DIGNITY IN RACE JURISPRUDENCE

Christopher A. Bracey

INTRODUCTION

Dignity remains the core aspirational value in the struggle for racial justice. For Americans of African descent, the relentless demand to be treated with respect and equal humanity resonates in virtually every sector of intellectual and cultural life. The idea of dignity has been deployed consistently and consciously for more than a century to expose the absurdity of racial injustice in America—from Frederick Douglass’s noble assertion that the Negro is “self-evidently a man, and therefore entitled to all the rights and privileges which belong to human nature” to Martin Luther King, Jr.’s deep meditation on the motivations of civil rights proponents to Harlem Renaissance poet Claude McKay’s fatalistic declaration that “If we must die, O let us nobly die... then even the monsters we defy [s]hall be constrained to honor us though dead!” to the late rapper Tupac Shakur’s lyrical condemnation of the crisis of poverty and social isolation that characterizes life in forgotten segments of the black community. These

---

1 Associate Professor of Law, Washington University School of Law. I would like to thank the participants in the University of Pennsylvania Journal of Constitutional Law symposium for their thoughtful comments and suggestions in response to my initial presentation of these ideas. In addition, I thank Dorothy Brown, Martha Minow, Blake Morant, and Leonard Rubinowitz for sharing with me their thoughts on dignity. Finally, I would like to thank my friends and colleagues on the law faculty at Washington University School of Law—especially Tomiko Brown-Nagin, Steve Gunn, Pauline Kim, Troy Paredes, and Laura Rosenbury—and my research assistant Michelle Tham.


4 Shakur writes:
   How can I feel guilty after all tha things they did to me
   Sweated me, hunted me
   Trapped in my own community
   One day I’m gonna bust
   Blow up on this society
   Why did ya lie to me?
   I couldn’t find a trace of equality
dramatic instances of agonistic assertiveness represent far more than individualized political or cultural expression—they are moments

Work me like a slave while they laid back
Homie don't play that
It's time to let'em suffer tha payback.


The call for the affirmance of African American dignity figured prominently in the introspective literary work of Ralph Ellison and protest novels of Richard Wright. See generally RALPH ELLISON, *INVISIBLE MAN* (1952) (providing a unique commentary of the continuing degradation of Black America through the story of a nameless narrator who feels "invisible" because of his race); RICHARD WRIGHT, *NATIVE SON* (1940) (telling the story of Bigger Thomas, a young black man who faces oppression and racial injustice and comes to define his life and find his place in the world through violence). James Baldwin, in *The Fire Next Time*, similarly laments the failure of whites to acknowledge the "unassailable dignity" of blacks. In an essay to his young nephew on the racial world he would soon face in adulthood, Baldwin wrote:

[Y]ou come from sturdy, peasant stock, men who picked cotton and dammed rivers and built railroads, and, in the teeth of the most terrifying odds, achieved an unassailable and monumental dignity. You come from a long line of great poets, some of the greatest poets since Homer. One of them said, "The very time I thought I was lost, My dungeon shook and my chains fell off."

You know, and I know, that the country is celebrating one hundred years of freedom one hundred years too soon.


The idea of dignity would later emerge in soul music of the ’60s and ’70s, as well as some aspects of hip-hop. See BRIAN WARD, *JUST MY SOUL RESPONDING: RHYTHM AND BLUES, BLACK CONSCIOUSNESS, AND RACE RELATIONS* 211, 361–62 (1998) (commenting upon the racial politics in James Brown’s 1968 anthem “Say it Loud—I’m Black and I’m Proud,” with its “obvious, if effective” lyrics “we’d rather die on our feet, than keep livin’ on our knees” and recounting the galvanizing effect of Aretha Franklin’s remake of Ous Redding’s “Respect” on the creation of “overtly engaged, political soul songs”); Tshombe Walker, *Hip Hop and the Rap Music Industry*, in *AFRICAN AMERICAN JAZZ AND RAP* 211, 214 (1997) (describing hip-hop as “primarily an expression of the honor of being black in racist America”); see also CRAIG WERNER, *A CHANGE IS GONNA COME: MUSIC, RACE & THE SOUL OF AMERICA* 299–40 (1998) (noting that some hip-hop pioneers, such as Afrika Bambaata, traced their political awareness to politically conscious soul artists, including James Brown and Sly Stone, as well as civil rights leaders Malcolm X, Martin Luther King, Jr., and Louis Farrakhan).

constitutive of a common, transhistorical call for the acknowledgment and affirmation of African American dignity.

The struggle for racial justice in America, then, is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color. The concepts of dignity and subordination are powerfully linked. The harm of racial subordination includes not only dignitary harms such as intentional and unintentional racist acts, but material injuries such as diminished health, wealth, income, employment and social status. Racial subordination, however, 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 such socially disfavored groups—are discretionary acts, and each of these discretionary acts rests upon perceptions of humanity and social worth, or dignity. Unexamined beliefs in the relative lack of dignity possessed by blacks, for example, are often relied upon to explain and justify subordinating practices. Not surprisingly, a substantial number of legal thinkers have engaged in sustained efforts to emphasize dignitary concerns in the contemporary legal struggle for racial justice. Nevertheless, con-

---

6 The idea of dignity figures prominently among antisubordinationists. The classic statement of the antisubordination principle was articulated by Professor Owen Fiss, who argued that the Equal Protection Clause prohibits a law or official practice that “aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group.” Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 157 (1976). Critical theorists have explicitly advanced this proposition in various forms for some time now. See Christopher A. Bracey, Adjudication, Antisubordination, and the Jazz Connection, 54 Ala. L. Rev. 853, 862 (2003) (“Constitutional adjudication that strives to realize democracy, then, encourages courts to embrace the antisubordination principle when deciding cases that pit minority rights and interests against majority rule.”); Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1931, 1386 (1988) (observing that “[t]he struggle of Blacks, like that of all subordinated groups, is a struggle for inclusion, an attempt to manipulate elements of the dominant ideology to transform the experience of domination” and that “[i]t is a struggle to create a new status quo through the ideological and political tools that are available”); Neil Gotanda, A Critique of “Our Constitution is Color-Blind”, 44 Stan. L. Rev. 1, 68 (1991) (discussing the danger of courts focusing on formal race rather than the “reality of racial subordination”); Charles R. Lawrence III, Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation, 47 Stan. L. Rev. 819, 824 (1995) (discussing the consideration of “racial equality as a substantive societal condition rather than as an individual right”); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987) (asking scholars to focus on subordinated individuals and groups when developing theories of racial justice); Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1453–54 (1991) (observing that “the antisubordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged”); Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 694 (1990) (arguing that “[e]qual protection,” for the progressive, means the eradication of social, economic, and private, as well as legal, hierarchies that damage”).
temporary race jurisprudence remains a profound disappointment precisely because it fails to take seriously the crucial and, in light of the comfort engendered through the tacit embrace of white privilege, deeply unsettling tasks of acknowledgment and affirmance of universal, undifferentiated dignity for historically subordinated racial minorities.

The idea of dignity is not altogether foreign in American law. The Supreme Court has, from time to time, demonstrated responsiveness to dignitary concerns in a variety of contexts, including race relations. The criticism I advance in this Article is that we appear to be in the midst of a dignitary downcycle in the race relations context—a period in which dignity is currently undervalued. Importantly, this undervaluation of dignity creates an air of unreality and nonresponsiveness to Court pronouncements on race matters, which in turn reinforces chronic impediments to the promotion and realization of substantive racial justice in this country.8

The roots of American racial pathology are in Negro slavery, and a crucial constituent element of slavery was the ritual dishonor and degradation of those enslaved.9 If law is implicated not only in terms

---

8 By substantive racial justice, I mean to refer to policies, initiatives, and norms that are self-consciously employed to promote and achieve real progressive changes in the material conditions of subordinated racial minorities. Antidiscrimination law and other policies that promote formal equality and equal opportunity are certainly crucial elements to the racial justice equation. Substantive racial justice goes further insofar as it places greater emphasis on material and redistributive approaches directed at concrete manifestations of deep-seated subordination, such as chronic disparities in wealth, health, employment, and education. For a fuller discussion of these disparities, see infra text accompanying notes 152–61.

9 Slavery represents the ultimate expression of power—absolute power for the master and absolute powerlessness for the slave. But it also presents a most obvious means of imposing social, economic, and cultural isolation. Degradation, dishonor, and remarkable disparities in socioeconomic well-being were both the desired and the intended consequences of slavery. See ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 185 (1982) (noting that if a slave attempted "to acquire the trappings of an honorable person and to deny his inherent baseness, then the law came down on him with all its force").
of creating the necessary conditions for race-based dignitary harm, but actively participating in ritualized degradation of blacks and other minorities, it would seem to follow naturally that race jurisprudence would be, at a minimum, sensitive to dignitary concerns when addressing racial issues in a contemporary setting.

This naturally insurgent need to address issues of dignity in the pursuit of racial justice, however, is complicated by the prevailing view that legal remedies for offenses to honor and dignity are rightly difficult to come by. As Southern historian Bertram Wyatt-Brown explains: "The courts and lawmakers never put honor into statutory or judicial form because it was commonly understood that there should be a division between the workings of the law and the stalwart defense of a man's sense of self."10

Professor Brown perhaps overstates the case, as one can point to a host of dignitary torts as modern, real-world examples of concrete le-
gal remedies available for affronts to honor and dignity. Actions that humiliate, torment, pressure, demean, or outrage a reasonable person—examples include assault, false imprisonment, malicious prosecution, outrageous conduct, defamation, and invasion of privacy—can be understood as injurious to the person’s dignitary interest and give rise to tort-based liability.\footnote{See Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (noting in the defamation context that “[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being”); see also Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962, 973 (1964) (describing the “real nature” of a privacy complaint as an “intrusion [that] is demeaning to individuality [and] an affront to personal dignity”). Assaults to dignity may also take the form of so-called expressive harms. See Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483, 485, 506-07 (1993) (defining “expressive harms” as harms that “result[] from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about”).}

Despite these developments, law has yet to carve out meaningful space for race-based harm to personal dignity. The reason for this may lie in Brown’s admission, for his comment reflects a core belief that seeking restoration or acknowledgment of dignity through law serves only to reaffirm one’s degraded status, further deepening the crisis of self-worth and social value. It is this belief that animates Michel de Montaigne’s unflinching assessment that “[h]e who appeals to the laws to get satisfaction for an offense to his honor[] dishonors himself.”\footnote{Michel de Montaigne, Of Custom, and Not Easily Changing an Accepted Law, in THE COMPLETE WORKS OF MONTAIGNE 77, 85 (Donald M. Frame trans., Stanford Univ. Press 1958) (1572-1574). As Julian Pitt-Rivers once explained: The conflict between honour and legality is a fundamental one that persists to this day. For to go to law for redress is to confess publicly that you have been wronged, and the demonstration of your vulnerability places your honor in jeopardy.... Moreover, it gives your offender the chance to humiliate you further by his attitude during all the delays of court procedure, which in fact can do nothing to restore your honor but merely advertises its plight. Julian Pitt-Rivers, Honour and Social Status 30 (1965).} If we take this view seriously, then one might reasonably conclude that the affirmation of dignity for African Americans has remained elusive precisely because blacks have chosen to appeal to institutions of civil society for a declaration of equal humanity.

Whatever one might think of traditional codes of honor among men, it is clear that universal declarations of dignity and equal humanity have become almost commonplace in modern civil society.\footnote{For a discussion of the prominence of such declarations in western philosophy and the international legal context, see infra text accompanying notes 18-31, 45-52.} At the same time, the hallmarks of the slavery regime—degradation, dishonor, and social, political, and economic isolation—are reflected in our contemporary landscape, taking the form of enduring racial
stereotypes and chronic racial disparities in health, wealth, and society. For this reason, the struggle for acknowledgment and affirmation of dignity remains critical to the enterprise of substantive racial equality.

I do not mean to suggest that dignity is the be-all-end-all of the struggle for racial justice. Indeed, there is a certain discomfort that creeps in whenever one begins to fixate upon amorphous concepts such as honor and dignity in the face of profound social, political, and material inequity. Nor is this simply a matter of privileging one discursive strategy over another. Mere utterance of magic words addressed to dignitary concerns is not my aspiration. Rather, I seek to emphasize dignitary concerns because this approach makes relevant a host of considerations—for example, the widespread acceptance of destructive stereotypes, the disabling consequences of seemingly innocuous subtle forms of racial bias, and the unexamined acceptance of so-called societal discrimination—routinely thought to be “off limits” in contemporary race jurisprudence. Emphasis on dignitary concerns historicizes, contextualizes, and deepens the discussion. It provides us with the means of recentering our conversation on matters of substantive racial justice, which is a welcome reprieve from the incessant wrangling over the scope and contour of procedural equality that has come to dominate contemporary race jurisprudence.

