

OF AMERICAN FRAGILITY: PUBLIC RITUALS, HUMAN RIGHTS, AND THE END OF *INVISIBLE MAN*

Etienne C. Toussaint*

ABSTRACT

The COVID-19 pandemic has exposed the fragility of American democracy in at least two important ways. First, the coronavirus has ravaged Black communities across the United States, unmasking decades of inequitable laws and public policies that have rendered Black lives socially and economically isolated from adequate health care services, educational resources, housing stability, environmental security, stable and living wage jobs, generational wealth, and other institutional structures necessary for resilience. Second, government-mandated social distancing in response to the coronavirus has failed to dampen America's racially biased, violent, and supervisory policing culture, reigniting demands from the Movement for Black Lives for police abolition and, more generally, the dismantling of white supremacy in sociopolitical life. In response, scholars have called for a radical (re)imagination of American democracy.

This Article argues that resolving the fragility of American democracy amidst the terrors of COVID-19 warrants a renewed commitment to the emancipatory language of human rights. This assertion rests on three claims, using the challenges of housing insecurity as a guiding explanatory thread. First, the geography of

* Associate Professor of Law, University of the District of Columbia, David A. Clarke School of Law. I thank colleagues who provided detailed feedback on drafts of this Article, including Khaled Beydoun, Andrew Ferguson, Marcy Karin, Diane Klein, Charleton Copeland, Marc-Tizoc González, Stephen Lee, Paul Gowder, Susan Jones, and Rashmi Dyal-Chand. I also benefited tremendously from critical feedback and sharp questioning during the Summer 2020 Poverty Law Workshop hosted by the AALS Section on Poverty Law, and the Section on International Human Rights: New Voices in International Human Rights Panel during the 2021 AALS Annual Meeting. I thank Sabrin Qadi, Stephanie Kamey, and Bradley Cunningham for research assistance, and Marielle Paloma Greenblatt for invaluable critiques during the editing process, alongside the excellent editors of the *Columbia Human Rights Law Review*. Finally, I thank Ebony, Etienne, and Edward—I am, because we are. Any errors or omissions contained in this Article are my own.

health inequity in Black communities across the United States embodies not merely governmental neglect, but more poignantly, the rituals of white supremacy that create and reconstitute the racial social order. As a result, beyond coordinated public health measures and short-term economic stimulus plans to address human vulnerability, the future of American democracy demands new tools to confront racial ritualization in everyday life. Second, human rights discourse challenges the normative underpinnings of contemporary public policy, which are shaped by liberal assumptions about the human condition that enshrine structural inequality and propagate economic power. Third, human rights discourse expands the social imagination, fostering innovation in lawmaking by deconstructing antiquated valuations of equality and reconstructing contextualized notions of liberty. Taken together, these insights reveal human rights discourse as a project of reimagining legal subjectivity and state responsibility.

To further elucidate the benefits of human rights discourse in view of compelling arguments to move beyond rights-based framings of equality and discrimination, this Article places Martha Fineman's theory of vulnerability in conversation with Ralph Ellison's articulation of the Black American experience during Jim Crow segregation in his novel, *Invisible Man*. This dialogue reveals the erasure of "sacrifice" from ongoing discussions of social and economic inequality. As this Article argues, sacrifice is a critical dimension of democratic citizenship that has been rendered invisible in contemporary rights-based discourse and emergent strategies for poverty alleviation. Drawing insights from the Movement for Black Lives and contemporary theorists of political philosophy, this dialogue clarifies the central role of "dignity" in establishing the preconditions for an engaged citizenry in the context of American racial capitalism.

TABLE OF CONTENTS

Introduction	829
I. On Race, Isolation, and the Rituals of White Supremacy	838
A. Economic Inequity	844
B. Educational Inequity	847
C. Social Inequity	851
D. Environmental Inequity.....	856
E. Health Inequity.....	860
II. On Equality, Liberty, and the Erasure of Sacrifice.....	863
A. Equality	865
B. Liberty	875
III. On Vulnerability, Dignity, and the Human Condition	884
A. Vulnerability	884
B. Invisibility	892
C. Dignity.....	896
D. Human Rights.....	901
Conclusion.....	908

INTRODUCTION

“Can you tell me why / Every time I step outside I see my niggas die All we want do is take the chains off All we want do is be free.” – J. Cole, *Be Free*¹

“I am invisible, understand, simply because people refuse to see me When they approach me they see only my surroundings . . . figments of their imagination . . . everything and anything except me.” – Ralph Ellison, *Invisible Man*²

On Saturday, April 4, 2020, thousands of residents of a South Bronx housing project, less than three miles from my childhood home, woke up without running water.³ Unable to wash their hands or faces in accordance with Centers for Disease Control and Prevention (CDC) guidelines to combat the outbreak of COVID-19, some presumably waited at home for water services to be restored to their apartment building. Many others likely relied on bottled water to clean up before heading to the subway to travel to work. Staying at home is a luxury that many low-income New Yorkers who work what are now called “essential” jobs in healthcare, transportation, and food supply cannot afford.⁴ Such unanticipated hurdles perhaps explain why people

1. J. COLE, *Be Free*, on BE FREE (Roc Nation Records 2014). *Be Free* is Cole’s response to the police shooting of an unarmed African American teenager, Michael Brown, in Ferguson, Missouri. Bethonie Butler, *Rapper J. Cole Responds to Michael Brown Slaying with A Song, ‘Be Free’*, WASH. POST (Aug. 15, 2014), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/08/15/rapper-j-cole-responds-to-michael-brown-slaying-with-a-song-be-free/> (on file with the *Columbia Human Rights Law Review*) (discussing the impact that Michael Brown’s murder had on the artist).

2. RALPH ELLISON, *INVISIBLE MAN* 3 (Second Vintage Int’l ed. 1952).

3. Michael Gartland & Larry McShane, *Rattled Tenants in Bronx Housing Project Wake up with No Running Water, Raising Fears of Coronavirus Infection Among Its 2,000 Residents*, N.Y. DAILY NEWS (Apr. 4, 2020), <https://www.nydailynews.com/new-york/ny-jackson-house-coronavirus-20200404-6bcmzgsrd2tpiuchnmjutwle-story.html> [<https://perma.cc/B5QX-SQSP>].

