evidence that deviates from the pattern. In short, we have been acculturated to expect and, to some extent, accept the reality of racial inequality in America.

So, the essential question is this: how exactly does one go about eradicating the culture of racial inequality–a culture that influences our private attitudes and beliefs, informs our public policy and sense of justice, and shapes our institutions and social practices? How exactly does one go about the task of displacing a culture that teaches us to expect and, to some extent, accept as "ordinary" the extraordinary reality of racial disparities in virtually every index of socio-economic wellbeing?

The most obvious response is to promote a culture of racial equality. But how exactly does one do that? And what can law do in this regard? This critical question has been engaged by a multitude of scholars and activists, with little by way of firm resolution. As Karl Llewellyn wrote some time ago, we cannot expect to legislate a racial "kiss and make up," but law can do "queer, slow things" to change prevailing racial attitudes and perceptions.[1] By this, Llewellyn meant that ideals could be placed in tension with existing social conditions, which may in turn, produce rich, transformative possibilities for progress. In the spirit of "getting back to basics," and with Llewellyn-like cautious optimism, I want to suggest that the pathway to a culture of racial equality begins with the idea of taking dignity seriously.

Dignity is arguably the premier value underlying the last two centuries of moral and political thought in Western society. Indeed, the idea of dignity serves as a common, recurring theme in progressive discursive strategies that purports to articulate a compelling vision of freedom in civilized society. The identification of dignity as a crucial element in the freedom struggle appears most prominently in European settings, where it is routinely enshrined in national constitutions and rights-defining charters. In the American context, the idea of dignity survives largely through interpretive efforts of judges who identify dignity as an inherent constitutional value. Indeed, modern American courts have come to rely upon dignitary discourse when analyzing Fourth Amendment protections against unlawful searches and seizures, Eighth Amendment protections against cruel and unusual punishments, Fourteenth and Fifteenth Amendment antidiscrimination claims, and Ninth and Fourteenth Amendment issues involving women's reproductive rights.

Dignity strikes me as a particularly compelling value in the realm of racial reform because racial subordination, at bottom, is a dignity expropriative enterprise. That is, racial repression can be understood as a thoroughgoing attempt to deny basic dignity and equal humanity of others because of their race. This theme of dignity expropriation[2] underlies not only the historic practices of slavery, Indian removal and Eurocentric naturalization policy, but modern modes of racial oppression, such as employment discrimination, racial profiling in law enforcement, housing discrimination, and discriminatory lending practices. Notice that there are symbolic and stigmatic implications as well as distinctly mate-

1. Karl N. Llewellyn, *What Law Cannot Do For Inter-Racial Peace*, 3 VILL. L. REV. 30, 32 (1958).

2. I borrow the phrase "dignity expropriation" from Barbara Flagg, who is using it to develop a similar idea but in a different context.

rialist implications of racial repression. Dignity expropriation through racial repression entails not only symbolic and stigmatic subordination, but also, and importantly, economic oppression.

Early proponents of racial justice were well aware of this connection, although they perhaps did not describe it in this way. Not surprisingly, dignity has always been a central area of concern in the struggle for racial justice in America. The idea of dignity figured prominently in early efforts to achieve racial equality, but contemporary race jurisprudence no longer places a premium on dignitary interests.[3] In my view, the evasion of dignity represents a crucial failing because it deprives race jurisprudence of a coherent and comprehensive moral vision or theory of racial justice. The idea of dignity is powerfully linked not only with formal notions of freedom and equality but the material wherewithal to exercise that freedom on an equal basis. Put differently, freedom and equality, viewed through the prism of dignity, demands not only formal equal opportunity for all but that each of us possess the equal capacity to exercise basic freedoms.

A race jurisprudence that overlooks the dignity expropriative aspects of racial oppression is fundamentally non-responsive to this core feature of racial inequality. By contrast, a dignity-centered race jurisprudence can be understood to open up the possibilities of substantive racial justice by placing fairly concrete material demands upon the state–demands that present real promise in terms of generating a truly racially egalitarian culture that can produce and sustain meaningful changes in the material lives of racially subordinated individuals. To be clear, this more developed understanding of what equality demands is not entirely unfamiliar. Indeed, it is grounded in notions of social citizenship and good society that have been advanced in the past but largely abandoned both theoretically and doctrinally. My hope is to identify and reinvigorate these overlooked insights, and redeploy them in service of the materialist agenda of racial justice.

This Article proceeds as follows. In Part I, I briefly describe what I mean by taking dignity seriously. In Part II, I explain the materialist implications of a dignity-centered approach to equality jurisprudence. In Part III, I explore how a dignity-centered race jurisprudence can promote a culture of racial equality. In Part IV, I present possible objections. Part V concludes.

3. For a deeper account of this shift in approach, see Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669 (2005).

I. TAKING DIGNITY SERIOUSLY–A DIGNITY-CENTERED RACE JURISPRUDENCE

I take as my point of departure the proposition that the concept of dignity can serve as the normative anchor of race jurisprudence. This, of course, requires that one have a robust conception of dignity. Although the idea of dignity is arguably "the premier value underlying the last two centuries of moral and political thought"[4] in Western society, it has proven notoriously difficult to define with precision. I have explored elsewhere[5] the various ways in which philosophers and legal scholars have conceptualized and deployed the idea of dignity in a variety of settings, and ultimately arrived at the following working definition of dignity.

Dignity can be understood in at least two important ways. First, dignity can be understood in personal terms. Personal dignity operates at the level of the individual, and is perhaps best understood as a sense of perspective on *self-worth.* To have personal dignity is to appreciate oneself sufficiently that one would withstand pressures to lower one's self esteem. Perspective on self-worth explains how, for instance, African Americans emerged from slavery, Jim Crow, and the agonistic mid-twentieth century civil rights movement with a sense of dignity intact.[6] The same can be said for other historically marginalized racial and ethnic groups, such as Native Americans[7] and Jews.[8] I refer to dignity of this type as first-order dignity.

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4. Hugo A. Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145 (Michael J. Meyer & William A. Parent eds., 1992).

5. Bracey, *supra* note 3, at 677-05.

6. *But see* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT (1964), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 538 (James M. Washington ed., 1991)

> The Negro in Birmingham, like the Negro elsewhere in this nation, had been skillfully brainwashed to the point where he accepted the white man's theory that he, as a Negro, was inferior. He wanted to believe that he was the equal of any man; but he didn't know where to begin or how to resist the influences that had conditioned him to take the least line of resistance and go along with the white man's views. *Id.*

KWAME TURE (STOKELY CARMICHAEL) & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION 29 (Vintage ed., 1992) ("From the time black people were introduced into this country, their condition has fostered human indignity and the denial of respect. Born into this society today, black people begin to doubt themselves, their worth as human beings. Self-respect becomes almost impossible.").