One might rightfully question whether dignity has independent force, whether it adds anything meaningful to the rights discourse. The position I advance is simply that thinking in terms of dignity allows us to focus on matters of substantive racial justice, which should

14 See Glenn Loury, The Anatomy of Racial Inequality (2002) (“Nearly a century and a half after the destruction of the institution of slavery, and a half-century past the dawn of the civil rights movement, social life in the United States continues to be characterized by significant racial stratification.”). For a racial comparison of socioeconomic well-being, see discussion infra text accompanying notes 152-61.

have been the primary focus all along. Viewing matters of racial justice from a dignitary perspective is worth doing precisely because it makes us think about these matters differently and more deeply. It is critical that we identify and resurrect these easily overlooked dignity concerns, lest they be forgotten entirely, and redeploy them to rescue an increasingly unanchored and unresponsive jurisprudence.

Focusing on dignitary matters is important for another reason. 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 instrumental terms: as providing a necessary precondition to economic inclusion and material empowerment.

My argument proceeds as follows. Part I begins with a discussion of the idea of dignity, and how that idea compares with the legal concept of dignity as it relates to constitutional rights and values. Part II contains a discussion of the concept of dignity in American race relations law. Here, I argue that dignity is (and always has been) a central area of concern in the struggle for racial justice, and that current Supreme Court jurisprudence indulges in delusional and counterfeit thinking when it chooses to undervalue, distort, or evade entirely core dignitary concerns in the context of racial disputes. Furthermore, I contend that this undervaluation, distortion, and evasion has resulted in the promulgation of precepts of racial equality unanchored by a coherent moral vision or theory of racial justice. In Part III, I suggest that there is good reason to think that the Court can reanchor race jurisprudence through a renewed emphasis on dignitary concerns, given the success of this approach when addressing the controversial matter of gay sex in Lawrence v. Texas. Specifically, I argue that Lawrence can be powerfully understood as a self-conscious acknowledgment and affirmation by the Court of the equal humanity and dignity of gays. In Part IV, I discuss the implications of the Court’s approach to dignity in Lawrence, and what a renewed emphasis on dignity might look like in the equally contentious field of American race relations. Although I acknowledge potential conceptual and doctrinal problems with this approach, I nevertheless maintain that a renewed emphasis on dignity may provide a mechanism that focuses the Court’s attention on the true nature of racial injustice and provides the Court with an anchor for its future race-based decision making.

Before proceeding, a word about the nature of this project is in order. Although this Article draws heavily upon the role of slavery in the creation and elaboration of American racial pathology, one

should not construe this demand for an undifferentiated acknowledgment of equal humanity as applicable only in the field of black/white relations. Concepts of honor and dignity transcend racial and ethnic lines, and the salience of these concepts in the construction of racial and ethnic identity is both profound and far-reaching. I avail myself of the black/white paradigm, in large part, because of the crucial role of black/white relations in the shaping of American consciousness of race matters. However, the longing for respect and acknowledgment of worthiness is a universal human desire, and the argument that honor and dignity is essential to justice should resonate within each of us.

I. DIGNITY IN AMERICAN CONSTITUTIONAL DISCOURSE: A BRIEF OVERVIEW

A. The Idea of Dignity

The idea of dignity is arguably “the premier value underlying the last two centuries of moral and political thought” in Western society. Yet it has proven notoriously difficult to define with precision. A common definition of dignity refers to “the quality or state of being

17 For a discussion of the importance of honor and dignity in the Latino community, see RUTH HOROWITZ, HONOR AND THE AMERICAN DREAM: CULTURE AND IDENTITY IN A CHICANO COMMUNITY (1983) (describing the lives of young people and their transition into adulthood in a Chicano community). For an example of how these concepts function in certain segments of the Asian American community, see SHIH-SHAN HENRY TS AI, THE CHINESE EXPERIENCE IN AMERICA 165 (1986), which describes the indignity and shame experienced by Chinese immigrants unable to obtain employment commensurate with their education and technical skill level, and its effects on Chinese youth, and MELFORD S. WEISS, VALLEY CITY: A CHINESE COMMUNITY IN AMERICA 254 (1974), which quotes a Chinese anthropological subject as stating:

Our traditions give us the courage to fight the forces of injustice. In America we may be small in numbers but we are proud of our glorious history. We were writing when the white man was still crawling in caves. Truly, we are more civilized. I know that while my mouth may speak English, my heart will always feel Chinese.


19 See Rhonda V. Magee Andrews, The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America, 54 ALA. L. REV. 483, 534 (2003) (“Like Potter Stewart’s characterization of obscenity in the Jacobellis case, human dignity tends to have an ‘I know it when I see it’ feel; a quality of abstractness that becomes more concrete and recognizable in specific factual scenarios.” (footnotes omitted)).
worthy, honored, or esteemed.”

Dignity in this sense appears almost conditional. A person is worthy, honored, or esteemed, perhaps under certain circumstances, but there is no suggestion, at least in this definition, that dignity inheres to the person. As Alan Gewirth writes:

[W]e may say of some person, ‘He behaved with great dignity on that occasion,’ or ‘She generally comports herself with dignity.’ Such dignity is a contingent feature of some human beings as against others; it may be occurrcidentally had, gained, or lost; and, depending on the context, it may or may not have a specifically moral bearing.

This idea of dignity is quite distinct from eighteenth-century notions of dignity as “elevated social rank,” as described by Nathan Bailey in the first full dictionary for the English language: “Dignity is properly represented by a lady richly cloath’d, and adorn’d . . . beautified with ornaments of gold and precious stones. The meaning is very obvious.” This notion of dignity as grounded in social hierarchy persists as the leading definition in Black’s Law Dictionary and as a subsidiary definition in most general dictionaries.

In Western philosophy, one might trace the roots of fuller, more modern understandings of dignity to Immanuel Kant. For Kant, dignity was simply another way of referring to a person’s worth. A person’s worth was understood as something independent of a person’s value or utility. Worth, according to Kant, did not rest upon virtuous conduct or morally decent behavior. Rather, worth was understood to refer to the capacity that each of us presumptively possesses for such conduct or behavior. Individuals may vary in their value or utility under different circumstances, but persons presumably do not vary in their dignity or worth.

---

20 MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 324 (10th ed. 1996); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 522 (3d ed. 1992) (defining dignity as the “quality or state of being worthy of esteem or respect”); WORDNET 2.0 (Princeton Univ. 2003) (defining “dignity” as “the quality of being worthy of esteem or respect”), available at http://www.cogsci.princeton.edu/cgi-bin/webwn2.0?stage=1&word=dignity.
21 Alan Gewirth, Human Dignity as the Basis of Rights, in THE CONSTITUTION OF RIGHTS, supra note 18, at 10, 12.
22 NATHAN BAILEY, DICTIOARIUM BRITANNICUM (2d ed. 1736).
23 BLACK’S LAW DICTIONARY 468 (7th ed. 1990) (defining dignity as “1. The state of being noble; the state of being dignified. 2. An elevated title or position”).
24 See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 20, at 324 (offering as a second definition “a: high rank, office, or position. b: a legal title of nobility or honor”); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, supra note 20, at 522 (offering, as a third definition of dignity, “[s]tateliness and formality in manner and appearance” and, as a fourth definition of dignity, “[t]he respect and honor associated with an important position”); WORDNET 2.0, supra note 20 (offering as a second definition “formality in bearing and appearance” and as a third definition “high office or rank or station”).
25 IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 30, 44 (James W. Ellington trans., Hackett Publ’g Co. 1983) (1785).
26 See Bedau, supra note 18, at 153 (“[D]ignity or worth is a kind of value that all human being have equally and essentially.”).
Autonomy was an essential feature of Kant's idea of dignity.\textsuperscript{27} By autonomy, Kant meant essentially the freedom to have and pursue one's own ends. To deny another's autonomy through force or fraud, to use another person without regard to his welfare or chosen ends, is violative of that person's dignity. Every man, according Kant, "is obligated to acknowledge, in a practical way, the dignity of humanity in every other man."\textsuperscript{28} Importantly, autonomy means more than simply affording formally equal opportunities to all persons. As Amartya Sen correctly observed, taking autonomy seriously entails, among other things, providing individuals with the capacity (including material wherewithal) to exercise that autonomy in a meaningful fashion.\textsuperscript{29}

Kant's views about the nature of dignity provide a window into the debate over the meaning of dignity that would span the generations.\textsuperscript{30} As Judith Resnik and Julie Chi-hye Suk explain:

Some claim for dignity a categorical valence, pronouncing the worth, value, esteem, and deference owed to all human beings and, it is occasionally argued, also to animals. Some relate dignity to religious commitments about the sanctity of humans, while others locate dignity in human agreement or conflict, as an artifact of interaction rather than as a predicate to it. For some, individual dignity is a social undertaking, stemming from recognition of a person's identity and an acknowledgment of an individual's connection to others as a part of a community.\textsuperscript{31}

In my own view, dignity can be understood in at least two important ways. First, dignity can be understood in personal or individualistic 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. A strong sense of perspective on self-worth often has the effect of revealing the spuriousness of assaults on dignity. Perspective on self-worth explains how African Americans emerged from slavery, Jim Crow, and the

\textsuperscript{27} KANT, supra note 25, at 30, 44.
\textsuperscript{28} Id. at 132. Under this view, the practice of slavery was morally indefensible. Interestingly, few if any moral philosophers raised this objection. See Bernard R. Boxill, Dignity, Slavery, and the Thirteenth Amendment, in THE CONSTITUTION OF RIGHTS, supra note 18, at 102, 111-12 (identifying statements made by David Hume and Immanuel Kant regarding the natural inferiority of blacks as "racy," but concluding that "although many notable European philosophers of the period supported, or failed to oppose, black slavery and—if we can judge from their passing remarks—were also very likely racists, none seriously endeavored to justify slavery [for such] an endeavor would have been doomed to obvious self-contradiction").
\textsuperscript{29} AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000).
\textsuperscript{30} Judith Resnik & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 STAN. L. REV. 1921, 1929 (2003) (noting that "locating" the concept of dignity raises many questions about the "boundaries of dignity itself").
\textsuperscript{31} Id. at 1929-30 (citations omitted).
agonistic mid-twentieth century movement for civil rights with a sense of dignity intact.32 The same can be said for other historically marginalized racial and ethnic groups, such as Native Americans33 and Jews.34 I refer to dignity of this type as first-order dignity.

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 integration into community membership. Dignity, in this sense, is universal and undifferentiated respect for social value. It is a 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 affirrnance of dignity are equal among all community members. I refer to dignity at the communal level as second-order dignity.35

For one to take dignity seriously, one must be attentive to both first- and second-order dignitary concerns. Holistic respect for dig-


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. at 538; see also STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 29 (1967) (“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.”).

33 See GARROUTrE, supra note 17, at 54 (noting that, among Native Americans, having survived the European invasion "is an extraordinary achievement, and the language of blood quantum [i.e., 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., 1991) (noting that the Cherokee Nation survives as the second largest Indian tribe in the United States and observing that "[t]oday the tribe has no doubt that in another 150 years basic Cherokee values, deeply rooted in tribal ways, will have survived").

34 See RICH COHEN, TOUGHJEWS 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, looking ahead with already dead eyes . . . [without] even a faint suggestion of personality"); 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").

35 Because second-order dignity functions at the communal level, we can imagine the forms of respect for social value to operate both between social groups (inter-group dignity) as well as within social groups (intra-group dignity). Although intra-group dignitary concerns are important, the discussion of second-order dignity in this Article will focus exclusively on inter-group dignitary concerns.
nity 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.

B. Dignity as a Concept in Legal Discourse

Although the idea of dignity has deep roots in American constitutional history,\(^\text{36}\) dignity within legal discourse is of fairly recent vintage. Most commentators agree that a deep appreciation for dignitary concerns of individuals did not emerge in American constitutional discourse until after World War II.\(^\text{37}\) Prior to this period, the Supreme Court understood dignity interests as held mainly by institutions.\(^\text{38}\) Justice Frankfurter first employed the idea of dignity in connection with constitutional rights in a 1942 criminal procedure case. The case, *Glasser v. United States*,\(^\text{39}\) involved a federal defendant's claim that he had been denied his right to counsel. Frankfurter disagreed with the majority's categorical finding that the mere absence of counsel constituted a *per se* rights violation, and in the course of his dissenting opinion, he observed: "The guarantees of the Bill of Rights are not abstractions. Whether their safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances."\(^\text{40}\) But it was Justice Murphy who offered the earliest passionate defense of dignitary interests. In denouncing the Court's approval of the internment of Japanese American citizens based solely upon ancestry in *Korematsu v. United States*,\(^\text{41}\) Justice Murphy pointed out that the use of race as a strong proxy for criminal suspicion has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now

---

\(^{36}\) See *The Declaration of Independence* para. 2 (U.S. 1776) (aspiring to create a social order in which "all [m]en are created equal"); *The Federalist* No. 1, at 36 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (recommending to the people of New York that the creation of a Constitution is the "safest course for your liberty, your dignity, and your happiness"); see also Michael J. Meyer, *Introduction to The Constitution of Rights*, supra note 18, at 1 (describing the idea of dignity during the founding era).