4. Jennifer Valentino-DeVries et al., *Location Data Says It All: Staying at Home During Coronavirus Is a Luxury*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/interactive/2020/04/03/us/coronavirus-stay-home-rich-poor.html> (on file with the *Columbia Human Rights Law Review*); Charles M. Blow, *Social Distancing Is a Privilege*, N.Y. TIMES (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/opinion/coronavirus-social-distancing.html>

living in the Bronx in the spring of 2020 were twice as likely to die from COVID-19 than the residents of New York City's other four boroughs.⁵ Yet, such hurdles also convey the stabilizing role of *sacrifice* in democratic life, much less a life defined by the treacheries of the novel coronavirus. As cities across America confront the uncertainties of a world with COVID-19, three questions tug at the moral fabric of American democratic citizenship:⁶ (1) are the sacrifices of the poor and Black borne voluntarily; (2) are the sacrifices of the poor and Black acknowledged; and (3) are the sacrifices of the poor and Black reciprocated?⁷

Public health experts say that the heightened risk of coronavirus deaths among low-income Black populations stems from the high rates of diabetes, hypertension, and other illnesses linked with recent COVID-19 deaths.⁸ Yet, underlying the presence of

(on file with the *Columbia Human Rights Law Review*) (discussing the hardships of the COVID-19 pandemic for those unable to social distance due to their jobs).

5. Ese Olumhense & Ann Choi, *Bronx Residents Twice as Likely to Die from COVID-19 in NYC*, THE CITY (Apr. 3, 2020), <https://thecity.nyc/2020/04/830ronx-residents-twice-as-likely-to-die-from-covid-19-in-nyc.html> [<https://perma.cc/Y5NY-BTED>].

6. This Article focuses on the plight of American citizens with an emphasis on Black Americans. This Article uses the term "Black" to describe individuals of African American identification and individuals of other African diaspora cultures. It also uses the term "minoritized" to describe how cultural groups are often pushed to the margins of society based upon racial, cultural, or other social categorizations, such as Latino Americans, certain immigrant populations, and Muslims. To be sure, low-income and undocumented migrants have also been disproportionately impacted by the novel coronavirus, especially given their prevalence in essential industries and their limited access to healthcare. Eva Clark et al., *Disproportionate Impact of the COVID-19 Pandemic on Immigrant Communities in the United States*, PUB. LIBR. OF SCI. (PLOS) NEGLECTED TROPICAL DISEASE, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357736/> [<https://perma.cc/DUE3-23RB>] (noting that "poverty, limited access to healthcare, and fear of legal repercussions place vulnerable immigrant communities within the U.S. at high risk for acquiring SARS-CoV-2 and developing severe COVID-19."). However, while other racial minorities and noncitizen asylees, immigrants, refugees, etc. may experience similar challenges to those described herein, and although they may benefit from application of this Article's recommendations, their discussion is beyond the scope of this Article.

7. Danielle S. Allen, *Ralph Ellison on the Tragi-Comedy of Citizenship*, in RALPH ELLISON AND THE RAFT OF HOME: A POLITICAL COMPANION TO INVISIBLE MAN 37, 47 (2004).

8. Off. of Minority Health, *Diabetes and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2019), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18> [<https://perma.cc/7KX4-RGBF>]; Off. of Minority Health, *Heart Disease and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS.

weakened immune systems are multiple social determinants—social and economic status, educational opportunity, neighborhood and environmental distress, and health care access—that collectively convey a geography of health inequity primed for devastation.⁹ Across New York City, low-income Black communities in parts of Brooklyn, Queens, and the Bronx have been demolished by the spread of COVID-19, while mostly white and upper-class neighborhoods in Manhattan have remained relatively unscathed.¹⁰

These challenges are not confined to New York City. Statistics captured in April 2020 from other cities across the country have confirmed what many researchers already suspected.¹¹ In Michigan, during the period studied, Black Americans represented 14% of the state's population but 40% of COVID-19 deaths.¹² In Louisiana, Black Americans represented 33% of the state's population but over 70% of COVID-19 deaths.¹³ In Chicago, Black Americans represented 29% of

(2020) <https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlID=19> [https://perma.cc/KE9K-659W].

9. Paula Braveman & Laura Gottlieb, *The Social Determinants of Health: It's Time to Consider the Causes of the Causes*, 129 PUB. HEALTH REP. 19, 20 (2014) (discussing a variety of social health determinants, such as the “[c]onditions in which people are born, grow, live, [and] work,” as fundamental drivers of health outcomes).

10. Sanya Mansoor, *Data Suggests Many New York City Neighborhoods Hardest Hit by COVID-19 Are Also Low-Income Areas*, TIME (Apr. 5, 2020), <https://time.com/5815820/data-new-york-low-income-neighborhoods-coronavirus/> [https://perma.cc/27GB-K7ME].

11. *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the United States*, APM RSCH. LAB (Oct. 15, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race> [https://perma.cc/YD2S-M5ND]; Letter from Elizabeth Warren et al., U.S. Sen. (D-Mass.), to Hon. Alex M. Azar II, Sect., U.S. Dep't Health & Hum. Servs. (Mar. 27, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.03.27%20Letter%20to%20HH%20re%20racial%20disparities%20in%20COVID%20response.pdf> [https://perma.cc/5FNP-HGK5] (citing the concerns of physicians' that Black communities will be disproportionately likely to contract COVID-19 and experience severe symptoms).

12. Bryce Huffman, *Black People Are 40% of COVID-19 Deaths in MI. What Does That Mean?*, MICH. RADIO (Apr. 4, 2020), <https://www.michiganradio.org/post/black-people-are-40-covid-19-deaths-mi-what-does-mean> [https://perma.cc/E8CK-UJM5].