7. *See* EVA MARIE GARROUTTE, REAL INDIANS: IDENTITY AND SURVIVAL OF NATIVE AMERICA 54 (2003) (noting that, among Native Americans, having survived the European invasion "is an extraordinary achievement, and the language of blood quantum [ie. full-blooded] gives people a well-deserved means to express it."); Rennard Strickland & William M. Strickland, *Beyond the Trail of Tears: One Hundred Fifty Years of Cherokee Survival, in* CHEROKEE REMOVAL: BEFORE AND AFTER 112 (William L. Anderson ed., 1970) (noting that the Cherokee Nation survives as the second largest Indian tribe in the United States and observing that "[t]oday, the

Dignity can also be understood to operate at the level of community. At the communal level, *inclusion* is the essence of dignity. To treat another with dignity is to consider another presumptively worthy of full integration into community membership. Dignity, in this sense, is universal and undifferentiated respect for social value. It is universal in that dignity inheres to every member of the community. It is undifferentiated in that the forms of social respect extended through an acknowledgment and affirmation of dignity are equal among all community members. I refer to dignity at the communal level as second-order dignity.

A dignity-centered race jurisprudence requires a baseline understanding that the pursuit of racial justice through legal means demands acknowledgment and confirmation of the essential dignity of persons subordinated on the basis of race. This requires that one be attentive to both first and second-order dignitary concerns. Holistic respect for dignity of another requires that one view others as possessing not only inherent dignity at the personal level–that is, equal humanity–but also a presumptive social worth that makes possible sincere inclusion and acceptance into one's own community.

The demands of first-order dignity–respect for equal humanity–requires us to historicize, contextualize, and deepen the discussion. One cannot acknowledge another's equal humanity without first interrogating the nature of that person's humanity, as well as one's own. This entails, among other things, a strong consideration of the lived experience of racial minorities. This means examining and coming to terms with the historical and present forms of oppression that provide content to the peculiar racial reality of subordinated racial groups. For African Americans, this may involve a deepened sense of appreciation of how the legacy of slavery, segregation, and stubborn beliefs in cultural inferiority continue to negatively impact their lives. For Latinos, this may require a greater appreciation of the ritual degradation and ethnic discrimination experienced by immigrant, low-skilled workers as well as members of established Latino communities

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tribe has no doubt that in another 150 years, basic Cherokee values, deeply rooted in tribal ways, will have survived.").

8. *See* LEONARD FEIN, WHERE ARE WE?: THE INNER LIFE OF AMERICA'S JEWS 72 (1988) (exhorting Holocaust survivors to remember that "[o]ur cautionary tale is more likely to be heard, attended, if it is seen not as special pleading but as testimony" and observing that "[w]e, the living, the survivors, and their kin, are witnesses, not victims."); *see also* RICH COHEN, TOUGH JEWS 192 (1998) (presenting a fictional Jewish character's angry reflection that "for people like me, who were born long after Germany was defeated, the worst part of the Holocaust was never the dead bodies; it was the way Jewish victims were portrayed [as] waiting to be shot, with already dead eyes [without] even a faint suggestion of personality . . . .").

that is not altogether different from the African American experience. For Native Americans, this may entail a greater sensitivity regarding the extended history of governmental and non-governmental oppression, alienation, and stereotyping that continue to constrain social and economic mobility of indigenous Americans. For Asian Americans, this may entail a greater appreciation of how the legacy of alienation and marginalization exemplified by racist naturalization policies, labor exploitation, and internment, feed contemporary mythology of Asian Americans as "perpetual foreigners" that plagues and confounds second, third, and fourth generation Asian American citizens.[9]

Likewise, a dignity-centered race jurisprudence must affirm second order dignity–presumptive worthiness of social inclusion. This is not an easy task, for one cannot affirm another's presumptive social value or worthiness of inclusion into a community without first interrogating the conditions of that community which make inclusion possible. If whites are to affirm the dignity and presumptive worthiness of inclusion of racial minorities, a necessary precondition is that whites examine critically and self-consciously not only the effects of racial subordination on minorities, but the myriad ways in which the culture of racial subordination has distorted and disfigured majority society, in general, and white identities, in particular. That is, dignity demands that whites not only indulge the prospect of an ever-expanding circle of people deserving respect, but also reflexively examine the question of what allows white Americans to see racial minorities as their presumptive inferiors and unworthy compatriots in the first place.[10]

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9. The theme of "foreignness" figures prominently in LatCrit scholarship. *See, e.g.*, Robert S. Chang, *A Meditation on Borders*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 244, 249 (Juan F. Perea ed., 1997) (observing that "foreignness" ascribed to Asian Americans "renders them suspect, subject to the violence of heightened scrutiny at the border, in the workplace, in hospitals, and elsewhere."); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1997) ("The alien represents a body of rules passed by Congress and reinforced by popular culture. It is society, often through the law, which defines who is an alien, an institutionalized 'other,' and who is not."); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 33-34 (1994) (observing that unlike most minority groups in America, Asian Americans are often viewed as distinctly "foreign"); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 988-90 (1995) (noting that the "national origin" language of Title VII forces plaintiffs to define themselves as outsiders, despite being American citizens, and reinforces pernicious norms about what constitutes the American identity).

10. This requires a level of reflection and introspection that few institutions and even fewer individuals are willing to voluntarily undertake. For commentary on the role of white introspection in the achievement of a culture of racial equality, see generally BARBARA JEAN FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW (1998); CRITICAL WHITE STUDIES: LOOKING BEHIND THE

II. DIGNITY AND MATERIALISM

Strong attention to dignitary concerns, respect for equal humanity and social value, therefore, provides a powerful mechanism to open up the possibilities of substantive racial justice. It asks what conditions must be established among the ranks of the whites so that whites might self-consciously and deliberately seek to overcome the difficulties of expanding the company of equals to include members of socially disfavored or oppressed groups. In this way, a renewed commitment to dignitary concerns of racial minorities provides us with the means of anchoring race jurisprudence to basic human values capable of producing meaningful changes in the lives of everyday people.

But the focus on dignitary matters is far from merely discursive. To be sure, an emphasis on dignity necessarily historicizes, contextualizes, and deepens the conversation on race. It makes relevant a host of atmospheric considerations routinely thought to be "off limits" in contemporary race jurisprudence.[11] But it also brings materialist considerations to fore–especially those that bear a close relationship to the ability of subordinated racial minorities to "realize" freedom. Relational perceptions of dignity inform a great deal of our social interactions, including relations that provide the means for securing and accumulating material stability and wealth. Thus, dignity can be understood in instru-

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MIRROR (Richard Delgado & Jean Stefancic eds., 1997); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991). Such an admission not only opens one up to stigmatic injury (having been denoted a racist), but legitimate claims of racial redress. It is therefore unsurprising that greater effort is spent asserting claims of racial innocence and disclaiming individual or collective responsibility for the troubled state of race relations.