\(^{37}\) See, e.g., Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 How. L.J. 145, 150 (1984) (noting that the phrase "human dignity" was first used by the Supreme Court in 1946); Resnik & Suk, supra note 30, at 1926 (claiming that "the word dignity was not used in reference to personal constitutional rights in the Supreme Court's jurisprudence until the 1940s in the wake of World War II").

\(^{38}\) See Resnik & Suk, *supra* note 30, at 1939–34 (observing Court acknowledgment of the dignitary interests of "nations, states, legal institutions, personages such as judges, the flag, and even God" (citations omitted)).

\(^{39}\) 315 U.S. 60 (1942).

\(^{40}\) Id. at 89 (Frankfurter, J., dissenting).

\(^{41}\) 323 U.S. 214 (1944).
pledged to destroy. To give constitutional sanction to that inference in this case . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.  

Two years later, Justice Murphy would again employ the term "human dignity" in a dissenting opinion in In re Yamashita.  

Yamashita involved the prosecution of a former Japanese Army General for war crimes committed during World War II. The majority ruled that General Yamashita was not entitled to the full panoply of rights protections generally afforded to criminal defendants. Justice Murphy, however, believed that human dignity demanded greater attention to the process of law: "If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."  

Some commentators have implied that Justice Murphy may have been responding to the United Nations Charter, signed into existence just seven months earlier, which affirmed in the preamble an international belief in "the dignity and worth of the human person." Today, explicit recognition and affirmation of human dignity in law is far more common outside American law. For instance, the United Nations' Universal Declaration of Human Rights states unequivocally that "the inherent dignity" and "equal and inalienable rights" of all is "the foundation of freedom, justice and peace." Article I of the German Constitution also speaks directly to the protection of dignity: "The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority." The new South African Constitution declares explicitly that the founding values of new society include "[h]uman dignity, the achievement of equality and the ad-

---

42 Id. at 240 (Murphy, J., dissenting).
43 327 U.S. 1 (1946).
44 Id. at 29 (Murphy, J., dissenting).
45 U.N. CHARTER pmbl.; see also Paust, supra note 37, at 151 (assuming Murphy's awareness of the U.N. Charter provisions, but rejecting the conclusion that "the birth of the constitutional concept of human dignity is tied to the United [Nations] Charter").
47 GRUNDEGESETZ [GG] [Constitution] art. 1 (F.R.G.) (entitled "Protection of Human Dignity"). "The Human Dignity Clause of the German Constitution is thought to be of primary importance . . . . In the view of the Federal Constitutional Court' this clause expresses the highest value of the Basic Law informing the substance and spirit of the entire document."
vancement of human rights and freedoms.”

In other countries, dignitary concerns have been simply “treated” as matters of constitutional importance. For instance, in Canada, where the Constitution contains no specific reference to dignity, the Canadian Supreme Court has held that the genesis of the rights and freedoms in the Canadian Charter, and the Charter itself, “are inextricably tied to the concept of human dignity.” Similarly, Israel, which does not have a single constitutional document, nevertheless enacted a “Basic Law of Human Dignity” in 1992 which purports to make dignitary concerns a matter of constitutional importance.

By contrast, dignitary discourse in American law survives largely through judicial efforts to locate dignity as an inherent value in the U.S. Constitution. Justice Brennan was perhaps the strongest proponent of dignity as a fundamental constitutional value. According to Justice Brennan, “the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of a libertarian dignity protected through law.”

For Brennan, the Constitution em-

---

48 S. Afr. Const. § 1. For an interesting discussion of how dignitary harms have been incorporated into antidiscrimination law under the new South African Constitution, see Frank I. Michelman, Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa, 117 Harv. L. Rev. 1378 (2004).

49 See Braz. Const. tit. 1, art. 1 (“The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on . . . the dignity of the human person”); Costa Rica Const. tit. 4, art. 33 (amended 1968) (“All persons are equal before the law and no discrimination may be made against human dignity”); Nicar. Const. tit. 1, art. 5 (amended 1995) (“Liberty, justice, and respect for the dignity of the human person . . . are principles of the Nicaraguan nation.”).


52 Brennan, of course, is not the only source for developing a meaningful concept of dignity in the law. Ronald Dworkin, for instance, has argued that moral dignity-based restraints on legislation are inherent in the Due Process and Equal Protection Clauses of the Constitution. A society that takes dignity seriously becomes more deeply democratic, according to Dworkin, because such a society “encourages each individual to suppose that his relations with other citizens and with his government are matters of justice.” Ronald Dworkin, A Matter of Principle 32 (1985); see also id. at 302 (“[N]o one in our society should suffer because he is a member of a group thought less worthy of respect, as a group, than other groups.”).

Similarly, philosopher Charles Taylor has suggested that the concepts of equal humanity and dignity are essential to the creation of a democratic society: “Democracy has ushered in a politics of equal recognition, which has taken various forms over the years, and has now returned in the form of demands for the equal status of cultures and of genders.” Charles Taylor, The Politics of Recognition, in Multiculturalism: Examining the Politics of Recognition 25, 27 (Amy Gutmann ed., 1994).

bodied a commitment to democracy premised upon the acknowledged worth of each individual member of the democratic community. Rights protections and concomitant limitations on government authority are rooted in a respect for individual autonomy. Thus, in Brennan's view, the Constitution "augmented by the Bill of Rights and the Civil War Amendments . . . is a sparkling vision of the supremacy of the human dignity of every individual."

The Court has, from time to time, invoked the legal concept of dignity when analyzing Fourth Amendment protections against unlawful searches and seizures, Fourteenth and Fifteenth Amendment antidiscrimination claims, and Ninth and Fourteenth Amendment issues involving women's reproductive rights. However, dignity as a legal concept has figured most prominently in the development of the Court's modern Eighth Amendment jurisprudence. Justice Brennan offered his most powerful statements on the importance of human dignity when confronting the issue whether criminal death sentences are barred by the Cruel and Unusual Punishment Clause of the Eighth Amendment. In Furman v. Georgia, Brennan explained: "The primary principle [advanced by the Eighth Amendment's prohibition on cruel and unusual punishment] is that

54 Id.
55 See Schmerber v. California, 384 U.S. 757, 767 (1966) (declaring that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwanted intrusion by the State"); Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) (arguing that dignitary interests inherent in the Fourth Amendment necessitate some limitation on the scope of searches of homes to ensure "that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect"). The Court continues to view dignitary interests as central to its analysis of the appropriateness of a search. See, e.g., United States v. Flores-Montano, 124 S. Ct. 1582, 1585 (2004) (observing that "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles"); Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (noting that "the degree of intrusiveness upon personal privacy and indeed even personal dignity" of a search varies, depending upon the circumstances); Arizona v. Evans, 514 U.S. 1, 23 (1995) (Stevens, J., dissenting) (arguing that "[t]he offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base strikes me as . . . outrageous"). For a discussion involving the intersection of dignity, race, and search and seizure law, see United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and discussion infra text accompanying notes 131-35. For a discussion of dignity in the context of privacy interests of individuals who practice gay sex, see Lawrence v. Texas, 539 U.S. 558 (2003), and infra text accompanying notes 168-84.
56 See discussion infra text accompanying notes 88-147.
57 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (declaring that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"); Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring) (stating that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment [and] protected by the Fourteenth Amendment from infringement by the States").
a punishment must not be so severe as to be degrading to the dignity of human beings." State-sanctioned punishments of individuals must be carried out "with respect for their intrinsic worth as human beings." Quite simply, a punishment is prohibited as "cruel and unusual" within the meaning of the Constitution if it "does not comport with human dignity." For Brennan, "death stands condemned as fatally offensive to human dignity."

Although Brennan would become the most salient voice of human dignity in Eighth Amendment jurisprudence, he was not the first Justice to invoke the concept. In *Trop v. Dulles*, Chief Justice Earl Warren announced his belief that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Interestingly, Warren expressed strong reservations that the death penalty ran afoul of the dignitary interest inherent in the Eighth Amendment. Indeed, he "put to one side the death penalty as an index of the constitutional limit on punishment," noting that "the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Nevertheless, Brennan's concurrence in *Furman* can be read as an expansion of Warren's concept of dignity into what Brennan would later describe as the principle "that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity."

Scholars generally agree that dignity has and continues to function as an important constitutional value. However, there remains
some disagreement as to what sorts of meanings might be ascribed to
dignity as a legal concept, and whether it adds anything of impor-
tance to the rights protections themselves. Even Justice Brennan,
who implored each of us to engage in the "ceaseless pursuit of the
constitutional ideal of human dignity," acknowledged that dignity
possesses a certain amount of conceptual imprecision. But he did
not view such dynamism as necessarily problematic. As Brennan re-
marked:

I do not mean to suggest that we have in the last quarter century
achieved a comprehensive definition of the constitutional ideal of human
dignity. We are still striving toward that goal, and doubtless it will be an
eternal quest... [T]he demands of human dignity will never cease to
evolve.

Dignity, like the constitutional values of freedom and equality, takes
shape against the backdrop of changing social, political, and eco-
nomic realities. Like freedom and equality, the conceptual elasticity
of dignity does not suggest that it is devoid of content. Rather, it sug-
gests core content that continues to emerge and evolve over time.
And as Brennan correctly observed, the ability to refine the constitu-
tional values over time is "the true interpretive genius of the text."

II. DIGNITY IN AMERICAN RACE RELATIONS LAW

The concepts of race and dignity have always shared a relationship
in American cultural consciousness, although that relationship has
transformed and grown increasingly complex over the centuries.
What follows is a discussion of the ways in which legal actors and insti-
tutions have understood and interpreted this relationship, and the
effects that this has had on the development of contemporary race
jurisprudence.

Brennan's location of dignity within the Constitution, he argues, is a "judicial fabrication[ ]
without constitutional warrant." Id. at 133-34.

See William A. Parent, Constitutional Values and Human Dignity, in THE CONSTITUTION OF
RIGHTS, supra note 18, at 48-50 (observing that the Court's deployment of dignity has lacked
logical and philosophical coherence, and advancing an alternative conception of human dig-
nity rooted in law); Paust, supra note 37, at 155-58 (observing that the Supreme Court has in-
voked "dignity" in a multitude of contexts, often in an inconsistent manner).

Resnik & Suk, supra note 30, at 1937 (suggesting that dignity is "not a distinct concept but
derives from and is a form of autonomy").

Brennan, supra note 53, at 12.

Id.

Id. at 14.
Dignitary and stigmatic harms were the hallmark of the slavery regime. Plantation society was an honor society and it was well understood by whites that slaves, by definition, had no honor. The fundamental unworthiness of slaves was confirmed in the minds of Southerners by what they perceived as the inability of slaves to confront death without fear. Southern gentlemen were not afraid to die; mastery over the fear of death was seen as a precondition of being a free man. Not surprisingly, it was an axiom of plantation society that a slave deserved a life of humiliation for having refused an honorable death.

Violence inflicted upon slaves further reinforced white honor and black dishonor in the eyes of Southern whites. Violence reinforced the idea of slaves as social pariahs—outsiders “cut off from society, making slavery itself a form of social death.” Scars from the lash, in addition to presumptive stigma derived from dark skin, provided immediate proof of the assault on Negro dignity. As historian Kenneth Greenberg describes, “[t]he scar, in a sense, spoke for itself—or rather spoke about the man whose body carried it—regardless of the process or the larger set of relations that brought it into existence.”