13. Laura Barrón-López et al., *Health Professionals Warn of 'Explosion' of Coronavirus Cases in Minority Communities*, POLITICO (Apr. 6, 2020), <https://www.politico.com/news/2020/04/06/coronavirus-demographics-170353> [https://perma.cc/DDU2-5EEY].

the city's population but 72% of COVID-19 deaths.¹⁴ In Washington, D.C., Black Americans represented 47% of the population but 80% of COVID-19 deaths.¹⁵ Similar reports in North Carolina, Wisconsin, and other states across America revealed COVID-19's disparate impact on Black and minoritized neighborhoods.¹⁶ Contrary to early popular opinion, Black Americans are not immune to the coronavirus.¹⁷

Instead, beyond exposing the shortcomings of the Trump presidential administration's lackluster response to its outbreak, COVID-19 has unmasked the adverse impact of decades of inequitable laws and public policies on low-income Black communities across the United States.¹⁸ Racism in the wake of American slavery and Jim Crow segregation is evinced by the historic social and economic isolation of marginalized and low-income communities, which often lack adequate health care services, housing stability, environmental security, stable and living wage jobs, generational wealth, and other institutional structures necessary for resilience.¹⁹

14. Natalie Moore, *In Chicago, COVID-19 Is Hitting the Black Community Hard*, NPR (Apr. 6, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/06/828303894/in-chicago-covid-19-is-hitting-the-black-community-hard> [https://perma.cc/23M5-XZ6S].

15. Jenny Gathright, *Black Washingtonians Make Up Less than Half of D.C.'s Population, But 80% of Coronavirus Deaths*, DCIST (May 6, 2020), <https://dcist.com/story/20/05/06/black-washingtonians-make-up-less-than-half-of-d-c-s-population-but-80-of-coronavirus-deaths/> [https://perma.cc/9PEL-TR67].

16. Akilah Johnson & Talia Buford, *Early Data Shows African Americans Have Contracted and Died of Coronavirus at an Alarming Rate*, PROPUBLICA (Apr. 3, 2020), <https://www.propublica.org/article/early-data-shows-african-americans-have-contracted-and-died-of-coronavirus-at-an-alarming-rate> [https://perma.cc/8JTG-UGAJ].

17. Elijah C. Watson, *Are Black People Immune to Coronavirus: How a Joke Turned into a Believable Myth*, OKAY PLAYER (Apr. 7, 2020), <https://www.okayplayer.com/news/are-black-people-immune-to-coronavirus.html> [https://perma.cc/T23S-ZBLP].

18. Leonard E. Egede & Rebekah J. Walker, *Structural Racism, Social Risk Factors, and COVID-19—A Dangerous Convergence for Black Americans*, 383 N. ENGL. J. MED. 77, 79 (2020) (arguing that structural racism and discriminatory practices in education, employment, housing, health care, and other systems have exacerbated the impact of COVID-19 in Black communities); Leann M. Tigges et al., *Social Isolation of the Urban Poor: Race, Class, and Neighborhood Effects on Social Resources*, 39 SOC. Q. 53, 72 (1998) (finding that low-income Black Americans experience social isolation at a disproportionate rate, in part due to public policy decisions regarding the deindustrialization of inner cities).

19. See Keeanga-Yamahtta Taylor, *The Black Plague*, NEW YORKER (Apr. 16, 2020), <https://www.newyorker.com/news/our-columnists/the-black-plague> [https://perma.cc/BM3M-VDWS] (“Racism in the shadow of American slavery has

Even more, government-mandated social distancing in response to the spread of COVID-19 has amplified America's racially biased, violent, and supervisory policing culture. In the summer of 2020, while some New York Police Department ("NYPD") officers handed out masks to white New Yorkers in Central Park with a smile, others handed out fines and harassment to Black New Yorkers in Brooklyn with disdain.²⁰ Such disparities have reignited demands from the Movement for Black Lives ("Black Lives Matter" or "BLM")²¹ for police abolition and, more generally, the dismantling of white supremacy in American sociopolitical life.²² As millions of Americans now find themselves unemployed, unable to access welfare benefits, evicted, and living shift-to-shift;²³ and as democratic governments

diminished almost all of the life chances of African-Americans. Black people are poorer, more likely to be underemployed, condemned to substandard housing, and given inferior health care because of their race.").

20. Poppy Noor, *A Tale of Two Cities: How New York Police Enforce Social Distancing by the Color of Your Skin*, THE GUARDIAN (May 4, 2020), <https://www.theguardian.com/world/2020/may/04/coronavirus-new-york-police-enforce-social-distancing> [https://perma.cc/4XGD-JE8D] (detailing how NYPD officers were photographed handing out personal protective equipment (PPE) to white sunbathers in one part of New York City, while officers in another neighborhood were captured "punching a person of color and sitting on him following a dispute about social distancing").

21. See Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08 (2018) (defining the Movement for Black Lives as "the larger movement configuration in which the chapter-based Black Lives Matter network functions"); see also Alicia Garza, *Foreword to WHO DO YOU SERVE, WHO DO YOU PROTECT?*, at vii, ix (Maya Schenwar et al. eds., 2016) (discussing the origin of the #BlackLivesMatter organizing network).

22. See *infra* Part I.

23. GREGORY ACS & MICHAEL KARPMAN, URB. INST., EMPLOYMENT, INCOME, AND UNEMPLOYMENT INSURANCE DURING THE COVID-19 PANDEMIC 7–8 (2020), <https://www.urban.org/sites/default/files/publication/102485/employment-income-and-unemployment-insurance-during-the-covid-19-pandemic.pdf> [https://perma.cc/H3QE-4UKM]; *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET AND POL'Y PRIORITIES 4 (Jan. 21, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [https://perma.cc/N8F6-8SQV] (tracking how the COVID-19 pandemic's economic fallout has disproportionately impacted "Black, Latino, Indigenous, and immigrant households. These disproportionate impacts reflect harsh, longstanding inequities—often stemming from structural racism..."). See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harv. Univ. Press 2014) (documenting the rise in income inequality); ARNE L. KALLEBERG, *PRECARIOUS LIVES: JOB INSECURITY AND WELL-BEING IN RICH DEMOCRACIES* (2018) (documenting the precarity of low-wage and temporary work); Mehrsa Baradaran, *THE COLOR OF MONEY: BLACK BANKS AND*

around the world struggle to disentangle political power from the clutches of private wealth;²⁴ a new wave of worldwide protests by Black Lives Matter activists has ushered a global reckoning with this generation's economic, social, and ecological crises of neoliberal capitalism.²⁵ As a result, scholars have called for a radical (re)imagination of American democracy, a new vision of sociopolitical life that might bend the moral arc of legal scholarship, lawmaking, public policy, and governance toward a more *just* union.²⁶

This Article builds upon such discourse by arguing that America's fragile democracy, exposed by the terrors of COVID-19, can be rebuilt through a renewed commitment to the emancipatory language of human rights. In so doing, the Article contributes to the work of scholars of the Law and Political Economy movement²⁷ with insights from critical race theorists, political theorists, anthropologists, and novelists. In recent years, scholars have sharply critiqued human rights law as a tool for social transformation.²⁸ Some have argued that rights-based discourse tends to insulate the

THE RACIAL WEALTH GAP (2017) (documenting the racial wealth gap and the embeddedness of racism in financial institutions).