11. By atmospheric considerations, I refer to aspects of so-called new racism, including but not limited to, the widespread acceptance of destructive racial stereotypes, *see, e.g.,* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Phillips eds., 1998); the disabling consequences of seemingly innocuous subtle forms of racial bias–not full blown racist acts, but more or less acts of racial carelessness, *see, e.g,* Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (describing microaggressions as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders" which can be viewed "as 'incessant and cumulative' assaults on black self-esteem."); and the unexamined acceptance of so-called societal discrimination, *see, e.g.,* ROY BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 109 (1996) (describing dignity harms as "macrosystemic" and "ubiquitous and permanent because they result from racialized ways of feeling, thinking, and behaving toward African Americans (and other minorities) that emanate from the American culture at large."). For a discussion of the Court's refusal to remedy societal discrimination, see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989) (O'Connor, J., plurality opinion) (rejecting "societal discrimination" as a justification for affirmative action); Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-08 (1975) (Powell, J., plurality opinion) (expressing deep skepticism that affirmative action may be used to address "societal discrimination").

mental terms, as well as providing a necessary precondition to economic inclusion and material empowerment.[12]

Contemporary race jurisprudence pays little attention to the material preconditions for the full and equal exercise of basic human freedoms. However, proponents of racial justice have always understood the essential role of materialism in promoting a culture of racial equality: to be free and equal demands that each of us possess the material wherewithal to exercise that freedom on equal terms. Indeed, this basic understanding of the material preconditions to freedom informed early Reconstruction efforts to achieve racial justice. The passage of the Fourteenth Amendment not only provided for equal citizenship, but granted Congress substantial enforcement power "to enact certain laws designed to affirm that blacks were equal citizens, worthy of respect and dignity."[13] It was well understood that racial equality reasonably contemplated regulation of systems of exclusion in such places as hotels, theaters, and public transportation and protection from racially motivated violence. In short, one could understand Congress' enforcement power exemplifying a new egalitarian constitutional affirmation that "blacks did indeed have rights that white men (and not merely governments) were bound to respect."[14]

This early egalitarian constitutional view understood that rights meant little if blacks did not possess the material wherewithal to exercise freedom in a meaningful sense. But there remained substantial disagreement as to the primacy of material demands. The predominant view among Republicans, black and white, was that a mixture of civil and political rights, education, and the passage of time would enable hard-working freedmen and women to achieve the material stability and wherewithal to enjoy full and equal citizenship. Nevertheless, others, most notably Thaddeus Stevens, in a now famous speech to Pennsylvania's Lancaster citizens on September 6, 1865, thought that material security through land ownership was paramount, and called for a

12. For a discussion of the vital role of social networks in capital formation and wealth creation, see Glenn C. Loury, *A Dynamic Theory of Racial Income Differences, in* WOMEN, MINORITIES, AND EMPLOYMENT DISCRIMINATION (Phyllis A. Wallace & Annette M. LaMond eds., 1977); *see also* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993); JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990); Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. OF ECON. PERSPECTIVES 91, 97-98 (Spring 1998); George Borjas, *Ethnic Capital and Intergenerational Income Mobility*, 107 Q. J. OF ECON. 123, 123-50 (1992).

13. Akhil Amar, *The Supreme Court 1999 Term-Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 105 (2000).

14. *Id.* at 105.

"parsing of the plantation."[15] Stevens called for the seizure of the 400 million acres belonging to the wealthiest 10 percent of southerners. Forty acres would be granted to each adult freedman and the remainder–some 90 percent of the total–sold "to the highest bidder" in plots, he later added, no larger than 500 acres. Though Stevens' proposal garnered lukewarm support among Republican elites, his view nevertheless resonated among newly emancipated blacks. Former Mississippi slave Merrimon Howard's response was typical: "Only land [would enable] the poor class to enjoy the sweet boon of freedom."[16]

The relationship between freedom and materialism would gather strength at the turn of the twentieth century. Indeed, for much of the early twentieth century, civil rights protections offered by the Supreme Court were largely understood in economic terms, such as the right to contract without government interference, the right to own private property, and the right to enjoy the fruits of one's own labor. The significance of this was not lost on racial justice advocates. The NAACP, responding to the urgent demands from working class blacks, began the daunting task of incorporating a strategy of economic justice into its limited repertoire of conventional civil rights litigation. The salary equalization cases, in which the NAACP litigated on behalf of African American teachers who received lower salaries than white teachers, were its initial foray into the sphere of economic justice. Although the NAACP publicly described these cases as part of its overall education strategy, the focus on wage differentials emphasized the prevailing view that racial justice carried with it a distinctly materialist element.

The NAACP's tentative embrace of economic justice strengthened during and after World War II, as blacks struggled to find and hold on to jobs in highly segregated, and often demeaning and harassing, workplaces. It was during this time that the NAACP achieved significant labor-related victories, the most prominent of which involved the protection of African American workers from discrimination and inequality in ship-

15. Thaddeus Stevens, Address to Lancaster Citizens (Sept. 6, 1865), *available at* http://history.furman.edu/~benson/hst41/red/stevens2.htm.

16. Letter from Merrimon Howard to Adelbert Ames (Nov. 28, 1873) (on file with Ames Family papers, Sophia Smith Collection, Smith College, Northampton, Mass.), *quoted in* Eric Foner, *The Meaning of Freedom in the Age of Emancipation, Presidential Address of the Organization of American Historians (Apr. 15, 1994)*, 81 J. AMER. HIST. 435, 458 (1994); *see also* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 32 (1999) (quoting ex-slave Garrison Frazier, a Baptist Minister, proclaiming on behalf of newly emancipated blacks that "[t]he freedom, as I understand it, promised by the Proclamation, is taking us from under the yoke of bondage and placing us where we could reap the fruit of our own labor and take care of ourselves.").

yards across the country, the protection of black union workers in New York, and the protection of African American workers from employer and union discrimination on the railroads. Although the mixing of labor issues with traditional civil rights issues posed unique political and doctrinal challenges for the NAACP, the combination was, in some ways, inevitable because of the very nature of racial subordination during the Jim Crow era. As Charles Hamilton Houston explained, "[i]n the United States, the Negro is economically exploited, politically ignored and socially ostr[a]cized."[17] Given the holistic nature of African American repression, it is unsurprising that the pursuit of freedom would entail a civil as well as distinctly materialist response.