The root indignity of white superiority and black inferiority occasionally resulted in the oppression of whites who, in defiance of prevailing associational norms, chose to closely intertwine their lives with dishonored slaves. For example, a 1664 Maryland statute provided that “freeborn English women forgetful of their free Condition and to the disgrace of our Nation [who] intermarry with Negro Slaves... shall Serve the master of such slave dureing the life of her husband [and] that all the Issue of such freeborn woemen soe married shall be Slaves as their fathers were . . . .” The stigma of the degraded and dishonored slave was understood to have irredeemably tainted such a woman, and so she suffered the core indignity of permanent estrangement from her presumptively privileged place in so-

---

71 See KENNETH S. GREENBERG, HONOR & SLAVERY xii (1996) (observing the close connection between the Southern code of honor and the slavery regime); WYATT-BROWN, supra note 10, at 46 (noting that slaves were incapable of subscribing to the Southern code of honor); Andrew E. Taslitz, Hate Crimes, Free Speech, and the Contract of Mutual Indifference, 80 B.U. L. REV. 1283, 1317 (2000) (observing that “Southern whites defined slaves as persons without honor”).
72 Taslitz, supra note 71, at 1320.
73 GREENBERG, supra note 71, at 109-10.
75 GREENBERG, supra note 71, at 16.
ciety. As historian Kathleen Brown concluded, such laws "impart[ed] to black sexuality the power to taint."\(^7\)

Denigration and dishonor were critical to the maintenance of the slavery regime, even in court proceedings in which slave status or racial identity itself was the issue being contested. As Ariela Gross recounts:

When a person of color whose racial identity was at issue in the lawsuit presented himself to the jury for 'inspection,' turning in all directions, taking off his shoes for examination of his feet, opening his mouth to reveal his teeth, removing his shirt, showing his fingernails, he re-enacted the shaming rituals of the slavemarket, the rites that so many ex-slaves remembered as the defining moment of enslavement. \(^7\)

Other courtroom protocol, such as the general prohibition on slave testimony in open court because of a presumptive lack of integrity and honor, served to reinscribe this root indignity of white superiority and black inferiority. \(^7\) As Gross explains, "[t]he dishonor of the slave was a lesson that had to be taught and re-taught, and the courtroom was one of the most public, official places where this lesson was driven home."\(^8\)

In this way, slavery allowed for what sociologist Orlando Patterson describes as "the permanent, violent domination of natally alienated and generally dishonored persons."\(^8\) In the Southern plantation ethos, the white master derived honor and status from the limitless power over the slave, whose denigrated and dishonored social status was wholly defined in terms of complete and utter domination. As Judge Ruffin famously proclaimed in *State v. Mann*, "[t]he power of the master must be absolute, to render the submission of the slave perfect."\(^8\)

Dishonor and degradation—inscribed in the Constitution's simultaneous embrace of the principles of freedom and equality and of the institution of slavery and the trafficking of human cargo, \(^8\) reinforced


\(^{80}\) Gross, *supra* note 78, at 652.

\(^{81}\) Orlando Patterson, *Slavery and Social Death* 13 (1982).

\(^{82}\) 13 N.C. (2 Dev.) 263, 266 (1829) (emphasis added) (reversing the conviction of a white man for assaulting and battering a slave). The court further observed that "[t]he slave, to remain a slave, must be made sensible, that there is no appeal from his master." *Id.* at 267.

\(^{83}\) Compare U.S. CONST. pmbll. ("We the people of the United States, in Order to... secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution... "), with id. art. I, § 2, cl. 3 (counting Negro slaves as three-fifths of one person for political representation purposes), id. art. I, § 9, cl. 1 (allowing for the importation and federal taxing of slave labor until 1808), id. art. IV, § 2, cl. 3 (creating a constitutional right to the re-
by infamous rulings in cases such as *State v. Mann* and *Dred Scott v. Sanford*—allowed the presumption of race-based dishonor and degradation to become deeply rooted in the hearts and minds of whites. As an oft-quoted passage from Alexis de Tocqueville’s *Democracy in America* suggests,

The tradition of slavery dishonours the race . . . .

. . . . [I]n those parts of the Union in which the negroes are no longer slaves, they have in nowise drawn nearer to whites. On the contrary, the prejudice of the race appears to be stronger in the States which have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those States where servitude has never been known.  

**B. Dignity and Reconstruction**

The Reconstruction Amendments, of course, directly repudiated Justice Taney’s declaration in *Dred Scott* that blacks could not be citizens because they were widely regarded by whites as “beings of an inferior order, and altogether unfit to associate with the white race.” Indeed, as others routinely point out, the repudiation of Justice Taney via the Fourteenth Amendment was done in a manner that would grant Congress, in the words of one commentator, substantial enforcement power to enact certain laws designed to affirm that blacks were equal citizens, worthy of respect and dignity. Such laws . . . could regulate larger non-governmental systems of exclusion in places such as hotels, theaters, and trains. Such laws could also seek to protect blacks from racially motivated violence, and thereby affirm that blacks did indeed have rights that white men (and not merely governments) were bound to respect.

The dignitary interests attended to by the Reconstruction Amendments were openly acknowledged and affirmed in the Court’s first interpretation of those Amendments in the *Slaughter-House...*
Justice Miller, writing for the majority, stated unequivocally that the Reconstruction Amendments should be interpreted in light of their overriding purpose: "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The Court reiterated this sentiment eight years later in *Strauder v. West Virginia*.

Justice Strong, in striking down a West Virginia statute that systematically excluded black jurors from participation in trials, addressed the twin dignitary concerns of self-worth and social value with surprising candor:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to the race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

**C. Jim Crow and Beyond**

If law and legal institutions during the Reconstruction era can be viewed as sensitive (indeed responsive) to the dignitary harms inflicted by slavery through an acknowledgment and affirmance of black humanity and social value, then the first half of the twentieth century is best understood as a retrograde period in which law resumed the work of racial denigration and dishonor through the reinscription of the root indignity of privileging whiteness above all others. Justice Brown’s opinion in *Plessy v. Ferguson* was a clarion call to unreconstructed racists everywhere that a policy of racial separation and oppression could be legally justified as a reasonable race distinction, consistent with the “established usages, customs and traditions” of plantation society. However, events during and immediately fol-

---

88 83 U.S. (16 Wall.) 36 (1872).
89 Id. at 71.
90 100 U.S. 303 (1879).
91 Id. at 308.
92 163 U.S. 537 (1896).
93 See id. at 544 (“[T]he amendment...could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”).
94 Id. at 550. For a discussion of the explosion in segregation laws across the country following the Court’s decision in *Plessy*, see THE ORIGINS OF SEGREGATION (Joel Williamson ed., 1968) (giving different accounts of the genesis and roots of segregation); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, 211 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951) (“It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man’s wages”); C. VANN WOODWARD, THE
lowing Reconstruction suggest the deep-seated aversion to acknowledging the essential self-worth and social value of newly emancipated slaves had never fully abated.

Perhaps the earliest expression of this post-Civil War sentiment occurred in March 1886, in President Andrew Johnson's Veto Message to Congress denouncing the proposed Civil Rights Bill. For, Johnson, immediate bestowal of citizenship upon newly emancipated blacks, when presumably white "intelligent, worthy, and patriotic foreigners" were required to proceed through standard immigration procedures, was an outrageous proposition because the colorline was now "made to operate in favor of the colored and against the white race." Rather than securing dignity via citizenship for the freedman, Johnson argued that the bill would serve only "to resuscitate the spirit of rebellion, and to arrest the progress" made thus far.

This sentiment would eventually gain voice in the Supreme Court's developing equality jurisprudence. Perhaps the best judicial expression of the hesitancy to take the dignity of newly emancipated blacks seriously prior to its repudiation of such concerns in Plessy v. Ferguson appears in Justice Bradley's majority opinion in the Civil Rights Cases. In striking down legislation designed to provide equal access to public accommodations, Justice Bradley rejected the idea that the struggle for racial justice should demand that attention be paid to the indignity occasioned by entrenched social inequality. As Justice Bradley explained:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there

---

STRANGE CAREER OF JIM CROW 97–109 (3d ed. 1974) (noting the spread of Jim Crow laws both before and after Plessy, which had the effect of "constantly pushing the Negro farther down"); see also RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 57 (2001) (noting that "in the wake of Plessy, legally mandated race-based segregation had suffused the social and political fabric of many states, especially in the South"). But see MICHAELJ. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 48 (2004) (concluding that "[t]he spread of segregation to new social contexts is also more plausibly attributable to factors other than Plessy" and noting that "white southerners generally codified their racial preferences first and tested judicial receptivity later").

95 Andrew Johnson, Veto of the Civil Rights Bill, March 27, 1866, in THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 74–78 (1871).

96 Id. at 75.

97 Id. at 78 (emphasis added).


99 109 U.S. 3 (1883).
must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.100

Justice Harlan’s response to Bradley on this point put the dignitary interests of blacks front and center. In Harlan’s view, blacks had never been the favorite of the law.101 More importantly, the principle struggle up to this time was getting whites to acknowledge the essential worthiness of blacks as co-equal citizens. According to Harlan: “The difficulty has been to compel a recognition [by whites] of [the black race’s] legal right to take [the] rank [of citizens] . . . .”102 Furthermore, Harlan acknowledges that the dignitary interest sought by blacks was, at bottom, one of inclusion and social value. Thus, Harlan reiterates that the signal of inclusion sent by legislating access to public accommodations is of critical importance because it “secure[s] the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.”103

Against this backdrop, the Court’s decision in Plessy can be understood as the wholesale eschewal of the dignitary interests of blacks, accomplished by the subversion of the Reconstruction Amendments’ mandate for substantive racial equality, and corresponding embrace of segregationist policy premised upon the unreconstructed values of the slavery regime. The Plessy Court not only sanctioned radical inequality; it audaciously declared that any perception that such policy was intended to disrespect or denigrate blacks was imaginary. According to the Court, race distinctions themselves do not create a badge of inferiority—if such a badge exists, “it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”104 In this way racial dishonor and indignity were reinscribed through law, which simultaneously refused to acknowledge the pernicious nature of this enterprise. Thus, as sociologist Gilbert Stephenson, writing in 1910, observed, notions of racial dishonor and stigma rooted in slavery and reinscribed in Jim Crow legislation flourished in myriad sectors of twentieth-century American life, distorting perceptions of worthiness of citizenship and co-equal participation in civil society.105

100 Id. at 25.
101 Id. at 61 (Harlan, J., dissenting).
102 Id. (emphasis added).
103 Id. (emphasis added).
104 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
105 See GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 254 (1910) (second alteration in original) (quoting an Arkansas county clerk of court’s explanation that blacks
This process of reinscription and disavowal became the hallmark of early twentieth-century race cases. Cases such as Gong Lum v. Rice, Ozawa v. United States, and United States v. Thind reveal that this tendency extended well beyond the traditional black/white paradigm. Gong Lum v. Rice involved a petition submitted by nine-year-old Martha Lum, a Chinese American girl, for permission to attend an all-white primary school in Mississippi. At the time, section 207 of the Mississippi Constitution provided that "[s]eparate schools shall be maintained for children of the white and colored races." The girl’s father, Gong Lum, did not wish to challenge the doctrine of separate but equal, but rather sought inclusion in the racial category of “white” to the extent that it operates in the realm of public schooling. The stakes of inclusion were simple for Gong Lum—he wanted his child to go to the better funded school and presumably preferred to associate with and possibly assimilate into the dominant (as opposed to the marginal) American culture.

From the Court’s perspective, however, inclusion of Asians within the categorical scheme of whiteness was deeply problematic because it would necessarily entail endorsement, to some extent, of the idea of social and political equality among the races. The acknowledgment and affirmance of the essential dignity of Asians ran up against core notions of white cultural superiority. Moreover, granting inclusion into the category of white for purposes of public education would expose the lie of separate but equal—for if the schools were equal, then Gong Lum presumably would have been indifferent as to which school his daughter attended. Deflecting the thrust of Gong Lum’s request to be treated with dignity, the Court proclaimed, “we [the Court] think that [Gong Lum’s challenge] is the same question which has been many times decided to be within the constitutional

are routinely barred from serving as jurors because “[c]olored jurors [are] not looked upon as intelligent, and very few as honest and possessing integrity”).

106 275 U.S. 78 (1927).
107 260 U.S. 178 (1922).
108 261 U.S. 204 (1923).
109 Gong Lum, 275 U.S. at 82 (quoting MISS. CONST. art. VIII, § 207 (repealed 1978)).
110 Cf. Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). Justice Harlan described the Chinese as “a race so different from our own that we do not permit those belonging to it to become citizens of the United States” and expressed outrage that

[A] Chinaman can ride in the same passenger coach with white citizens . . . while citizens of the black race . . . many of whom, perhaps, risked their lives for the preservation of the Union, . . . who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals . . . if they ride in a public coach occupied by citizens of the white race.

Id.; see also Lothrop Stoddard, The Rising Tide of Color Against White World-Supremacy 299-307 (1920) (decrying the corrosive effects associated with the mixing of white and “Asiatic blood,” including “the collapse of civilization”).
power of the state legislature." The effect of the Court's ruling was to rest Gong Lum's fate in the hands of a demonstrably racist Mississippi legislature. In this way, the Court's decision in Gong Lum served to reinscribe the root indignity of white supremacy by reinterpreting the doctrine of separate but equal to mean not only separation of whites from blacks, but separation of whites from every other race in American society.

The Court's championing of white supremacist values and denigration of other races was likewise reflected in naturalization cases. In Ozawa v. United States, a man of Japanese ancestry applied to the District Court of Hawaii to be admitted as a citizen. At the time, the Naturalization Act of 1906 appeared to limit naturalization to whites and persons of African descent. Nevertheless, Ozawa argued that he should be allowed to be naturalized because: (1) he had resided in Hawaii for twenty years; (2) he was schooled in the United States; (3) he had educated his children in the United States; (4) he had attended American churches; and (5) he spoke English in his home.