24. Deva Woodley, *An American Reckoning*, PUBLIC SEMINAR (Jun. 4, 2020), [https://publicseminar.org/essays/an-american-reckoning/?mc_cid=e919b0a580&mc_eid=\[UNIQID\]](https://publicseminar.org/essays/an-american-reckoning/?mc_cid=e919b0a580&mc_eid=[UNIQID]) [<https://perma.cc/TXM3-5VYP>]. See generally CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber et al. eds., 2018) (discussing challenges in constitutional democracies around the world); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012) (discussing the influence of affluent citizens on the policymaking process); ANAND GIRIDHARADAS, *WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD* (2019) (discussing how global elites use narratives of social change to exploit the poor and preserve the status quo).

25. See Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 *YALE L.J.* 1784, 1789 n.21 (2020) ("Neoliberalism is a mode of governance and legitimation that enforces specific distributions and configurations of 'market discipline' that support profits and managerial power over democratically determined social guarantees—for instance, labor market 'liberalization,' erosion of unions' role in the economy, and rollbacks of social provision.").

26. See Akbar, *supra* note 21, at 406–10; see also Britton-Purdy et al., *supra* note 25, at 1835 ("[A] legal imaginary of democratic political economy, that takes seriously underlying concepts of power, equality, and democracy, can inform a wave of legal thought whose critique and policy imagination can amplify . . . movements for structural reform—and, if we are lucky, help remake our polity in more deeply democratic ways.").

27. See generally LAW & POL. ECON. PROJECT, <https://lpeproject.org/> [<https://perma.cc/QDV6-45RM>]. This Project is a network of individuals and scholars studying political economy and the law. See *id.*

28. See *infra* Section II.A.

subordinating nature of private ordering from governmental regulation, legitimate existing structures of social subordination, and perpetuate an individualistic and atomistic conception of the human condition.²⁹ Others have emphasized the way rights-based frameworks have been used to protect existing structures of social and economic privilege, alienate the disempowered, and frustrate the broader political project of structural reform.³⁰ Still others have concluded that human rights-based movements, at least in their current conception, are simply “not enough” to inspire radical change.³¹ Thus, it remains unclear whether the language of human rights can unearth solutions to the inequality of low-income Americans who find themselves segregated into pockets of concentrated disadvantage. This Article grounds its recommendation of human rights discourse on three philosophically and historically informed normative claims, using the problem of housing inequality as a guiding explanatory thread.

First, this Article contends that the geography of health inequity in Black communities across America embodies not merely governmental neglect, but more poignantly, the rituals of white supremacy that create and reconstitute anti-Black racism and redeem white privilege. From normalizing the conscious disregard of the homeless, to rationalizing the existence of Black urban ghettos with “culture of poverty” sociological theories,³² the process of “racial ritualization” comprises social practices, cultural norms, and codes of behavior that create the fictions of race. It enables white citizens to “recover, relive, and be regenerated by [white history] in the present, interrupting their ordinary life—replete with contemporary challenges to white privilege and white priority—with a revered time in which white people enjoyed racial domination over people of

29. See *infra* Section II.A.

30. See *infra* Section II.A.

31. See, e.g., SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 2–4 (2018) (“[P]eople invest their hopes (and money) in human rights, looking the other way when vast inequality soars . . . human rights do not necessarily call for a modicum of distributive equality. And a concern for human rights, . . . has risen as moral commitments to distributive equality fell.”).

32. Paul Gorski, *The Myth of the “Culture of Poverty,”* 65 *EDU. LEADERSHIP* 7, 32–36 (2008) (discussing educators who buy into the “culture of poverty” myth—the idea that poor people share more or less monolithic and predictable beliefs, values, and behaviors”).

color.”³³ As a result, beyond coordinated public health measures and short-term economic stimulus plans to forge material resilience against human vulnerability,³⁴ and beyond sweeping calls for diversity and inclusion in response to BLM protests, the future of American democracy demands new tools to confront racial ritualization in American democratic life.

Second, building upon the revolutionary potential of rights-based discourse found within the Marxist tradition, which emphasizes a need to distinguish political emancipation from *human* emancipation,³⁵ this Article argues that human rights law offers innovative tools to challenge the normative underpinnings of contemporary public policies, which are too often tinged with liberal assumptions about the human condition that enshrine structural inequality and propagate economic power.³⁶ By unmasking the conflict of moral values that lie at the heart of liberal democracy—the twin ideals of equality and liberty—human rights discourse exposes hidden biases that warp heralded democratic ideals into silent justifications for the entrenchment of white privilege. Human rights ideals should not be relegated to conversations about extreme poverty in developing nations; rather, they should be employed domestically to assess how marginalized and subordinated citizens in the United

33. Julia Robinson Moore & Shannon Sullivan, *Rituals of White Privilege: Keith Lamont Scott and the Erasure of Black Suffering*, 39 AMER. J. THEOLOGY & PHIL. 34, 38, 43 (2018).

34. Benjamin J. Cowling & Allison E. Aiello, *Public Health Measures to Slow Community Spread of Coronavirus Disease 2019*, 221 J. INFECTIOUS DISEASES 1749, 1749–50 (2020) (discussing possible methods of containment for the virus); Andrew Taylor et al., *Trump Signs \$2.2 Trillion Stimulus Package to Provide Payments to Most Americans, Rescue Coronavirus-Hit Businesses*, CHI. TRIB. (Mar. 27, 2020), <https://www.chicagotribune.com/coronavirus/ct-nw-coronavirus-covid-19-stimulus-package-20200327-lop4m3j7ujc4tfvnrhmvb4qmli-story.html> (on file with the *Columbia Human Rights Law Review*) (covering the stimulus package).