The reasons for the abandonment of the material agenda of civil rights litigation are varied and complex. Some commentators argue that the rise of domestic, anticommunist repression put the NAACP and labor activists on the defensive, and forced a retreat from labor-related cases to classic civil rights cases that sought to protect minority rights "under the American Constitution and the American concept of democracy," while others point to politics within the NAACP and the institutional privileging of middle class interests at the expense of the interests of poor and working-class blacks.[18] Certainly, larger shifts in the constitutional landscape–such as the decline of Lochnerian substantive due process and the ascendancy of Equal Protection doctrine–and the Court's endorsement of the idea that stigma and psychological injury were the essence of racial harm left little doctrinal space in which to articulate claims that sounded both in racial oppression and economic subordination. Although the relative weight of the contributing factors that led to the evasion of a materialist civil rights agenda remains somewhat uncertain, what is readily apparent is that this evasion has successfully yielded egalitarian constitutional principles without securing the concomitant material changes.

Despite the doctrinal abandonment of a materialist civil rights agenda, the basic insight into the materialist underpinnings of freedom and equality remains theoretically robust, at least among a handful of good society theorists such as Frank Michaelman, Michael Sandel, Amartya Sen, Martha Nussbaum, Robin West, and William Forbath. Indeed, Amartya Sen and Martha Nussbaum's work on "capabilities" proves particularly illuminating on the possibilities of securing dignity, freedom and

17. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 134 (1983).

18. Risa L. Goluboff, *'Let Economic Equality Talk Care of Itself': The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 U.C.L.A. L. REV. 1393, 1464, 1423-24 (2005).

equality in a liberal democratic state.[19] By capabilities, Sen and Nussbaum refer to valuable human freedoms that can be meaningfully exercised by individuals. The focus is not on freedom in some abstract sense but a contextualized freedom that is contingent upon material disparities and the exercise of limited human agency. Under this view, the benchmark of equality is not formal opportunity but real opportunity for individuals to determine their own conceptions of the good with dignity and respect.

Importantly, the capabilities approach does not impose a requirement on government to secure minimum welfare for all citizens.[20] Instead, it demands that the state ensure that all citizens possess certain capabilities, such as the capability to live a safe, well-nourished, productive, educated, social, and politically and culturally participatory life of normal length.[21] However, the approach respects individual autonomy insofar as it leaves to the individual citizen the choice whether or not to avail themselves of those capabilities. Thus, citizens need not have the full range of welfare goods–food, shelter, clothing, physical safety, non-discriminatory and non-humiliating work, and the like–but they must have the capability to attain them. Access to the material preconditions of these capabilities is the truest measure of freedom and equality in a liberal state. Thus, Sen and Nussbaum's work articulates a vision of a good and just society that makes explicit the materialist underpinnings of freedom and equality.

While Sen and Nussbaum's commitment to human flourishing is productive in terms of deepening our understanding of what freedom and equality entail, it is important to emphasize that both appreciate the substantial role of government meeting the materialist obligations of the good society. For Nussbaum in particular, the state is not just permitted, but obligated, to ensure on behalf of its citizens that these material preconditions of our fundamental human capabilities are met.[22] The obligation extends not from politics or public policy but from a deeper understanding of civil society as an organic collective of individuals possessing equal moral worth or dignity by virtue of their human capabilities. Thus, Nussbaum argues that the state's obligation to

19. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 30-51 (Martha C. Nussbaum & Amartya Sen eds., 1993); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

20. *Cf.* Frank I. Michelman, *The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 (1969) (concluding that the state is obligated to do whatever it takes to provide that minimal level of well-being to each of its citizens).

21. NUSSBAUM, *supra* note 19, at 75-83; SEN, *supra* note 18, at 16.

22. NUSSBAUM, *supra* note 19, at 74-75, 89-90.

secure the minimal material preconditions of human capabilities ought to be understood as a fundamental constitutional duty.[23]

A race jurisprudence that takes dignity seriously has profound materialist implications because the idea of dignity is powerfully linked not only with formal notions of freedom and equality, but the material wherewithal to exercise that freedom on an equal basis. Put differently, freedom and equality, viewed through the prism of dignity, demands not only formal equal opportunity for all, but that each of us possess the equal capacity to exercise basic freedoms. In this way, dignity places fairly concrete material demands upon the state–demands that present real promises in terms of generating a culture of racial equality that can produce and sustain meaningful changes in the material lives of racially subordinated individuals.[24]

III. DIGNITY AND THE PROMOTION OF A CULTURE OF RACIAL EQUALITY

Kenneth Karst once explained that "to be a citizen is not merely to be a consumer of rights, but to be responsible to other members of the community."[25] Such responsibilities include the ability to take care of oneself and one's family. For Karst, this implied a "claim to respect, which the individual can legitimately make against society."[26] For racial minorities and African Americans in particular, respect and equal humanity have proven notoriously difficult to come by. As Glenn Loury recently acknowledged, "people do not freely give the presumption of equal humanity. Only philosophers do that . . . [T]he rest of us tend to ration the extent to which we will presume an equal humanity of our fellows."[27]

A central difficulty that must be addressed if we are to transform our culture of racial inequality is the chronic inability of whites to accord equal dignity to racial minorities. The pursuit of

23. *Id.* at 74.

24. For an interesting collection of articles discussing the intersection of race, ethnicity and citizenship, see generally *Symposium: Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination*, 76 OR. L. REV. 207, 207-74 (1997); Ibrahim J. Gassama et al., *Foreword: Citizenship and its Discontents: Centering the Immigrant in the Inter/National Imagination (Part II)*, 76 OR. L. REV. 207, 209 (1997) ("The papers in this Symposium investigate the aporetic relations among the nation-state, liberal understandings of citizenship, and problematic constructions of race and ethnicity as they are applied to immigrants."). For an intriguing look at the role of culture in the construction of post-colonial citizenship and nationhood in Puerto Rico, see Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000).

25. Kenneth L. Karst, *The Supreme Court 1976 Term-Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 9 (1977).

26. *Id.* at 10.

27. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 87 (2002).

racial justice in America is best understood as a struggle to secure dignity in the face of sustained efforts to degrade or dishonor persons on the basis of color. Put differently, the project of racial subordination takes place within and against a framework of dignity. The creation, toleration, or defense of racially subordinating features of society–features that have the effect of entrenching second-class citizenship for members of socially disfavored groups–are discretionary acts that rely upon relative perceptions of humanity, social worth, and dignity. A race jurisprudence that takes dignity seriously–that is, one that acknowledges and affirms the universal, undifferentiated dignity of historically subordinated racial minorities–responds directly to the culture of racial inequality that nurtures and sustains these practices.

A dignity-centered race jurisprudence provides the key to securing meaningful changes in the material lives of racially subordinated minorities because it embraces a more compelling and robust conception of freedom and equality responsive to all aspects of racial inequality. Racial subordination has always been intertwined with economic oppression. The harm of racial subordination includes not only stigmatic injuries, but material injuries, such as diminished health, wealth, income, employment, and social status. Freedom from racial subordination, then, must entail some effort to secure freedom from concomitant economic oppression.