At trial, Ozawa emphasized the extent of his assimilation and eschewal of Japanese culture. Indeed, during oral argument, Ozawa's attorney emphasized the whiteness of Ozawa's skin. The Ozawa Court conceded that Ozawa was well qualified for citizenship in terms of character and education. However, the Court rejected Ozawa's petition for citizenship. Despite the absence of an express prohibition on Asian naturalization in the statute, the Court nevertheless concluded that Asians were presumptively barred. According to the Court, Congress would have clearly indicated its desire to allow Asians to naturalize if it really intended to do so. The Court interpreted the term "white" in the naturalization statute to refer to the scientific designation "Caucasian," and concluded that Ozawa, though an assimilated, educated man of Japanese ancestry, was not "Caucasian" and therefore ineligible to become a citizen. As it had done twenty-five years earlier in Plessy, the Court evaded the dignitary interests of Ozawa, stating that "there is not implied—either in the legislation or

---

111 Gong Lum, 275 U.S. at 86.
112 America's first naturalization statute restricted naturalization to "free white person[s]." Uniform Naturalization Act of 1790, § 1, 1 Stat. 103 (repealed 1795). Following the Civil War, Congress allowed for the naturalization of "aliens of African nativity and ... persons of African descent." Act of July 14, 1870, § 7, 16 Stat. 256.
115 Ozawa, 260 U.S. at 189.
116 Id. at 197.
117 Id. at 189.
in our interpretation of it—any suggestion of individual unworthiness or racial inferiority."\textsuperscript{118}

The Court's ruling in \textit{Ozawa} would seem to have resolved the ambiguity in the naturalization statute—naturalization under the 1906 statute was limited to white persons, defined as Caucasians, and persons of African nativity. However, one year later in \textit{United States v. Thind}, the Court revisited this standard and, in so doing, ensured the categorical exclusion of Asians from the political community. \textit{Thind} involved a naturalization petition filed by a "high-caste Hindu."\textsuperscript{119} Although Indian and born in India, Thind claimed to be a descendant of the Aryan race. According to Thind, the genealogy of the Aryan of India can be traced to the same source as the Aryan of Europe. Under the caste system, Thind and other Aryan Indians were at the top of the racial pecking order. The Court conceded that the term Caucasian, which excluded Ozawa, did not technically exclude Aryan Indians—that "[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity."\textsuperscript{120} However, the Court now claimed that the scientific meaning ascribed to the term Caucasian was too scientific and could not have been comprehended by the Framers, who were unfamiliar with the term. As a consequence, the \textit{Thind} Court stated that the term "white" should be interpreted as popularly understood by the Framers and by the proverbial "common man."\textsuperscript{121} Applying this new, unscientific rule of racial classification, the Court summarily concluded that the term white simply does not contemplate Indian, although it does contemplate Eastern, Southern, and Middle Europeans, Slavic, and Mediterranean types. As the Court explained: "It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white."\textsuperscript{122} Although the ruling of the Court made clear that immigrants from India are not afforded the same privileges that immigrants from European countries enjoy—at least in terms of availability of citizenship—the Court once again, in the spirit of \textit{Plessy}, observed that the decision does not "suggest the slightest question of racial superiority or inferiority."\textsuperscript{123}

\textsuperscript{118} Id. at 198.
\textsuperscript{119} United States v. Thind, 261 U.S. 204, 206 (1923).
\textsuperscript{120} Id. at 209.
\textsuperscript{121} Id. at 214.
\textsuperscript{122} Id. at 215.
\textsuperscript{123} Id.
D. Dignity in Modern Race Jurisprudence

In the modern era of race jurisprudence, the Supreme Court has periodically embraced consideration of the extent to which the pursuit of racial justice through legal means demands acknowledgment and confirmation of the essential dignity of persons subordinated on the basis of race. Certain landmark cases such as Brown v. Board of Education placed the issue of dignity at the forefront of the movement for racial justice. Brown, after all, was far more than simply a case involving the application of the Fourteenth Amendment to segregated public education. It represented an opportunity taken by the Court to enshrine the rights of people of color in the name of a collective sense of justice and dignity.

Justices in subsequent cases would periodically comment upon the centrality of dignitary concerns within the context of civil rights and the future of American race relations. Justice Goldberg, in his concurring opinion in Heart of Atlanta Motel v. United States, highlighted Senate conclusions that the primary purpose of the Civil Rights Act of 1964 was

"to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color."

Under this view, public accommodations laws ensure equal access to goods and services in order to affirm the equal dignity and worth of previously excluded individuals. Justice Stevens reiterated this theme of equal dignity in the voting rights context. In his concurrence in City of Mobile v. Bolden, Justice Stevens declared that respect for black voters entailed, among other things, that blacks and members of other identifiable groups be permitted to "go to the polls with

---

125 See James T. Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy 69, 221–23 (2001) (discussing how the Brown decision had powerful symbolic significance and led to a "larger rights-consciousness that deeply influenced American law and life").
127 Id. at 291–92 (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16 (1964)).
128 See Peter Brandon Bayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. Davis L. Rev. 769, 845 (1987) (describing Title VII as "directed towards protecting the dignity, self esteem, and individuality of employees and employment applicants").
equal dignity and with an equal right to be protected from invidious discrimination.\(^{130}\)

Similarly, the Court has periodically demonstrated its awareness of the elevated importance of dignitary concerns when dealing with cases in which matters of race and criminal procedure are intertwined. For instance, in *United States v. Martinez-Fuerte*, Justice Brennan described the discriminatory targeting of Mexican Americans at border checkpoints as an “affront to the dignity of American citizens of Mexican ancestry and Mexican aliens.”\(^{131}\) In *Powers v. Ohio*, the Court observed that its prohibition on the use of race-based peremptory strikes in jury selection announced in *Batson v. Kentucky*\(^{132}\) served multiple ends, including the protection of the dignity interest of individual jurors and the integrity of the courts.\(^{133}\) The Court again acknowledged the nature of this dignitary harm in *Georgia v. McCollum*, noting that the exclusion of a juror not only harms the dignity of the individual juror, but of the entire community.\(^{134}\) Interestingly, the most emphatic articulation of this dignitary harm to potential jurors was offered by Justice Blackmun, albeit in the context of gender-based exclusion:

All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions... Striking individual jurors on the assumption that they hold particular views simply because of their gender... denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation.\(^{135}\)

More recently, however, the Court has generally chosen to elide the question of dignity as it relates to our painful history of racial injustice. Discussions of dignity in modern race jurisprudence typically take one of two forms. In some cases, dignitary interests are folded into the concept of the colorblind ideal. In these instances, dignity is considered only in thoroughly abstracted form, dislodged from its

\(^{130}\) *Id.* at 89 n.10 (quoting Cousins v. City Council of Chicago, 466 F.2d 830, 852 (7th Cir. 1972) (Stevens, J., dissenting)).

\(^{131}\) 428 U.S. 543, 573 n.4 (1976). Justice Murphy expressed a similar sentiment in his dissenting opinion in *Korematsu v. United States*, 323 U.S. 214, 240 (1945) (Murphy, J., dissenting) (observing that the use of Japanese ancestry as a proxy for criminal suspicion was “one of the cruellest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow”).

\(^{132}\) *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (“*Batson* recognized that a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors and the community at large.”).

\(^{133}\) *Id.* at 87.

\(^{134}\) 505 U.S. 42, 49 (1992) (“But [t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” (citing *Batson*, 476 U.S. at 87)).

proper historical context. As a consequence, dignity is thought to be best protected by a strong presumption against the deployment of any racial classification. Thus, a plurality of the Court viewed the striking down of a set-aside program for minority businesses in *City of Richmond v. J.A. Croson Co.* as protective of dignity, albeit the dignity of whites.\(^{156}\) As Justice O'Connor wrote:

The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.\(^{137}\)

Justice O'Connor's linking of "equal dignity" and the colorblind ideal had the effect of severing claims of affirmanance of self-worth and social value from their historical moorings. All citizens were entitled to equal dignity without reference to accounts of past injustices.\(^{158}\) It was of little interest to the Court that the Richmond program was an attempt at material and dignitary recompense for past racial injustices. The significance of the adoption of the program in the former capital of the Confederacy was lost on the majority.\(^{139}\) In this historical and contextual vacuum, all racial classifications are equally troubling, and there is little, if any, principled ground upon which to sort the good from the bad.\(^{140}\)

\(^{156}\) 488 U.S. 469 (1989).

\(^{137}\) Id. at 493.

\(^{158}\) As Professor Richard Epstein recently remarked:

One of the great ironies with the modern statement of strict scrutiny is that it erects a color-blind norm that runs in both directions, such that ... any claim brought by a white person against state action should be judged by the same exacting standards as any claim brought by a black person against state action ... [But] no one could say, or at least say honestly, that whites today are excluded from the political process as blacks had been under segregation; nor, in light of an oft-painful racial history, is it possible to subject racy-based polices [sic] that benefit blacks to the same full-throated denunciation as could be brought against state-sponsored segregation.


\(^{139}\) As Justice Marshall stated in his dissent: "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst." *Croson*, 488 U.S. at 528 (Marshall, J., dissenting).

\(^{140}\) William Bradford Reynolds, Assistant Attorney General and head of the Civil Rights Division of the U.S. Department of Justice during the Reagan Administration, was a particularly strong proponent of this view. According to Reynolds, "[b]y 1981, many forces within the civil rights movement had abandoned their moral dedication to equality for all and instead had embraced the concept of so-called 'benign' discrimination." William Bradford Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future*, 42 VAND. L. REV. 993, 994 (1989). For Reynolds it was impossible to make benign racial classifications—affirmative action policy was no less contemptible than the de jure segregation of years past. *Id.* at 995. *But see* Epstein, *supra* note 15, at 2046 (suggesting that those who claim that affirmative action and segregation laws are qualitatively indistinguishable are guilty of intellectual dishonesty).
More importantly, the moral force of claims for equal dignity that once defined the racial justice movement for African Americans was deflected and funneled into the aspirational norm of colorblindness. Not surprisingly, it is also in *Croson* where we find Justice Kennedy's powerfully revisionist assertion that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." Justice Thomas reiterated this distorted view of the role of dignity in equality jurisprudence in *Adarand Constructors, Inc. v. Peña*, stating that "it is irrelevant whether . . . racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."

141 William Bradford Reynolds was particularly forthright in his misappropriation of civil rights movement rhetoric, and in particular the moral authority of Dr. Martin Luther King, Jr. For instance, Reynolds offered this explanation for the Reagan Administration's infamous policy of weakening civil rights enforcement and opposing affirmative action:

[R]acial classifications are wrong—morally wrong—and ought not to be tolerated in any form or for any reason. . . . [T]he true essence [of this principle] was best captured, in my judgment, by Dr. Martin Luther King, Jr., when he dreamed aloud in the summer of 1963 of a nation in which his children would "not be judged by the color of their skin, but by the content of their character."


We are committed to a society in which all men and women have equal opportunities to succeed, and so we oppose the use of quotas. . . . We want a colorblind society. A society that in the words of Dr. King, judges people not by the color of their skin, but by the content of their character.


Unfortunately, conservative thinkers have often failed to hear King's deeper message on the meaning of racial justice. As King explained:

Many whites who concede that Negroes should have equal access to public facilities and the untrammeled right to vote cannot understand that we do not intend to remain in the basement of the economic structure; they cannot understand why a porter or a housemaid would dare dream of a day when his work will be more useful, more remunerative and a pathway to rising opportunity. This incomprehension is a heavy burden in our efforts to win white allies for the long struggle.


White America was ready to demand that the Negro should be spared the lash of brutality and coarse degradation, but it had never been truly committed to helping him out of poverty, exploitation or all forms of discrimination . . . . But the absence of brutality and unregenerate evil is not the presence of justice.


142 *Croson*, 488 U.S. at 518 (Kennedy, J., concurring).

Dignitary interest in contemporary race jurisprudence also takes the form of concern over the possible stigmatizing effects of being denoted the "beneficiary" of a racial classification. 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 beneficiaries." Justice Powell, in *Regents of the University of California 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." Justice Kennedy, in *Metro Broadcasting, Inc. v. FCC*, offered a similar warning: "The 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 . . . can foster the view that members of the favored groups are inherently less able to compete on their own."

In the Court's most recent race case—*Grutter v. Bollinger*—Justice O'Connor evaded almost entirely the issue of dignity and stigma in her opinion upholding limited race preferences in law school admissions. Her solitary "nod" to dignitary concerns is contained in a single sentence: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." Implicit in this remark is an acknowledgment of second-order dignity—that racial and ethnic minorities should be presumptively worthy of inclusion among the ranks of American leaders. Importantly, the remark highlights that acknowledgment of second-order communal dignity alone does not legitimize leadership, but it does allow us to think about and, in Justice O'Connor's case, justify
policies directed at achieving material changes consistent with a view of substantive racial justice.