35. ERICH FROMM, MARX'S CONCEPT OF MAN 3 (Continuum, 2004 ed.) (1961) (“[T]he very aim of Marx is to liberate man from the pressure of economic needs, so that he can be fully human[.]”). *But see* Justine Lacroix & Jean-Yves Pranchère, *Karl Marx Fut-il vraiment un opposant aux droits de l'homme? [Was Karl Marx Truly Against Human Rights?]* 62 REVUE FRANÇAISE DE SCIENCE POLITIQUE [REV. FR. SCI. POL.] 433, 433 (2012) (discussing the young Marx's diatribe against human rights, which Marx reduces to “the rights of egoistic man, of man as a member of bourgeois society, that is to say an individual separated from his community and solely concerned with his self-interest”).

36. *See* Britton-Purdy et al., *supra* note 25, at 1791; *see also infra* Part II (discussing the use of rights-based discourse to combat social and economic inequality in the case of housing policy).

States have been treated as less than human and rendered disposable.

Third, human rights discourse expands the social imaginary, fostering innovation in lawmaking by deconstructing antiquated valuations of equality and reconstructing contextualized notions of liberty.³⁷ By unravelling the relationship between political equality and liberty—revealing that citizenship demands not merely the inclusion of subordinated citizens into the body politic, but also the recognition of dominated citizens *within* the body politic—such discourse exposes the United States’ historic preoccupation with securing the Black citizen’s freedom from government interference as inadequate. In so doing, it also unveils the United States’ parallel insouciance to the Black citizen’s lack of freedom from domination. Taken together, these insights reveal human rights discourse not simply as a vehicle for unearthing universal and lofty ideals, but rather, and perhaps more importantly, as a project of reimagining legal subjectivity and state responsibility in local context.

To further elucidate the benefits of human rights discourse in view of compelling arguments to move beyond rights-based framings of equality and discrimination,³⁸ this Article places Martha Fineman’s theory of vulnerability in conversation with Ralph Ellison’s articulation of the Black American experience during Jim Crow segregation in his 1952 novel, *Invisible Man*. The Fineman-Ellison dialogue reveals that even efforts to transgress the shortcomings of rights-based discourse can cultivate, albeit unintentionally, the erasure of *sacrifice* from discussions of social and economic inequality. Even more, this dialogue clarifies the act of sacrifice as a critical dimension of democratic citizenship that has been rendered invisible in many contemporary rights-based debates and developing strategies for poverty alleviation. This too emerges as a ritual of white supremacy—the erasure of Black sacrifice from the American consciousness and, consequently, the creation and reconstitution of Ralph Ellison’s *Invisible Man*. Finally, by drawing insights from the policy platform of BLM and contemporary theorists of political philosophy, this dialogue underscores the central role of *dignity* in

37. See *infra* Section II.B.

38. See, e.g., Martha Albertson Fineman, *Beyond Equality and Discrimination*, 73 SMU L. REV. F. 51, 51 (2020) (arguing that a vital question for twenty-first century activists is “whether and to what extent . . . equality/antidiscrimination logic has lost its effectiveness as a critical tool and what, if anything, should be the foundation of the rationale that supplements or even replaces it”).

establishing the preconditions for an engaged citizenry in the context of modern-day racial capitalism in the United States.³⁹

Part I of this Article discusses how the social and economic isolation of Black communities across America has created a geography of health inequity that explains why Black Americans have been disproportionately killed by COVID-19. This geography also reveals the rituals of white supremacy that create and reconstitute the racial social order. Part II then explores ongoing debates on the utility of rights-based discourse for poverty alleviation. It employs rights-based discourse to reveal strains of American colonialism at work in fair housing policy that degrade democratic citizenship, exploit human vulnerability, and perpetuate the erasure of sacrifice to sustain the United States' racialized status quo. Finally, Part III discusses Martha Fineman's theory of vulnerability, which offers an alternative conception of human suffering and yearns to transcend the contested equality-liberty debate. By placing Fineman's vulnerability theory in conversation with Ralph Ellison's *Invisible Man*, Part III argues that rights-based discourse provides a key tool for contextualizing alternative theories with the lived experiences of oppressed peoples. Consequently, rights-based discourse should be integrated into the vulnerability thesis of human suffering. In conclusion, this Article points toward human rights as not only a vehicle to center the freedom struggles of oppressed peoples in poverty alleviation efforts,⁴⁰ but also as a critical variable toward operationalizing radical imagination and disrupting the logic of racial capitalism in the emerging age of pandemics.

I. ON RACE, ISOLATION, AND THE RITUALS OF WHITE SUPREMACY

From the onset of U.S. chattel slavery in 1619 to post-Reconstruction-era "Jim Crow" laws, modern-day mass incarceration, and racially biased policing, white supremacist ideology has set the stage for racially segregated, marginalized, and low-income Black

39. See *infra* Section III.C.

40. The notion of "freedom struggle" is deeply embedded in the Black radical tradition in the United States. See Frederick Douglass, West India Emancipation Speech at Canandaigua, New York (Aug. 3, 1857), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 367 (Philip S. Foner & Yuval Taylor eds., 1999) ("Those who profess to favor freedom and yet deprecate agitation, are men who want crops without plowing of the ground, they want rain without thunder and lightning.").

'ghettos' across America.⁴¹ After the abolition of slavery in 1865, Black Americans found themselves living in a country of forgotten promises, exemplified by the sharecropping industry and the practice of convict leasing that re-created slavery by another name.⁴² Even more, a violent culture of racial terrorism fragmented Black communities and facilitated the theft of Black-owned land.⁴³ Many Black Americans fled the South in search of the promises of freedom in northern urban enclaves during the "Great Migration."⁴⁴ From Illinois, to Maryland, Michigan, and New York, Black Americans protested unequal treatment under the law and demanded respect from their white peers. Instead, a state-sponsored system of "massive

41. See, e.g., IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 10 (2016) ("The beneficiaries of slavery, segregation, and mass incarceration have produced racist ideas of Black people . . . Consumers of these racist ideas have been led to believe there is something wrong with Black people, and not the policies that have enslaved, oppressed, and confined so many Black people."); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (1st ed. 2010) (arguing that the War on Drugs led to unprecedented drug arrests and prosecutions, which directly caused the spike in U.S. mass incarceration, particularly of Black men); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 3–5 (2016) (discussing how the war on poverty created by white liberal politicians, such as Kennedy and Johnson, turned into the war on crime and became a presidential campaign policy priority for Nixon, Reagan, and Bush, inspiring various "law and order" crime policies); Jeremy Travis & Bruce Western, *Poverty, Violence, and Black Incarceration*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 294, 295 (Angela J. Davis ed., 1st ed. 2017) ("Like earlier chapters in African American history—slavery, Jim Crow, and the emergence of the northern ghetto—the racial inequality produced by mass incarceration has been perpetuated by the levers of law and political control.").

42. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (1st ed., 2009) (describing the history of convict leasing, sharecropping, and peonage in America, a system enforced by state and local governments after the Civil War until World War II that overwhelmingly targeted African Americans).

43. Vann R. Newkirk II, *The Great Land Robbery*, *THE ATLANTIC* (Sept. 29, 2019), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/> [<https://perma.cc/Q6F8-68AK>].

44. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (Vintage Books 1st ed. 2011) (describing the personalized accounts of Black people and their difficulty in fleeing racial oppression in the South in search of a better life in northern American cities).

suburbanization” following the Great Depression facilitated a “spatial fix” that enclosed white Americans in segregated suburbs.⁴⁵

Further, a neoliberal approach to economic development that prioritized private investment in affordable housing and job creation, while deprioritizing public spending on critical social welfare services, isolated Black neighborhoods from social and economic opportunities.⁴⁶ Scholars have defined five social determinants of health that categorize the economic and social conditions of such communities: (1) economic stability, (2) education, (3) social and community context, (4) neighborhood and built environment, and (5) healthcare.⁴⁷ Health justice scholar Emily Benfer offers an additional social determinant—(6) America’s legal system—which, she argues, works in tandem with the others to legitimate “court systems that inconsistently apply legal standards and mandates,” enact “laws that perpetuate poor health,” and haphazardly enforce “laws designed to protect or remove barriers to health.”⁴⁸ Taken together, these six characteristics describe the way residents of low-income Black neighborhoods have been rendered vulnerable by governmental neglect and inaction, lending support toward Martha Fineman’s

45. See generally Douglas J. Elliot, *The Federal Role in Housing Finance: Principal Issues and Policy Proposals*, in *THE FUTURE OF HOUSING FINANCE: RESTRUCTURING THE U.S. RESIDENTIAL MORTGAGE MARKET 1* (Martin Neil Bailly ed., 2011) (describing the federal government’s role in housing finance generally). See also JASON HACKWORTH, *THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM* 79–80 (2007) (describing the “spatial fix” following the Great Depression as “[a]n interrelated and government-supported mixture of massive suburbanization, growth in the automobile industry, and expansion within key consumer durables markets”).

46. See Etienne Toussaint, *Dismantling the Master’s House: Toward a Justice-Based Theory of Community Economic Development*, 53 *U. MICH. J.L. REFORM* 337, 365 (2020); see also Ross Barkan, *Cuomo Helped Get New York into This Mess*, *THE NATION* (Mar. 30, 2020), <https://www.thenation.com/article/politics/covid-ny-hospital-medicaid/> [<https://perma.cc/T7TL-8M7G>] (“The same Cuomo who holds press briefings at a major New York City convention center, now the home of a temporary 1,000-bed hospital, presided over a decade of hospital closures and consolidations, prioritizing cost savings . . .”).

47. See, e.g., CDC, *SOCIAL DETERMINANTS OF HEALTH in HEALTHY PEOPLE 2020 MIDCOURSE REVIEW* (2020), <https://www.cdc.gov/nchs/data/hpdata2020/HP2020MCR-C39-SDOH.pdf> [<https://perma.cc/E2JX-B54P>].

48. See Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 *AM. U. L. REV.* 275, 307 (2015).

theory of vulnerability as a mode of analysis for human suffering that avoids the critiques of rights-based discourse.⁴⁹

Before discussing the merits and shortcomings of Fineman's theory of vulnerability,⁵⁰ this Part recontextualizes the vulnerability of low-income Black neighborhoods in the language of rituals. Specifically, it asserts that the health inequities of Black communities across the United States convey not merely a history of governmental neglect, but more disturbingly, tangible rituals of white supremacy that construct and reconstitute the racial social order.⁵¹ In her masterwork, *Ritual Theory, Ritual Practice*,⁵² religious studies scholar Catherine Bell⁵³ characterized the ritual, in materialist

49. Martha Albertson Fineman, *Fineman on Vulnerability and Law*, NEW LEGAL REALISM (Nov. 30, 2015), <http://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law/> [<https://perma.cc/V7KN-SZR5>]. Fineman's theory holds that:

Vulnerability theory challenges the dominance of [the] static and individualized legal subject, and argues for the recognition of actual human lives as socially and materially dynamic. . . . [H]uman beings are not rendered more or less vulnerable because they have certain characteristics or are at various stages in their lives, but do experience the world with differing levels of resilience. The inequality of resilience is at the heart of vulnerability theory because it turns our attention to society and social institutions.

Id. See generally *infra* Section III.A (exploring Fineman's theory of vulnerability and its relationship to rights-based discourse).

50. See *infra* Sections III.A–B.

51. David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV., Summer 2000, at 76 (“[U]nderstanding racial disparities in medical care requires an appreciation of the ways in which racism has operated and continues to operate in society.”).

52. CATHERINE BELL, *RITUAL THEORY, RITUAL PRACTICE* (2009). Although beyond the scope of this Article, theories of rituals and their implications for social, cultural, and religious life are highly contested. For example, there are diverse interpretations of the festival of carnival, or *Fastnacht*, as it is called in the German tradition. The festival has Pagan roots tracing back to the Alemanische tribes in the southwestern part of Germany that chased out the winter spirits with wooden carved masks. These traditions are reminiscent of tribal rituals in Africa and Southern Asia. While “Carneval” records date back to the 18th century, *Fastnacht* records date back to the 12th century. Some argue that the Catholic church coopted existing tribal rituals and reinterpreted them to assert its own moral standards replacing existing internal ones. *Id.* at 130–140.