A dignity-centered race jurisprudence demands a commitment to the presumptive social worthiness of inclusion in society, and therefore, views material considerations as inherent in the concept of freedom and equality. To be free and equal demands that each of us possess the material wherewithal to exercise that freedom on equal terms. Materialism, in this sense, is a fundamental concept of equal citizenship. Dignity, therefore, demands more than a chimera of equal opportunity premised upon abstracted negative rights and prohibitions on racial discrimination. Instead, it focuses upon real freedom and real opportunities in the form of securing the necessary material preconditions to exercise basic freedoms on an equal basis.

Although it contemplates normative realignment and corresponding structural and institutional changes, a dignity-centered approach retains a healthy respect of individual autonomy. It focuses on real opportunities, but it by no means guarantees substantive outcomes. An emphasis on equal worth and presumptive worthiness of inclusion imposes a clear obligation on the state to ensure that racial minorities possess the "capability" to participate fully and freely in society, but it does not purport to achieve

the impracticable (if not impossible) goal of securing minimal welfare for all. Rather, it seeks to promote a culture of racial equality that makes real the possibility of meaningful social and economic achievement. At the same time, it respects human agency insofar as it remains up to the individual to utilize.[28] Let me offer two examples. First, consider the material disparities in wealth, health, and society between blacks and whites. Along virtually every metric of social well-being, blacks lag behind whites. African Americans with the same level of education as whites continue to earn substantially less. Blacks continue to occupy proportionally fewer managerial positions and proportionally greater service and unskilled labor positions. Median family income for African Americans is roughly two-thirds that of whites. Black youth continue to lag behind whites in performance on standardized tests for mathematics and reading comprehension. The percentage of African American children under the age of eighteen who live in poverty is almost doubled that of whites. The same is true for the number of births to single mothers. Homicide victimization rates for blacks are nearly double the rates for whites. Incarceration rates for black men are seven times those of white men. African American adult men and women have a shorter life expectancy than their white counterparts; with black infant mortality rates approximately double those of whites.[29]

What does conventional race jurisprudence have to say in response to this evidence? As an initial matter, conventional race jurisprudence either assumes baseline substantive equality of natural and material endowments, or deems this matter entirely irrelevant. It then asks whether both blacks and whites enjoy formal equality. Have either blacks or whites been denied the negative right to be free from invidious racial and ethnic classification? Has there been a formally recognized abridgment of these negative rights that bears directly on the criteria of comparison? If both questions can be answered in the negative, then there is no reason under this conventional view to be suspicious of racially-correlated disparities. Such disparities may be unfortu-

28. By conventional race jurisprudence, I refer to the prevailing normative and doctrinal framework by which legal actors understand and interrogate claims of unlawful racial bias. The normative dimension is grounded in a profoundly ahistorical and thoroughly decontextualized version of colorblindness that views members of all racial groups, regardless of past treatment or present power monopoly, as on the same "racial footing" for purposes of asserting a racial bias claim. Doctrinally, conventional race jurisprudence understands racial subordination as the consequence of individual bad acts rather than institutional norms and practices–that is, racial subordination is properly understood in individualistic rather than structural terms–and, with limited exception, requires evidence of discriminatory intent and demonstrable discriminatory effect to validate a legal claim.

29. *See* LOURY, *supra* note 27, at 175-76, 180-82, 184, 190, 196, 200-04.

nate, but there is nothing that conventional race jurisprudence can do about them.

A dignity-centered approach departs from the conventional view in a number of key ways. First, unlike the conventional view, a dignity-centered approach neither assumes baseline equality of material endowments (although it does presume equal humanity and social worth), nor deems this matter irrelevant. Instead, it meaningfully interrogates the baseline, and asks whether blacks and whites possess equal capabilities to flourish under a regime of formal equality. Does society presume the equal humanity of blacks and whites, and provide each with the material wherewithal to exercise basic freedoms on an equal basis? Only if one can answer this question in the affirmative does one pursue the conventional inquiry as to whether both blacks and whites possess the negative right to be free from invidious racial and ethnic classification, and whether there has been a formal abridgement of that right. However, if the initial inquiry must be answered in the negative, then there is good reason to be suspicious of the raceven if there has been no formal abridgment.

So we can begin to see how a dignity-centered approach really opens up the possibilities of substantive racial justice. Unlike the conventional view, which focuses exclusively on the project of negating dignity expropriative behaviors after the fact, the dignity-centered approach places an affirmative obligation on the state to secure baseline equality by providing the material preconditions for racial minorities to exercise freedom on par with whites.

A second and more concrete example–work–further clarifies the redeeming qualities of the dignity-centered approach. Work is a powerful constituent element of personal identity. It goes beyond mere cash accumulation. Work can be understood as a person's contribution to society which triggers a host of other values including respect, dignity, and recognition. Among the range of status hierarchies, perhaps the most obvious and accessible is the distinction between those individuals who are gainfully employed and those who are not. As William Forbath explains,

> the most salient border between minimum respect and degradation in today's class structure falls along the lines between those who are recognized by organized society as working and providing a decent living for themselves and their families (or those housewives who "belong" to households with husbands fulfilling that role) and those men and women at the bottom of the class hierarchy who are not.[30]

30. Forbath, *supra* note 16, at 16.

It is perhaps unsurprising to learn that on average, people of color have fewer and less lucrative employment opportunities than whites.[31] As an initial matter, workers of color tend to be disproportionately unemployed. In 2003, 10.8 percent of blacks, 7.7 percent of Hispanics, and 6 percent of Asians were unemployed, compared to 5.2 percent of whites.[32] In the economic downturn from 2000 to 2002, people of color lost annual real income over three times as fast as whites, with blacks experiencing real income losses of 1.5 percent per year as compared to 0.5 percent for whites.[33] The state of Illinois exemplifies this pattern. In 1995, after a substantial number of blue-collar jobs were lost, 75.2 percent of all white men over sixteen years old were employed while the black male employment rate was only 56.6 percent.[34]

It is perhaps equally unsurprising to learn that disparities persist even among those gainfully employed. Census data shows, for instance, black women's wages are 62 percent of similarly situated white men's and 85 percent of similarly situated white women's.[35] Among the college-educated males, white men earn $66,000 a year, while Hispanics earn $49,000 and blacks earn $45,000. In blue-collar workplaces, immigrants, women, and people of color remain largely segregated in jobs with the worst conditions.[36] For instance, women and African Americans are overrepresented in temporary and part-time employment, where jobs are low paying and workers have little or no control over their hours.[37] Immigrants and women of color also number disproportionately among those who toil in sweatshops, contending with sub-minimum wages, nonpayment of wages, compulsory overtime, and long hours leading to damaged health.[38]

The prevailing response has been one that looks to formal equal opportunity. Under this view, one might reasonably conclude employment opportunities have been equalized, and that

31. *See* ROBERT CHERRY, WHO GETS THE GOOD JOBS?: COMBATING RACE AND GENDER DISPARITIES 9 (2000).

32. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2004/2005 (2005), table 3.1 at 222.

33. *Id.*, table 1.6 at 48.

34. CHERRY, *supra* note 31, at 9.

35. Women's Bureau, U.S. Dep't of Labor, *Facts on Working Women: Black Women in the Labor Force*, *available at* http://www.dol.gov/dol/wb/public/wb_publs/bwlf97.htm.

36. *See* Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOYOLA L. REV. 351, 363-73 (2001).

37. *See* Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 506-14 (1997).

38. Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 297 (2003); *see generally* MIRIAM CHING YOON LOUIE, SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY 41 (2001).

the "achievement gap" accounts for the continuing gaps in wages and employment between whites and minorities.[39] But what might a dignity-centered race jurisprudence demand in this particularf we understand that ability to work and reap the fruits of one's labor as an important freedom, then a dignity-centered approach might ask what preconditions need to be in place in order for all citizens, regardless of race, to exercise this basic freedom on an equal basis. This may entail obligations on the state to provide free and equal access to decent healthcare, education, and protection from physical violence. Moreover, once employed, the state may have the further obligation to ensure that individuals possess free and equal opportunities to earn comparable wages in dignified working conditions and to seek promotion.

The dignity-centered approach, therefore, contemplates serious structural changes in the institutional obligation of the state to citizens of color. In demanding rigorous, contextual scrutiny of material preconditions of freedom, the dignity-centered approach to race jurisprudence promotes a culture of racial equality that enables the human flourishing of racial minorities–a culture that conventional race jurisprudence is fundamentally unable to realize.

IV. ANTICIPATED OBJECTIONS

As with any reform proposal, one can anticipate a series of objections. Because the dignity-centered approach is a marked departure from conventional thinking on race matters and advocates a fundamental restructuring of institutional arrangements, sfuch skepticism is not entirely unwarranted. What follows is a brief discussion of three such objections.

A. *Race Jurisprudence as Negative Rights Regime*

Perhaps the strongest objection to a dignity-centered race jurisprudence is that the imposition of some affirmative obligation on the state to ensure material preconditions to exercise freedom on an equal basis is fundamentally inconsistent with the prevailing conception of liberal constitutional rights. The conventional view of liberal constitutional rights is that they are nega-

39. *See, e.g.*, ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING (2003); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 263 (1992) (suggesting that less-educated blacks should take jobs on an at-will basis and at lower wages to develop the skills they need to move ahead). Indeed, the Thernstroms adhere to this position, despite the fact that significant gaps in employment and wages remain even after controlling for educational attainment and test scores. *See* William R. Johnson & Derek Neal, *Basic Skills and the Black-White Earnings Gap*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra* note 11, at 480.

tive rights–rights that place explicit limits on the ability of the state to interfere in the private lives of citizens. Individual rights to liberty, property, contract, and privacy protect us against paternalistic meddling by the state, including intervention that some view as promoting a "good and just society." Because individual rights are both conceived and deployed to protect against an overreaching state, the logic of these negative rights would appear diametrically opposed to any affirmative obligation on the state to ensure that citizens possess the material wherewithal to exercise basic freedoms. Put differently, our negative rights regime has the effect of disempowering the state from interfering in the private lives of citizens, even for progressive democratic purposes. If the state is to have an obligation to secure the material aspects of equal dignity, it must do so through some mechanism other than individual rights.

Although the prevailing view is one that fetishes negative liberties, this need not be the case. The Constitution certainly implies positive rights that arguably interfere with traditional individual rights to be free from state meddling in private affairs. Consider the Thirteenth Amendment's prohibition of slavery the Supreme Court has invoked it only to strike down state legislation,[40] it is a fair assumption that the Thirteenth Amendment also imposes an obligation on the federal government to protect people against private violations of this right as well. Similarly, the Seventh Amendment requires the federal government to provide jury trials in civil and federal cases even though, unlike criminal cases, the state is not directly involved. And in the criminal context, the Supreme Court has required the state to provide counsel, trial transcripts and other assistance to defendants.[41]

Similarly, one might plausibly read the Fourteenth Amendment's prohibition on the abridgment of the privileges and immunities of citizens and the denial of equal protection of the laws as an affirmative obligation on the state to ensure equal citizenship of the sort discussed above. The first sentence of Section 1 declares that "No State shall deny" various entitlements, including equal citizenship and protection of the laws. As Robin West notes, "[i]t may be unfortunate that the drafters chose to use a double negative, but the meaning is not obscure. If no state is

40. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 n.1 (2d ed. 1988).

41. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent defendant in state criminal prosecution has the right to have counsel appointed to him); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that indigent defendants have the right to be furnished with trial records and transcripts, without cost, for appellate purposes).

allowed to deny, then all states must provide."[42] To be sure, this is not the conventional reading of the Amendment's guarantee.[43] However, it is certainly a plausible interpretation, and one that seems more consistent with both the promise of Reconstruction and the overall struggle for racial equality.[44] Moreover, almost all state constitutions provide recognize constitutional rights to welfare, housing, health, and abortions.[45] One can debate whether positive rights are best located at the state or federal level. However, it is clear that positive rights are not wholly outside the constitutional tradition.

At the same time, it is important to realize that the distinction between negative and positive rights is more theoretical than real. Take the right to possess private property. There seems to be little controversy about the appropriateness of protecting property and other forms of private economic activity against governmental action. This is justified on the ground that this involves only a negative right; that is, preventing the state from interfering with property. However, this conveniently overlooks

42. Robin West, *Rights Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1911 (2001).

43. As Richard Posner famously declared in Jackson v. City of Joliet, 715 F.2d 1200, 1206 (7th Cir. 1983), "[o]ur Constitution is a charter of negative rather than positive liberties . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them." This restrictive rights approach is perhaps epitomized in the modern era by the Court's analysis of the Due Process Clause and its application to children in the foster care system in DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 193 (1989) (denying that the state had a duty under the Due Process Clause to intervene and protect a child from abuse). Consistent with this view, the Court has refused to recognize the poor as a suspect class under the Fourteenth Amendment and has rejected any constitutional right to minimal welfare benefits. *See, e.g.*, James v. Valtierra, 402 U.S. 137, 141-42 (1971) (refusing to recognize poverty as a suspect classification); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970) (rejecting right to welfare benefits).