It is dissenting Justice Thomas who chooses to address dignity and stigma most directly. In Brown v. Board of Education, the Court understood that the dignitary harm was caused by segregation, and that the remedy was to take affirmative steps to integrate public schools. In Grutter, Justice Thomas turns this argument on its head, suggesting that the dignitary harm is caused by the affirmative steps to integrate, and that the "remedy" is to declare such affirmative steps unconstitutional. As Justices Thomas writes:

The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.149

Some argue that the Court's prevailing fetish of colorblindness and concerns about stigmatic harm to affirmative action beneficiaries is an example of how the Court does take dignity seriously.150 Others maintain that dignity is perhaps best preserved by taking government out of the business of racial regulation.151 The problem, however, is

---

149 Id. at 373 (Thomas, J., dissenting).
150 See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 539 (1997) ("Race-conscious policies make for more race-consciousness; they carry American society backward."). However, a number of scholars have pointed out the more pernicious consequences of the Court's adherence to a theory of "colorblindness." See, e.g., Henry L. Chambers, Jr., Colorblindness, Race Neutrality and Voting Rights, 51 EMORY L.J. 1397, 1414 (2002) ("The combination of colorblindness and the intent rule appears to create a world in which laws that unintentionally harm racial minorities because of their position in society are presumptively valid while laws that affirmatively seek to help racial minorities attain an equal position in society are presumptively invalid."); Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 954 (1993) ("[T]he pursuit of colorblindness progressively reveals itself to be an inadequate social policy if the ultimate goal is substantive racial justice."); Gotanda, supra note 6, at 16 (observing that colorblindness "fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue"); John E. Morrison, Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action, 79 IOWA L. REV. 313, 358 (1994) (arguing that "[c]olorblindness is a simple and an apparently costless way to forget the racism in American society").
151 See, e.g., MILTON FREEDMAN, CAPITALISM AND FREEDOM 108–18 (1962) (arguing that the "free market" regulation of racial discrimination is preferable to government intrusion); Richard Epstein, Two Models of Civil Rights, 8 SOC. PHIL. & POL'Y 38 (1993) (arguing that an emphasis
that both of these positions appear to focus almost entirely on first-order personal dignity. As discussed above, a meaningful conception of dignity entails attention to second-order communal considerations as well. Indeed, in the context of race relations, second-order dignitary concerns of inclusion and community are arguably worthy of elevated importance.

The transformation or outright evasion of second-order dignity in recent years by the Court is deeply troubling precisely because it neglects the principles of inclusion and community, and as such, has left race jurisprudence unanchored to a meaningful theory of racial justice. There is, I believe, an important relationship between dignity and substantive racial justice. The acknowledgment and affirmance of dignity is neither automatic nor inevitable. Rather, it entails an active opposition and engagement with life's harshest truths. A crucial aspect of those harsh truths is that slavery, segregation, and modern forms of so-called societal discrimination involve extensive efforts to degrade, dishonor, isolate, and ostracize. We see the consequences of this reflected in enduring racial stereotypes and chronic disparities in health, wealth, and social mobility. Importantly, these disparities are not mere by-products of these efforts; they are the intended consequences of these regimes.

A comparison of indicia of social well-being between blacks and whites proves remarkably revealing. 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 double that of whites. The same is true for the number of births to unwed mothers. Homicide victimization rates for blacks are nearly double the rates for whites. Incarceration rates for black men are seven times those for white men. African American adult men and women have

---

on freedom of contract and association provide the optimum level of civil rights protections and respect for dignity of all).

152 LOURY, supra note 14, at 175 tbl.1.
153 Id. at 176 tbl.2.
154 Id. at 184 fig.2.
155 Id. at 180–81 tbls.6 & 7.
156 Id. at 190 fig.8.
157 Id. at 196 fig.14.
158 Id. at 200 fig.18.
159 Id. at 201 fig.19.
a shorter life expectancy than their white counterparts, with black infant mortality rates approximately double those for whites.

Unlike the post-Civil War and Warren Courts, which understood that they could not properly realize the pursuit of racial justice without reference to dignitary interests, the current Court's transformation or outright evasion of the dignity inquiry has enabled it to scrutinize current racial classifications in a socially antiseptic environment—one cleansed of troubling historical context and wiped clean of any indicia of present-day racial subordination. Sincere attention to dignitary concerns—respect for equal humanity and social value—provide a mechanism to open up the possibilities of substantive racial justice. Such attention advances substantive racial justice because an emphasis on dignitary concerns forces 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 that person's lived experience. For African Americans, this means examining and coming to terms with the historical and present forms of oppression that provide content to the African American racial reality.

Similarly, one cannot affirm another's presumed social value or worthiness of inclusion into a community without first investigating the conditions of the community that make inclusion possible. If whites are to affirm the dignity of African Americans, a necessary precondition is that whites examine critically and self-consciously not only the effects of racial subordination on blacks, but the myriad ways in which the culture of subordination has distorted and disfigured majority society in general and white identities in particular. A central problem with focusing exclusively on formal equality is that the discourse may very well indulge the prospect of inclusion for black Americans in an ever-expanding circle of people deserving respect, but leaves the center of that circle tragically unexamined. Equality extended without reference to dignity leaves unanswered the question of what allows white Americans to see black Americans as their presumptive inferiors in the first place.

Because an emphasis on dignity necessarily historicizes, contextualizes, and deepens, it begins to make relevant a host of considerations routinely thought to be "off limits" in contemporary race jurisprudence. Contemporary race jurisprudence has proven incapable of addressing aspects of American life that have a remarkably oppres-

---

160 Id. at 182 tbl.8.
161 Id. at 204 fig.22.
sive quality: the widespread acceptance of destructive stereotypes;\(^{162}\) the disabling consequences of seemingly innocuous and subtle forms of racial bias—not full blown racist acts, but acts of racial carelessness;\(^{163}\) and the unexamined acceptance of so-called societal discrimination.\(^{164}\) An emphasis on dignity asks what conditions whites must establish so that they can 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 African Americans provides us with the means of re-centering our conversation on matters of substantive racial justice, a way of anchoring race jurisprudence.

Focusing on dignitary matters, especially second-order dignity, is important for another reason. 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, we can understand dignity in instrumental terms as well: as providing a necessary precondition to economic inclusion

---

\(^{162}\) One particularly pernicious effect of pervasive racial stereotypes is the phenomenon of "stereotype threat" identified by psychologist Claude Steele. See 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). Steele's research demonstrates that stereotypes can be self-confirming in that groups can deploy them in social interaction to influence and shape outcomes consistent with the stereotypes. According to Steele, "stereotype threat" may explain racial disparities in performance on standardized tests:

African American students know that any faltering could cause them to be seen through the lens of a negative racial stereotype. Those whose self-regard is predicated on high achievement—usually the stronger, more confident students—may feel this pressure so greatly that it disrupts and undermines their test performance.

*Id.* at 402; see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997) (arguing that stereotype threat, as a situational threat, can be self-threatening for those who identify with targeted groups); Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44 (examining the impact of stereotype threats on the academic performance of black college students).

\(^{163}\) See Peggy C. 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 psychiatrists often view "as 'incessant and cumulative' assaults on black self-esteem"); see also ROY L. 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").

\(^{164}\) See, e.g., City of Richmond v. J.A. Croson, 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 Educ., 476 U.S. 267 (1986) (same); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–08 (1978) (Powell, J., plurality opinion) (expressing deep skepticism that affirmative action may be used to address "societal discrimination").
Moreover, to the extent that one’s sense of self-worth is shaped by social and economic status, enhancing relational perceptions of dignity can have the effect of producing first-order dignitary benefits as well.

Unfortunately, the story of contemporary race jurisprudence has been one of preemption of the terms of substantive racial justice, the evasion of dignitary interests, and the embrace of an antiseptic norm of colorblindness. But it need not remain this way. The Court’s recent decision in *Lawrence v. Texas* suggests that dignity as a concept has not fully disappeared from the legal landscape, and can be successfully deployed to protect the interests not only of those in same-sex relationships, but also of other oppressed members of society as well.

**III. DIGNITY AND LAWRENCE V. TEXAS**

Perhaps the single most dramatic instance in which the current Supreme Court acknowledged and confirmed the essential dignity of members of a socially stigmatized and structurally subordinated group occurred in *Lawrence v. Texas*. John Lawrence and Tyron Garner were charged and convicted of violating a local ordinance that outlawed homosexual sodomy. In a landmark ruling, the Rehnquist Court emphatically declared the statute unconstitutional on substantive due process grounds.

---

165 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* 153 (Phyllis A. Wallace & Annette LaMond eds., 1977); see also James S. Coleman, *Foundations of Social Theory* (1990) (examining various kinds of social capital and the ways in which it is generated in order to create social relationships); Robert Putnam, *Making Democracy Work* (1993) (describing the great benefits of social networks and the norms of reciprocity and trustworthiness that arise from them); Kenneth Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. Econ. Persp., Spring 1998, at 91, 98 (concluding that the network model, in which personal interactions develop from transactional relations, is most appropriate in studying the labor market); George J. Borjas, *Ethnic Capital and Intergenerational Income Mobility*, 107 Q. J. Econ. 123 (1992) (arguing that skills of the ethnic contemporaries of parents are as important an input to human capital accumulation as the skills of parents).


167 Id.

168 Interestingly, some commentators have suggested that Lawrence and Garner were not in a longstanding relationship. See, e.g., Nan D. Hunter, *Living With Lawrence*, 88 Minn. L. Rev. 1103, 1138 (2004) (remarking that “neither the record nor their attorneys suggested that John Lawrence and Tyron Garner had anything other than a mutually desired fleeting encounter” and theorizing that the Court’s attempt to present them as a couple is indicative of society’s heteronormative impulse).
Although the ruling itself was hailed as a victory for gay rights, perhaps most surprising was the candor and solicitude expressed in Justice Kennedy’s majority opinion when addressing matters of dignity. *Lawrence* acknowledges and powerfully affirms the dignity of homosexuals, and does so in a deeply respectful and non-patronizing manner. It acknowledges dignity in universal and undifferentiated terms. In doing so, the Court deemed the lives of homosexuals worthy of genuine, categorical respect equivalent to that afforded to those of heterosexuals. It is a moving opinion precisely because it comprehends gays as worthy of the presumption of humanity and inclusion in greater society. In this light, *Lawrence* exemplifies how dignity can best be meaningfully incorporated into equality jurisprudence to promote substantive justice for members of oppressed groups in American society.

At the heart of *Lawrence*’s dignitary enterprise is a series of acknowledgments. In *Bowers v. Hardwick*, decided almost twenty years before *Lawrence*, the Court had addressed the issue of sodomy in the narrowest of terms, failing to comprehend gay sex as intrinsic to a life worthy of dignity and respect. In *Lawrence*, Justice Kennedy publicly acknowledges the error in framing the issue of sodomy divorced from its human context. Framing the issue so narrowly, according to Justice Kennedy, “discloses the Court’s own failure to appreciate the extent of the liberty at stake.” Justice Kennedy fully understood that consideration of the dignitary interests of gays marked a substantial departure from *Bowers*: “The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”

---


171 Interestingly, the Court’s failure to address this issue more broadly might have been attributable to the style of briefing in the case. As William Eskridge explains, Professor Laurence Tribe knew that “there was no Court majority for a ‘gay rights’ argument, and so his brief for the challenger pushed homosexuality into a legal closet and emphasized the abuse of state power represented by the gendarmerie’s charge into Michael Hardwick’s bedroom.” William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2181 (2000).

172 See *Lawrence*, 599 U.S. at 567.

173 Id. at 577.
Lawrence also contains an explicit acknowledgment of the equal humanity of gays. The Bowers Court, in disturbingly antiseptic terms, upheld the criminalization of gay sex and sent the unmistakable signal that gay sex was somehow undignified and homosexuals were unworthy of mutual respect. In contrast, Justice Kennedy's opinion in Lawrence affirms the essential humanity of gays. Bower's criminalization of homosexual intercourse, according to Justice Kennedy, is problematic because "[i]ts continuance as precedent demeans the lives of homosexual persons." Justice Kennedy emphasizes this acknowledgment of the humanity of gays by forthrightly distinguishing homosexual intercourse from the litany of proscribed socially deviant practices routinely invoked in connection with sodomy by opponents of the gay rights movement.

The Lawrence opinion also contains a surprising acknowledgment of the strategic use of historical narrative in the subordination of gays. According to Justice Kennedy, "the historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate." Moreover, Justice Kennedy made clear that the justifications for criminalizing sodomy need not be privileged simply because the Court had articulated them in the past. "To the extent Bowers relied on values we share with a wider civilization," observes Justice Kennedy, "it should be noted that [those purported values] have been rejected elsewhere." More importantly, according to Justice Kennedy, "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." In this way, Justice Kennedy appears to suggest that the prevailing view that subordinates homosexuals who practice gay sex may be illegitimate.