53. Catherine Bell builds upon the works of anthropologists Max Gluckman and Victor Turner. See generally MAX GLUCKMAN, *RITUALS OF REBELLION IN SOUTH-EAST AFRICA* (1954) (arguing that “rituals of rebellion” serve principally to maintain social order by enabling the expression of underlying social tensions); see also Victor Turner, *Social Dramas and Stories About Them*, 7 CRITICAL

terms, as a bridge between tradition and an ever-changing social world, a structural mechanism that navigates the tensions between the internal moral self and the external sociopolitical order. According to Bell, “acting ritually emerges as a particular cultural strategy of differentiation linked to particular social effects and rooted in a distinctive interplay of a socialized body and the environment it structures.”⁵⁴ Thus, *ritualization* as a cultural strategy of differentiation leverages “lived tensions and values of social life [to demarcate] a privileged opposition—which differentiates by opposing and unites by dominating.”⁵⁵ As Bell asserts, the ritual serves as a form of “social control” that establishes a “culturally strategic way of acting” in terms of belief, ideology, legitimation, and power.⁵⁶ Parties engaged in rituals—e.g., the actor, the observer, and the sacrificed—create “sacred time” through “reenactments of sacred events [that] interrupt ordinary, profane time with a past meaning and reality that is holy.”⁵⁷

Applying Bell’s theory of ritualization to the ideology of white supremacy in America, modern day cultural norms, laws, and policies that operate to construct “limited and limiting power relationship[s] . . . [of] both consent and resistance, misunderstanding and appropriation” between white and nonwhite citizens can be construed as the heirlooms of anti-Black rituals and historic racial ritualizations of public space.⁵⁸ The ongoing subjugation of Black people in America is forged by discrete “ceremonies” of racial ritualization that use race to construct notions of “domination and resistance within the arena of the social body.”⁵⁹ For example, early

INQUIRY 141, 153 (1980) (describing the “cultural performance” of certain values as a “social drama,” an inversion of the normal social order to relieve hidden tensions of sociopolitical life). One example of this phenomenon arises in the Western Christian Carnival festival, where people parade in colorful masks and indulge in taboo acts prior to the liturgical season of Lent, which can be seen as a ritual catharsis that eases the social tensions of race, class, gender, and Christian morality. CATHERINE BELL, *RITUAL: PERSPECTIVES AND DIMENSIONS* 125–128 (Oxford Univ. Press. 2009).

54. BELL *RITUAL THEORY, RITUAL PRACTICE*, *supra* note 52, at 7–8.

55. *Id.* at 106.

56. *Id.* at 8.

57. Moore & Sullivan, *supra* note 33, at 38. For example, the Christian ritual of the Eucharist creates sacred time by reenacting Jesus’s sacred meal with his disciples, during which he shared his body and blood through the offering of bread and wine, thereby interrupting the irreverent reality of today with the sacred promises of a former time. *Id.* at 39.

58. BELL *RITUAL THEORY, RITUAL PRACTICE*, *supra* note 52, at 8.

59. *Id.* at 204.

justifications of the trans-Atlantic slave trade as a means to civilize African savages by moving them into white colonies are reborn in contemporary public policies that aim to resolve poverty by moving Black people into white neighborhoods.⁶⁰

As a result, rituals of white supremacy *create* “white sacred time” by enabling historic anti-Black ideas to be “born again,” interrupting modern sociopolitical life with racist traditions that “renew, regenerate, and re-energize their participants, infusing the present with holy meaning.”⁶¹ In other words, just as “clan rituals make real the conception of a shared identity based on clan membership,” and just as “rituals of penance make real the conception of a moral life” and humanity’s interminable need for redemption, so too do anti-Black rituals make real a conception of white supremacy premised on schemas of Black subjugation.⁶² Both the subjects of anti-Black rituals (e.g., the sacrificial Black body) and passive observers (embodied by the “white moderate,” to echo the phrase of Martin Luther King, Jr.) are participants in ongoing racial ritualizations by virtue of their proximity to whiteness, socialized to ritual habits of action even if not consciously invested in their underlying ideology.⁶³

Collectively, anti-Black rituals serve as processes of “othering” that dehumanize Black lives, degrade Black citizenship, and provide “the narrative language and moral framework for the continuation of white class privilege and the notion of [B]lack inferiority.”⁶⁴ While racial ritualization often occurs unconsciously, it

60. LEONARD RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 25 (2002) (discussing desegregation efforts and the “mobility” assumption that “desegregation was to be achieved by low-income Blacks moving to mostly white areas.”).

61. Moore & Sullivan, *supra* note 33, at 39, 42 (defining “white sacred time” as “a timeless moment of time that provides racial renewal and regeneration in contrast to white disorientation, resentment, and or guilt in the racial present”).

62. Elizabeth Collins, *Reflections on Ritual and on Theorizing about Ritual*, *J. RITUAL STUDS.*, Summer 1998, at 5.

63. Moore & Sullivan, *supra* note 33, at 38. For an example of the ongoing participation of Dr. King’s “white moderate,” see Jeanne Theoharis, *Martin Luther King and the “Polite” Racism of White Liberals*, *WASH. POST* (Jan. 17, 2020) <https://www.washingtonpost.com/nation/2020/01/17/martin-luther-king-polite-racism-white-liberals/> (on file with the *Columbia Human Rights Law Review*) (discussing the modern “white moderate” that resists change to racial disparities, segregated school systems, and law enforcement practices when such change is to occur in their local districts and communities).

64. *Id.* at 36.

nonetheless represents the interruption of present-day anti-racist discourse with the ideology of a “sacred” time when white supremacy justified the sacrifice of Black lives.⁶⁵ The framing of social and economic inequality as a process of racial ritualization reveals that shoring up human vulnerability with material resilience may be inadequate to confer the human dignity necessary for democratic citizenship. Consider first the ritual of unmitigated economic inequity, enacted historically through the restrictive code of racist housing laws and policies,⁶⁶ and re-enacted through modern narratives of poverty that justify its existence.