44. *See* West, *supra* note 42 (noting that the interpretation of the Fourteenth Amendment as only proving "negative rights" is inconsistent with Framer's understanding); Michael J. Gerhardt, *Essay: The Ripple Effects of Slaughter-house: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410-22 (1990) (describing the Court's decision in the *Slaughterhouse Cases* as subverting the political aspiration of Reconstructionists); *but see Jackson*, 715 F.2d at 1203 (stating that Fourteenth Amendment was adopted "at the height of laissez-faire thinking" and "sought to protect Americans from oppression by state government, not to secure them basic governmental services").

45. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (asserting that "every state constitution in the United States addresses social and economic concerns" and provides the foundation for "positive rights rang[ing] from the right of children to receive free public schooling, to the right of workers on public construction projects to receive 'prevailing' wage rates" (footnote omitted); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-96 (1989) (collecting state constitutional provisions mandating public, material assistance to the indigent ill, the poor, and the elderly); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

the vast array of resources and protections that property owners expect the state to provide in order to give substance to property rights. Negative property rights necessarily impose affirmative obligations on the state to provide adequate record keeping, law enforcement, and the provision of a legal structure to resolve property rights disputes.

Whether we are talking about positive right-features of negative rights, or positive rights explicitly, the animating principle is simply that in civil society one can always make a claim on government to create institutions and programs that provide for the common defense of individual rights and promote the general welfare. We demand that the government provide certain things, and to that end obligate it to create certain programs, because we believe that as citizens we are entitled to them.

B. *Merit Objection*

One might also object on the ground that this approach runs afoul of America's deep commitment to merit. Indeed, the belief in individual merit and the corresponding denunciation of unearned privilege permeates nearly every aspect of American life, from club memberships to education to employment.[46] The problem, of course, is that merit is perhaps more mythology than truth.[47] In reality, the idea of merit has always been situated as

46. Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 MICH. L. REV. 2036, 2053-54 (2002) (noting that the original rhetoric in support of the 1964 Civil Rights Act was grounded in a sincere belief that "disembodied merit should be the exclusive criterion on which employment (and similar decisions) were made"); Mark R. Killenbeck, *Pushing Things Up to Their First Principles*, 87 CAL. L. REV. 1299 (1999) (observing that "[m]uch of the growth and prestige of post-World War II American higher education was a direct consequence of the ability of colleges and universities to characterize themselves as institutions open to all, where individual merit and personal determination were the criteria for success or failure."); *see also* HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-72 (1990) (describing the prevailing view among race commentators that merit is, and should be, the determining factor in employment and academic selections, and noting that critics consider anti-discrimination legislation and affirmative action to be deviations from a merit-based system). For an interesting account of gender distinctions in merit-based hierarchical arrangements, see D. E. BROWN, HUMAN UNIVERSALS 110, 137 (1991) (observing that men serve as military leaders and hold leadership roles in religious, social, and cultural institutions more often than women); Felicia Pratto et al., *Social Dominance Orientation: A Personality Variable Producing Social and Political Attitudes*, 67 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 741, 742 (1994) (citing studies demonstrating that "men hold more hierarchy-enhancing attitudes, such as support for ethnic prejudice, racism, capitalism, and right-wing political parties, than do women.").

47. For examples of this in fictional works, see HORATIO ALGER, JR., RAGGED DICK, OR STREET LIFE IN NEW YORK, *reprinted in* RAGGED DICK AND STRUGGLING UPWARD (1868); F. SCOTT FITZGERALD, THE GREAT GATSBY (1925); EDNA FERBER, EMMA MCCHESNEY & CO. (1915); AYN RAND, ATLAS SHRUGGED (1957). For nonfiction works, see BENJAMIN FRANKLIN, AUTOBIOGRAPHY (1790); BOOKER T.

an ideal against the prevailing backdrop of privilege and inheritance. Not surprisingly, the idea of merit is increasingly exposed as largely illusory.[48] As Fred Schauer explains, "[w]e are rapidly

WASHINGTON, UP FROM SLAVERY (1901); ANDREW CARNEGIE, THE EMPIRE OF BUSINESS (1902).

48. Merit has proven a particularly divisive concept in race relations, yielding heated debate over: (1) the relevant criteria of merit; (2) the starting assumption that all candidates compete on a level playing field; (3) the hyper subjectivity of metric for measuring merit; and (4) the circumstances in which merit-based decision making is appropriate (and where it is not). *See, e.g.*, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 91-111 (1997) (stating that the current meritocratic system employs rhetoric which masks the reality of unfair privilege, measurements which are highly imprecise or simply subjective, and subjective value choices about what factors constitute merit). *See also* NICHOLAS LEMAN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY 342-51 (2000) (observing that meritocracy in America operates on an uneven playing field, presenting subjectively chosen criteria of what constitutes merit as if they were objective); John Roemer, *Equality of Opportunity*, *in* MERITOCRACY AND ECONOMIC INEQUALITY 318 (Kenneth Arrow et al. eds., 2000) (proposing a way to purportedly "level the playing field"); Susan Strum & Lani Guinier, *The Future of Affirmative Action*, *in* WHO'S QUALIFIED? 3-5 (Susan Strum & Lani Guinier eds., 2001) (stating that a meritocracy based on standardized tests does not begin with a level playing field, make truly objective measurements, or accurately measure merit, unless merit is redefined strictly as the ability to do well on standardized tests); Mary Waters & Carolyn Boyes-Watson, *The Promise of Diversity*, *in* WHO'S QUALIFIED?, *id.* at 55 (agreeing with Strum and Guinier that a meritocracy based on standardized tests in "neither functional nor fair"); Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379, 385-92 (2005) (arguing, in the education admissions context, that the criteria constituting merit vary depending upon the goals of the admitting institution); Leon Botstein, *The Merit Myth*, N.Y. TIMES, Jan. 14, 2003, at A31 ("universities have for too long maintained a lie about how subjective and imprecise the assessment of merit actually is;" "[m]otivation, ambition, curiosity, originality and the capacity to endure risk and think independently are essential components of merit."). For examples of arguments that certain circumstances do or should involve non-meritocratic decisions in traditionally meritocratic contexts, see Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085, 1097-98 (1995) (asserting that, in circumstances where employee satisfaction with the work environment strongly influences efficiency and there is no overriding customer preference for diversity, homogeneity (rather than merit) should be the basis of employment decisions). *See also* Grutter v. Bollinger, 539 U.S. 306, 367-68 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that the college admissions process "is poisoned by numerous exceptions to 'merit,'" including "legacy preferences"); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001) (detailing the effects of admissions preferences for athletes); Jody David Armour, HYPE AND REALITY IN AFFIRMATIVE ACTION, 68 U. COLO. L. REV. 1173, 1195-99 (1997) (observing that, in circumstances of legacy admissions in education and the "old boy network" in employment, non-merit-based decisions prevail); Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 311 n.177 (2003) (observing that legacy admissions "circumvent" meritocratic "qualifications"); Richard A. Epstein, *The Subtle Vices of the Employment Discrimination Laws*, 29 J. MARSHALL L. REV. 575, 580 (1996) (re-iterating the argument in The Status-Production Sideshow); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 925-26 (2000) (observing that, due to their small size, modern tribal governments must accept nepotism); L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 310-12 (2005) (arguing that law schools should "consider

in the process of burying the myth of Horatio Alger [because it is becoming increasingly apparent that] [y]ou cannot get rich (or even not poor) in contemporary America just by working hard."[49] But much of that mythology still remains and continues to serve an important role in the shaping of our American identity.