Justice Kennedy's acknowledgment of the oppressive nature and stigmatizing effect of these laws deepens the suggestion that the prevailing view on criminalization of gay sex is illegitimate. The concept of liberty is organic, according to Justice Kennedy, and the Framers "knew times can bind us to certain truths and later generations can

174 Id. at 575.
175 See id. at 569, 578 (observing that laws prohibiting sodomy were directed at "predatory acts of an adult man against a minor girl or minor boy" and that "[t]he present case does not involve minors," "does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused," and "does not involve public conduct or prostitution").
176 Id. at 571.
177 Id. at 576. Justice Kennedy points to both policies of foreign nations and legal scholarship to "cast[s] some doubt on the sweeping nature of the statement[s] [made in Bowers pertaining] to private homosexual conduct between consenting adults." Id. at 571.
178 Id. at 577.
see that laws once thought necessary and proper in fact serve only to oppress." Not only does enforcement of such laws serve to oppress, but their mere presence may have stigmatizing effects. According to Justice Kennedy, "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." Justice Kennedy went on to note: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."

Justice Kennedy’s embrace of a liberty and dignitary aesthetic enables him to advance the proposition that each of us should be concerned about the Texas statute because it “ha[s] more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.” This acknowledgment of a universal and unfettered dignity sends a powerful message to all Americans that gays are entitled to respect and inclusion because such persons are members of the extended American family. Because “[t]he petitioners are entitled to respect for their private lives,” declares Justice Kennedy, the state must be precluded from “demean[ing] their existence or control[ling] their destiny by making their private sexual conduct a crime.”

IV. TAKING DIGNITY SERIOUSLY: LESSONS FROM LAWRENCE

Justice Kennedy’s opinion in Lawrence suggests that the Court can take dignity seriously in the pursuit of protection and validation of the status of members of subordinated groups. In addition, Lawrence provides some discursive insight into how this enterprise might be undertaken in the equally contentious field of American race relations.

Respect for the first-order dignity of members of socially disfavored minority groups entails some acknowledgment of the equal humanity of those individuals. The Lawrence Court undertook the task of distinguishing gay sex from prohibitions against bestiality to cleanse gays of stigma-by-association. In this way, the Court sought to

179 Id. at 579 (emphasis added).
180 Id. at 575 (explaining why overturning the ordinance on equal protection grounds, as endorsed by O’Connor, was not satisfactory).
181 Id.
182 Id. at 567.
183 Id. at 578.
demonstrate that the practice of gay sex in no way denigrates the essential humanity of gays. By revealing the spuriousness of arguments to support criminalizing the so-called gay lifestyle, the Court affirms the inherent worth of gays as human beings.

Respect for first-order dignity in the race context entails a similarly explicit acknowledgment and affirmation of the equal humanity of members of racially oppressed groups. As discussed above, the failure to extend that presumption to minorities, especially blacks, has deep historical roots. As Glenn Loury has acknowledged: "[P]eople 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." First-order dignity, then, represents the first step along the path of this dignitary enterprise in race jurisprudence.

Attention to second-order dignitary concerns is reflected in two separate acknowledgments by the Lawrence Court. The first is the Court's acknowledgment of the role of historical narrative in shaping legal outcomes. Justice Kennedy's revelation in Lawrence that selective historical narrative is often used as a means to subordinate suggests that the acknowledgment and affirmation of dignity of racial minorities may involve a similar admission to the extent that the Court's prior decisions were based upon contested historical or conceptual grounds. Dignitary concerns may demand that the Court not only reconsider its preferred reading of the purpose of the Reconstruction Amendments, but also the centrality of colorblindness in the Court's equality jurisprudence and the Court's historic inability to distinguish between benign and burdensome race distinctions when it attempts to do so in a contextless environment.

Second, and relatedly, the Lawrence Court acknowledged the narrow and provincial understanding it held regarding gay sex in particular and gay relationships more generally. Specifically, the Court acknowledged that its understanding of the concept of liberty as it relates to gays was equally emaciated. In short, the Court admits that the Bowers Court got it wrong both contextually and jurisprudentially.

In the race relations context, it is imperative that proponents of racial justice continue to advance the notion that the promise of the Reconstruction Amendments entails far more than procedural equality. To the extent that the Court believes that procedural equality and fidelity to the norm of colorblindness is tantamount to racial justice, it continues to get it wrong and getting it wrong demeans the lives of those who have suffered historic and contemporary injustices on account of race.

184 Loury, supra note 14, at 87.
185 Lawrence, 539 U.S. at 574–75.
Although *Lawrence* provides insight into how to seek dignity in race jurisprudence, one should be mindful of a number of key features of the *Lawrence* decision that impede the ability to capitalize on its approach to dignitary concerns in the race context.

A. Race, Sexuality, and Doctrinal Convergence

Gay and lesbian identities plainly differ conceptually from racial identities. For instance, race is an immutable characteristic, whereas homosexuality is commonly understood to be mutable. To be sure, blacks may adopt strategies of racial performance that deflect attention away from their racial make-up. Adaptive behaviors may range from simply adopting stereotypically white American language, gestures, and dress to full-fledged replication of both the physical and cultural identity, a practice commonly referred to as "passing." But the mutability of the gay identity allows gays to shield their identity from public view not only with greater ease, but also with remarkable thoroughness. In this sense, the gay and lesbian identities are conceptually far more performative than racial identities.

The largely performative core of gay and lesbian identities suggests, at first blush, that a mode of empowerment centered on dignity would have greater impact. If homosexuality is a mutable characteristic, the decision to participate in openly gay relationships is an exercise in autonomy. Dignity is fundamentally about acknowledging inherent worth and equal humanity, and to treat another with dignity means that one must respect human agency. In this way, a focus on dignity is empowering insofar as it demands respect for autonomy and individual choice.

---

186 See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 796 (2002) (tracing the scientific debate of Freud’s time regarding the correct designation of homosexuality—as biological or cultural, for example—as informing the mutability of homosexuality).

187 See RANDALL KENNEDY, INTERRACIAL INTIMACIES 281-338 (2003) (describing the practice of blacks visually and "aurally" passing as white); Yoshino, *supra* note 186, at 926 (describing the practice of "covering" by gays and blacks who seek to assimilate by downplaying or otherwise making it difficult for persons to discern one’s sexual orientation or race).

188 See Yoshino, *supra* note 186, at 814–27 (discussing the historic norm of "passing" within the gay community, and its contestation and eventual dislocation in the 1970s). This is not to suggest that racial minorities do not engage in "covering" type behaviors to draw attention away from one’s racial identity. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1265 (2000) (arguing that minorities often emphasize their identity as workers in part to contradict work-related stereotypes associated with their racial identity). My point is simply that the technique of identity masking can be more powerfully deployed by gays than racial minorities.

The consequences of dignity in the realm of sexuality are far more circumscribed than in the racial context. To the extent that dignity is concerned about equal humanity and worthiness of inclusion, it is worth noting that gays were always understood, on some level, as presumptively worthy of inclusion. Gays have always been understood as residents of the human family. Indeed, the history of oppression of gays is one characterized by assumptions of deviant humanity, not an essential lack of it. Homosexuality, until fairly recently, was commonly understood as a medically or psychologically treatable condition. Treatments traditionally ranged from surgically invasive techniques, such as clitoridectomy and castration, to aversion therapy and psychoanalysis. The prevailing understanding of homosexuality as a psychopathology led to its inclusion in the Diagnostic and Statistical Manual of Mental Disorders and fueled the expansion of conversion therapy.

By contrast, the history of oppression of blacks is one characterized by the denial of humanity. While the heterosexual majority has provided for the inclusion of gays, whites have held deep suspicions as to the worthiness of including blacks within the American political family. Moreover, suspicion of equal worth is not an artifact of years past—conservative racial theorists continue to question openly the equal humanity of blacks.

---

191 See id. at 129 (identifying these as part of the repertoire of then-available treatments). Katz also notes the existence of other physically invasive practices, including neurosurgery, shock treatment, and the use of psychotropic drugs. Id. at 129–207.
192 See id. at 148–50, 198–99 (identifying psychoanalysis and aversion therapy as among the less invasive techniques).
193 See American Psychiatric Ass’n Diagnostic and Statistical Manual of Mental Disorders 39 (1st ed. 1952) (identifying “homosexuality” as “pathological behavior”). Although homosexuality was formally deleted from the second edition by a 1973 vote of the American Psychiatric Society, see American Psychiatric Ass’n Diagnostic and Statistical Manual of Mental Disorders vi (2d ed. 1968 & 8th prtg. 1975), it was replaced with the category “Sexual Orientation Disturbance,” which purported to describe individuals “who are disturbed by, in conflict with, or wish to change their sexual orientation.” Id. The current category, “Gender Identity Disorder,” see American Psychiatric Ass’n Diagnostic and Statistical Manual of Mental Disorders 533–38 (4th ed. 1994), retains this understanding of homosexuality as pathology. See Lawrence D. Mass, Homosexuality and Sexuality, Dialogues of the Sexual Revolution 219 (1990).
195 The historic questioning of black humanity now takes the form of a deep skepticism regarding the capacity of blacks to function on par with whites in civil society. Dinesh D’Souza’s End of Racism: Principles for Multiracial Society is one particularly corrosive example of this. Ac-
Not surprisingly, in the racial context, an assumption of equal humanity and worthiness of inclusion would appear to have far greater consequences. Whereas treating gays with dignity means lifting the stigma imposed on persons involved in gay sexual relationships, treating blacks with dignity presumably would entail lifting stigma that, when operationalized, has relegated blacks to social, political, and economic margins of society. For this reason, one might be inclined to think that a dignity focus makes more sense in the realm of sexuality and may be of limited utility in the racial context.

An additional layer of complexity arises from the fact that race and sexuality are traditionally analyzed under different doctrinal frameworks—equal protection for race, and substantive due process for sexuality. The analytic distinction between these two doctrinal fields impacts the kinds of arguments that resonate with the Court. In the realm of modern substantive due process, the inquiry is typically phrased in terms of whether a fundamental personal right has been impaired. This is usually done without reference to the distinctiveness of the aggrieved claimant. The focus remains on the right that has allegedly been infringed, and whether the state’s infringe-
ment is justified. In contrast, traditional equality jurisprudence has enabled courts to interrogate the distinctiveness of the aggrieved claimant and the right that has allegedly been infringed. This sort of interrogation provides courts with an opportunity to engage in a meaningful discussion of, and ultimately incorporate, dignitary concerns into the analytical framework.

Contemporary equality jurisprudence, however, eschews this sort of deep thinking about the distinctiveness of the aggrieved complainant. Indeed, the Court's steadfast reliance upon the norm of colorblindness prevents it from pursuing this line of analysis and makes it correspondingly difficult to address dignitary concerns with reference to history and context. This conundrum, of course, is a function of the doctrinal framework developed by the Court (and, in theory, could be set aside), but nevertheless would appear to present a formidable obstacle.

Despite these core differences, however, the approach in *Lawrence* is promising in the racial context precisely because it links the ideas of liberty and autonomy with traditional core values of equal treatment and protection. As Justice Kennedy explained, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." In this way, the Court makes clear that it is less concerned about dignifying the act of sodomy, and more focused on treating persons involved in gay relationships with equal humanity. Justice Kennedy's position is remarkably similar to Chief Justice Warren's approach in *Loving v. Virginia*. While it is true that the Warren Court viewed marriage, in some sense, as a fundamental right, the Court was most concerned about treating those who choose to marry across the colorline with equal respect. Indeed, *Loving* represents a most powerful manifesto against white supremacy precisely because it affirms the equal humanity of blacks and their worthiness of inclusion in the human family.

---

197 388 U.S. 1 (1967) (holding that Virginia's prohibition of interracial marriages was unconstitutional).
198 As Chief Justice Warren explained:
   The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.
   
   ... Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.
   *Id.* at 11-12.
199 *Id.* at 12 (observing that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").
The blending of equal protection and substantive due process in *Lawrence*, with its antisubordinationist echoes of *Loving*, underscores the importance of dignitary concerns within the realms of race and sexuality. Moreover, *Lawrence*’s rejection of a purely equal protection approach has strong implications in the racial context. Justice O’Connor argued in her concurrence that the Texas sodomy statute was problematic mainly because it singled out homosexual sodomy for criminalization. In her view, a “neutral” ban on all sodomy, whether practiced by homosexuals or heterosexuals, would satisfy the safeguards of the Equal Protection Clause. The majority of the Court rejected this approach precisely because it did nothing to affirm the equal worth of gay couples and all but ensured that a vital component of any meaningful same-sex relationship—a component that homosexuals are distinctly drawn to—would continue to serve as the basis for stigma.

As Professor Laurence Tribe explains, “The net effect [of a complete ban on sodomy] would be to establish the legitimacy—and certainly the rationality, at a minimum—of what Justice O’Connor labeled ‘discrimination’ against those whose sexual desires pull them toward erotic fulfillment exclusively with lovers of their own sex.”

Treating gays with equal dignity and respect necessarily goes beyond both “fundamental rights” and equal protection analysis. This move beyond traditional doctrinal forms is not unlike what proponents of an antisubordinationist reading of the Reconstruction Amendments have advanced over the past two decades, albeit within the confines of equality jurisprudence. As Professor Charles Lawrence explained:

> [T]here is another way to think about the problem of race and racism and the project of racism’s eradication. This is to think of racial equality as a substantive societal condition rather than as an individual right. The substantive approach sees the disestablishment of ideologies and systems of racial subordination as indispensable and prerequisite to individual human dignity and equality.

Thus, the Court’s treatment of matters of sexuality in *Lawrence* is well-suited to the task of empowering African Americans.

---

200 *Lawrence*, 539 U.S. at 584–85 (“I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”).

201 Id. at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).


B. Dignity and Remedy

In *Lawrence*, the remedy that went along with the acknowledgment and affirnance of the essential humanity and social value of gays was simply to strike down the Texas statute criminalizing sodomy. In the race context, the remedy may be far less circumscribed. Taking dignity seriously presumably would entail a remedial progression. In addition to the discursive acknowledgment of first- and second-order dignity, the remedy likely would entail a critical re-examination of the prevailing approach to equality jurisprudence. This, in turn, could have tremendous substantive and material consequences with respect to minority set-aside contracts, affirmative action, and funding for public schools, for example. In addition, other policies and practices that arguably produce stigmatizing or dignitary harm, such as racial profiling and racial disparities in incarceration rates, may be reviewed as part of a renewed emphasis on dignity.

One plausible objection is simply one of feasibility—that the Court, as currently constituted, would never undertake this project. Indeed, when faced with a similar issue in *Washington v. Davis*—whether a litigant could use disparate impact theory to advance an equal protection challenge—the Court flatly refused to expand the opportunities for a more thorough, racial-remedial scheme. As the Court explained:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

This is consistent with the “interest-convergence theory” offered by Professor Derrick Bell to explain why advances in civil rights appear only when whites can be convinced that they stand to benefit as well. Indeed, the Court’s hesitancy in *Davis* and its current disposition offer a poignant glimpse at how modest our approach to racial justice truly is. Nevertheless, there is value in simply pointing out that the current Supreme Court’s jurisprudence indulges in delusional and counterfeit thinking when it chooses to evade core dignitary concerns in the context of racial disputes. *Lawrence* not only reminds us that such dignitary concerns are not “off limits,” but also provides

---

204 426 U.S. 229 (1976).
205 *Id.* at 248.
206 Derrick A. Bell, Jr., Comment, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) (arguing that blacks’ interest in racial equality will only be accommodated when it converges with whites’ interests).
insight into a world in which members of socially disfavored groups can obtain judicial acknowledgment and affirmance of dignity. The challenge for proponents of racial justice is to replicate this success.

In addition to the feasibility objection, a practical problem presented by the renewed emphasis on dignitary concerns involves the standard that courts should use to scrutinize potentially offending laws or policies. In Lawrence, the Court invokes the language of “fundamental rights” analysis, observing that the ability to engage in a meaningful gay relationship involves a “protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance in defining the rights of the person.”207 This conclusory formulation reveals a great deal of flexibility, which some will undoubtedly find undesirable in the racial context. Proponents of racial justice will likely argue that such a standard, in the hands of judicial conservatives, will neutralize any positive effects because it may accommodate high levels of judicial deference to oppressive legislative policy. Conservatives will argue that such a flexible standard will only serve to encourage judicial activism on the racial front. The struggle over appropriate levels of scrutiny, however, is nothing new in equality jurisprudence.208 Invariably, the Court will strive to strike the appropriate balance, for as Justice Thurgood Marshall once explained, “[s]o long as the basis of the discrimination is clearly identified, it is possible to test it against the State’s purpose for such discrimination—whatever the standard of equal protection analysis employed.”209

Finally, there remains the problem of determining what respect for dignity demands in a given context. For instance, how would a renewed emphasis on dignity play out in law enforcement policy in a working class minority community in which both the victims and perpetrators of crime are predominately African American? Would elevated concerns about the dignity of law-abiding residents warrant greater scrutiny of suspicious individuals to promote greater security?

208 Compare Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227-37 (1995) (holding that strict scrutiny applies to all racial classifications), and City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (noting that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification”), with Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-600 (1990) (applying intermediate scrutiny to benign racial classifications), and Regents of the Univ. of Calif. v. Bakke, 488 U.S. 265, 399 (1978) (Brennan, J., concurring in part, dissenting in part) (noting that “a number of considerations—developed in gender discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’”).
Or would respect for dignity entail fewer stops, less intrusive policing, and an overall diminished police presence? One response is that dignity demands that law enforcement police the hypothetical minority community in the same manner as it would police any other community. But not every community experiences law enforcement presence in the same manner. Dignity, at a minimum, would demand respect for differing community norms. But notice that we are still left with the task of determining what precisely dignity demands in a given context and operationalizing dignity in a way that does not run afoul of community norms.

C. Lawrence As the "Gay Rights" Brown Decision

_Lawrence_ can be read as the _Brown_ decision for gay rights: it represents an attempt by the Court to enshrine the rights of gays in the name of a collective sense of justice and dignity. Yet one of the most powerful criticisms of _Brown_ has been that addressing dignity and stigma concerns, without more, does little to alleviate material conditions of oppression. As Professor Derrick Bell argued: "Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance." Or as Kimberlé Crenshaw states, "[w]hite race consciousness, in a new [post- _Brown_] form but still virulent plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks." Recent books to commemorate the fiftieth anniversary of the Brown decision

---

210 See, e.g., GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF _BROWN_ V. BOARD OF EDUCATION 37-38, 84-87 (1996) (discussing educational progress by African Americans since _Brown_); GERALD N. ROSENBERG, THE HOLLOW HOPE 105 (1991) ("It is equally clear that the Constrained Court view captures the key reasons why, despite Supreme Court action, nothing changed in the first decade after _Brown_."); RAYMOND WOLTERS, THE BURDEN OF _BROWN_: THIRTY YEARS OF SCHOOL DESEGREGATION 282-89 (1984) (noting the continued disparity in educational achievement since _Brown_); Derrick A. Bell, Jr., _Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation_, 85 YALE L.J. 470 (1976) (concluding that the promise of _Brown_ failed urban black students who remain in unequal, all-black schools); see also Kevin Brown, _Revisiting the Supreme Court's Opinion in Brown v. Board of Education from a Multiculturalist Perspective_, in _BROWN v. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY'S SCHOOLS_ 44 (Ellen Condliffe Lagemann & LaMar P. Miller eds., 1996) (noting that while _Brown_ "provided significant positive changes in American society," nevertheless "[r]acial and ethnic segregation in public schools is likely to increase").


212 Crenshaw, _supra_ note 6, at 1378-79.
have expressed similar reservations regarding the case's transformative possibilities.\textsuperscript{215}

The thrust of this criticism applies not only to \textit{Lawrence}, but also to any attempt to seek substantive racial justice through exclusively dignitary means. If it is arguable that the promise of \textit{Brown} has been largely eviscerated over the years, one might be rightly skeptical of the good that can come from this renewed interest in dignity.

Despite the mixed legacy of \textit{Brown}, I nevertheless subscribe to the view that acknowledging and affirming the equal humanity of people of color is a good thing, in and of itself. Nothing has proven more disabling of African American advancement than the corrosive denial of equal humanity. Enslavement of blacks was rooted in the prevailing view that blacks were, in some way, less human than whites.\textsuperscript{214} In the modern era, claims of inferior intelligence and work ethic fueled opposition to full citizenship, participation in jury service, voting and other mundane aspects of public life, as well as employment and educational advancement. Presumptions of cultural inferiority justified segregation, and are reflected in today's social networks, housing patterns, and racially disparate law enforcement policies. In many ways, the acknowledgment of equal humanity is both the first and final frontier of American race relations.

Judicial acknowledgment of second-order communal dignity not only expands our understanding of what racial justice entails, but makes relevant a host of considerations routinely thought to be "off limits" in contemporary race jurisprudence: the widespread acceptance of destructive stereotypes, the disabling consequences of seemingly innocuous, subtle forms of racial bias, and the unexamined acceptance of so-called societal discrimination, among others. Focusing on dignity, then, provides us with an opportunity to move the race dialogue forward by re-centering our conversation on matters of substantive racial justice. This is a welcome reprieve from the incessant wrangling over the scope and contours of procedural equality that

\textsuperscript{215} See, e.g., DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004) (arguing that \textit{Brown} stirred confusion and conflict, and positing that the question for racial justice requires the eradication of silent covenants that serve to maintain the status quo); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION (2004) (arguing that the \textit{Brown} decision was flawed from its inception because it is deeply susceptible to defiance and circumvention).

\textsuperscript{214} See CARROLL, supra note 195, at 125-36 (offering natural history and biblical evidence that African Americans were not human, but a soulless species of Ape); THOMAS JEFFERSON, NOTES ON VIRGINIA (1787), reprinted in 2 THE WRITINGS OF THOMAS JEFFERSON 1, 201 (Thomas Jefferson Memorial Ass'n 1903) (concluding that "blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to whites in the endowments of both body and mind"); see also Dred Scott v. Sanford, 60 U.S. (19 How.) 395 (1857) (arguing that blacks were justifiably reduced to slavery for their own benefit).
has come to dominate contemporary race jurisprudence. It is critical that we identify and resurrect these easily overlooked dignity concerns, lest they be forgotten entirely, and re-deploy them to rescue an increasingly unanchored jurisprudence.

CONCLUSION

In this Article, I have argued for a renewed commitment to seek dignity in contemporary race jurisprudence. Sincere attention to dignitary concerns provides an important mechanism for expanding the possibilities of substantive racial justice. Focusing on dignitary concerns demands that we historicize, contextualize, and deepen our discussion when it comes to matters of race, and this is precisely the kind of analysis that contemporary courts have chosen to evade.

To be clear, I view the Court's ritualistic transformation and evasion of dignity in the racial context as a crisis in need of immediate attention. Yet I realize that this is a crisis centuries in the making. In 1852, Frederick Douglass addressed the indignity of slavery and the issue of equal humanity before an anti-slavery group on the heels of a Fourth of July celebration:

You are all on fire at the mention of liberty for France or for Ireland; but are as cold as an iceberg at the thought of liberty for the enslaved of America. . . . You profess to believe "that, of one blood, God made all nations of men to dwell on the face of all the earth," and hath commanded all men, everywhere to love one another; yet you notoriously hate, (and glory in your hatred), all men whose skins are not colored like your own. You declare, before the world, and are understood by the world to declare, that you "hold these truths to be self evident, that all men are created equal; and are endowed by their Creator with certain inalienable rights; and that, among these are, life, liberty, and the pursuit of happiness;" and yet, you hold securely, in a bondage which, according to your own Thomas Jefferson, "is worse than ages of that which your fathers rose in rebellion to oppose," a seventh part of the inhabitants of your country.

Over a century later, Martin Luther King, Jr., spoke directly to the dignitary harm occasioned by racial segregation:

I guess it is easy for those who have never felt the stinging darts of segregation to say "wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize and even kill . . . ; when you have seen the vast majority [of blacks] smothering in an air-tight cage of poverty in the midst of an affluent society . . . ; when

\hspace{1cm} 215 FREDERICK DOUGLASS, What to the Slave is the Fourth of July?: An Address Delivered in Rochester, New York on 5 July 1852, in 2 THE FREDERICK DOUGLASS PAPERS 359, 383 (John Blassingame ed., 1982).
you have to concoct an answer for a five-year old son asking in agonizing pathos: "Daddy, why do white people treat colored people so mean?"; 
... when your first name becomes "nigger" and your middle name becomes "boy" ... and when your wife and mother are never given the respected title "Mrs." ...; then you will understand why we find it difficult to wait. 216

In the post-Civil Rights era, African Americans fear neither enslavement nor the brutal reality of vulgar de jure segregation. Yet we continue to struggle for the acknowledgment of equal humanity and inclusion in the American political family.

The task of acknowledging and affirming the self-worth and social value of socially disfavored groups is not easy. It entails, among other things, deep questioning of our shared intuitions and healthy interrogation of the legitimacy of prior institutional decision making. It requires a Court willing to brush law and legal institutions against the grain. To be sure, there are real differences between the struggle for equality in the gay rights and race relations contexts, some of which may affect the viability of a dignity-centered approach to empowerment. Yet Lawrence provides a glimpse into a world in which members of socially disfavored groups can obtain judicial acknowledgment and affirnance of dignity without further indulging the nihilistic cul-de-sac of victimhood. The challenge for proponents of racial justice is to replicate this success by seeking dignity in race jurisprudence.

216 KING, supra note 2, at 292–93.