Moreover, a dignity-centered approach can be understood to correct a fundamental anomaly of the merit argument. The idea of merit presupposes baseline equality, and then seeks to explain or ameliorate suspicion of injustice triggered by demonstrable disparities in socio-economic well being by attributing them to varying degrees of individual effoenvelops these disparities within an aura of "naturalness" and evades serious contemplation of exogenous explanations for the purported "natural" hierarchy.

Whatever one might think about merit, it is clear that if we are to subscribe fully to the merit principle and the outcomes it produces, we must be confident in the assumption of baseline equality. The progressive appeal of the dignity approach to race jurisprudence is that it poses a direct challenge to the legitimacy of racial hierarchy by calling attention to baseline inequalities among groups and highlighting the social and cultural insecurities of those who reside at the highest levels of the racial pecking order. In this sense, the dignity-centered approach enhances the reliability of merit based assessments by ensuring baseline equality through equal investment in all citizens.

C. *The Indignity of Material Transfer*

One might also object that an explicitly materialist response to perceived racial injustice may prove stigmatizing to recipients of Justice Stevens, in his concurring opinion in *Croson*, observed that "[a]lthough [a race preference policy] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, *it actually imposes a greater stigma on its supposed*

granting a multicultural race-neutral diversity preference admission to qualified former athletes who have less than excellent grades and lower standardized test scores."); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 757 (2003) (noting that the application of a "sex-integrated meritocracy" "would, in all likelihood, lead to an almost total absence of women from the formally coed varsity athletic squads."). *But see* Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995) (asserting that the successes of Jews, Japanese Americans, and Chinese Americans, surpassing those white gentile males on the whole, can only be explained by conceding that the current meritocratic system really does reward actual merit to some degree).

49. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1516 (1986).

beneficiaries."[50] Justice Powell, in *University of California Board of Regents v. Bakke*, observed that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[51] Justice Kennedy, in *Metro Broadcasting v. FCC*, offered a similar warning: "[t]he history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them . . . Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own."[52]

Although some whites may view material transfers to nonwhites as stigmatizing, it is not entirely clear whether that view is shared by racial minorities. A number of commentators have pointed out that proponents of this view rarely seek confirmation that such stigmatization actually occurs. As Alexander Aleinikoff comments, "[d]espite assertions by whites that race-conscious programs 'stigmatize' beneficiaries, blacks remain overwhelmingly in favor of affirmative action. Would we not expect blacks to be the first to recognize such harms and therefore to oppose affirmative action if it produced serious stigmatic injury?"[53] Indeed, Derrick Bok and David Bowen's landmark study on the beneficiaries of affirmative action suggests race conscious material transfers have the effect of boosting self-esteem and self confidence because the beneficiaries have been given the opportunity to learn and compete with the best and brightest students.[54]

But even if one believes that special preferences are stigmatizing to beneficiaries, there is no reason to conclude that a policy that secures baseline equality would necessarily produce the same effect. The dignity-centered approach is grounded in the idea of equal humanity and social worth. By focusing on baseline equality of opportunity, it seeks to eliminate the "special preference" afforded to whites in a culture of racial inequality that nurtures and sustains racial oppression. It is hard to imagine how providing the material preconditions to exercise freedom on an equal basis would prove stigmatizing. Indeed, in a culture committed to racial equality, stigma would presumably attach to

50. *Croson*, 488 U.S. at 516-17 (Stevens, J. concurring) (emphasis added).

51. *Bakke*, 438 U.S. at 298.

52. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 635-36 (1990) (Kennedy, J., dissenting).

53. *See* Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1091 (1991).

54. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 245-48, 261 (1998).

those who seek to retain special privilege derived from structural barriers that prevent others from exercising social and economic mobility on a free and equal basis.

There is, of course, a second stigma objection that one also hears in connection with affirmative action–which is that such policies stigmatize all members of the group denoted as beneficiaries, regardless of whether they actually receive the benefit. This argument was most recently advanced by Justice Thomas in *Grutter v. Bollinger*. According to Justice Thomas, the Michigan Law School's use of affirmative action in the admissions process meant that "the majority of blacks are admitted to the Law School because of discrimination," and that "because of this policy all are tarred as undeserving."[55] This proved particularly troubling because "[t]his problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination."[56] Thus, according to Justice Thomas, merely sharing the same racial classification as material recipients poses a substantial risk of stigma, even if one does not ultimately derive the material benefit.

The logic of stigma-by-association, however, rests upon the notion that actual beneficiaries are somehow stigmatized. Individuals who are commonly associated with actual beneficiaries –in this instance because of shared racial characteristics–are stigmatized only if one believes the actual beneficiary has been previously stigmatized. But as discussed above, there is no reason to believe that this is the case. Establishment of the material preconditions of freedom is premised upon the idea of equal humanity and social worth. Unlike classic welfare dispensation, which purports to guarantee minimal allocation of goods and social welfare, the dignity approach focuses on providing material preconditions to exercise freedom on an equal basis. Importantly, it does not guarantee material equality, but merely that all citizens possess equal capacity to participate fully in all features of the good society. If providing the material preconditions to exercise freedom on an equal basis is not stigmatizing to actual beneficiaries, then there is little reason to think that it would nevertheless prove stigmatizing to members of the same social group who ultimately do not receive any material benefit.

V. CONCLUSION

The achievement of racial equality in American society remains one of the most perplexing and profound challenges of our time. The essential, yet confounding, task remains how best to

55. *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting).
56. *Id.*

promote a freedom-loving culture that empowers racial minorities to exercise that freedom on equal terms. In this Article, I have argued that law can be better utilized to promote a culture of racial equality when we understand the normative aspiration of race jurisprudence as one that seeks to secure and promote the dignitary interests of racial minorities. In many ways, these ideas are deeply utopian insofar as they project a vision of social citizenship and good society that is profoundly in tension with the prevailing conception of the welfare state and conventional beliefs in status and hierarchy in a liberal capitalist society. But, like any good society theorist, I believe that progress occurs when one not only articulates but presses for realization of the ideal. My hope is that some aspect of this enterprise might yield material changes in our culture and in our institutional arrangements that enable racial minorities to exercise basic freedoms and flourish on a free and equal basis.