A. Economic Inequity

During the Great Migration, Black Americans did not find freedom in the North.⁶⁷ In *The Case For Reparations*, Ta-Nehisi Coates shares the story of Clyde Ross, a Black man who migrated to the neighborhood of North Lawndale in Chicago with ambitions of becoming a homeowner.⁶⁸ Black Americans in the early- to mid-twentieth century were intentionally kept out of the home mortgage market by government “redlining” policies, racially restrictive covenants, and discriminatory Federal Housing Administration (FHA) policies.⁶⁹ These practices espouse the formal characteristics of

65. Allen, *supra* note 7, at 42 (“Although democracies claim to act for the good of all, every political decision inflicts some loss on some members of the polity, even in cases where the whole community generally benefits.”).

66. See generally STEPHEN GANT MEYER, AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS (2000) (explaining the variety of methods—legal and social—used by white supremacists to prevent racial integration in their neighborhoods). See also Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 38 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

67. See KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 25 (1965) (explaining that Black individuals who moved north during the Great Migration frequently were “compelled to live in concentrated ghettos”).

68. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/6LZN-NTQL>].

69. See BERYL SATTER, FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA 41–42 (2010) (describing racist housing policies perpetuated by the federal government that favored white consumers and largely disallowed home buying for non-white people). See generally KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (examining the shift from U.S. Department of Housing and Urban

rituals, facilitating a “loose social acquiescence” to limited modes of social expression, and a “restricted code” of behavior that embodies a form of social control.⁷⁰ In Chicago, the rituals of white supremacy enacted by routine housing discrimination perpetuated social control by limiting the expression of liberty among Black residents, notwithstanding their equality under law.⁷¹

Attempts by some Black Americans to integrate white neighborhoods were foiled by the racist practice of “blockbusting,” whereby white real estate agents and white developers convinced white homeowners to sell their homes at low prices and move out of their neighborhoods under the threat of an influx of Black people.⁷² Further, contract-lending schemes targeted Black Americans, subjecting them to stringent provisions that allowed sellers to reclaim home ownership for as little as one missed contract payment.⁷³ Like many Black Americans of his day, Clyde Ross was forced to buy his home “on contract” and was restricted to segregated and crowded Black neighborhoods.⁷⁴

To be sure, racist housing policies in Chicago did not go unchallenged. Both the formation of the Contract Buyers League⁷⁵ and the staunch advocacy of fair housing activists—such as Jesuit seminarian Jack MacNamara, who led a neighborhood-wide payment

Development’s (HUD) exclusionary practice of redlining to inclusion in the real estate market under social pressure from the Civil Rights movement).

70. BELL, RITUAL: PERSPECTIVES AND DIMENSIONS, *supra* note 53 at 139–40.

71. See Coates, *supra* note 68.

72. *Id.*

73. See SATTER, *supra* note 69, at 62.

74. CHRIS MYERS ASCH & GEORGE DEREK MUSGROVE, CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION’S CAPITAL 335 (2017) (“Black residents paid up to 50 percent more than white residents for comparable housing, and black housing units were roughly five times more crowded than white units. As more people crammed into older black neighborhoods, public services could not keep up, schools expanded beyond capacity, and living conditions deteriorated.”).

75. Barbara Brotman, *Decades Late, Black Homebuyers’ Battle for Justice Back in Spotlight*, CHI. TRIB. (July 25, 2015), <https://www.chicagotribune.com/news/ct-contract-buyers-league-20150724-story.html> [https://perma.cc/4UKA-T7J2] (“The Contract Buyers League was an organization of black homeowners in Chicago who banded together in the 1960s to protest housing discrimination. . . . The league organized payment strikes, got many contracts renegotiated and collected information that led to the passage of federal anti-discrimination laws.”).

strike in North Lawndale between 1968 and the early 1970s⁷⁶—helped Black families fight for fair housing rights. Nevertheless, it would ultimately take decades for many Black families to obtain any semblance of justice. Black families endured two massive federal lawsuits that sought to enforce the Supreme Court’s 1968 ruling in *Jones v. Mayer*,⁷⁷ which had denounced any race-based policy that “herds men into ghettos and makes their ability to buy property turn on the color of their skin” as a “relic of slavery.”⁷⁸ And, it would take a half-century after *Jones* for the nation’s first major public-housing desegregation lawsuit, *Gautreaux v. Chicago Housing Authority*,⁷⁹ to reach a final settlement.⁸⁰ In 2019, the Chicago Housing Authority agreed “to develop mixed-income housing, strengthen its voucher program, and create several early childhood development programs at existing public-housing developments,” to be completed by July 2024.⁸¹ Unfortunately, plaintiff Dorothy Gautreaux died of cancer in 1969 before she could witness the conclusion of her case. Dorothy’s lead attorney, Alexander Polikoff, alongside countless public housing residents, would spend over fifty years “waiting for Gautreaux.”⁸²

76. Angela Pauldine, *Honoring the Heroes of Housing Justice*, CHIC. BUNGALOW ASS’N (Feb. 5, 2020), <https://www.chicagobungalow.org/post/honoring-the-heroes-of-housing-justice> [https://perma.cc/DBD4-G3XG]; see also Mary Lou Finley, *Inside the Contract Buyers League’s Fight Against Housing Discrimination*, CHIC. REP. (Feb. 15, 2016), <https://www.chicagoreporter.com/inside-the-contract-buyers-leagues-fight-against-housing-discrimination/> [https://perma.cc/43QX-RNS6] (sharing the story of Clyde Ross, a North Lawndale resident who “bought his North Lawndale home on contract in 1961. He was able to keep it after joining the Contract Buyers League, which fought for legitimate mortgages by staging a payment strike.”).

77. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

78. *Id.* at 443.

79. 296 F. Supp. 907 (N.D. Ill. 1969).

80. Settlement Agreement at 1, *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969) (No. 66 C 1459).

81. *Id.* at 3; Sophie Kasakove, *A Major Chicago Public-Housing Lawsuit Is Wrapping Up. The Segregation It Fought Against Lives On.*, PAC. STANDARD MAG. (Feb. 28, 2019), <https://psmag.com/social-justice/a-major-chicago-public-housing-lawsuit-is-wrapping-up-the-segregation-it-fought-against-lives-on> [https://perma.cc/RLT8-33PF] (discussing the Chicago Housing Authority’s court-ordered duty to continue to develop mixed-income housing and create several early childhood development programs).

82. See generally ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006) (chronicling Polikoff’s decades long struggle to end racial segregation in public housing in Chicago and reform fair housing policies).

Many Black Americans were forced to leave North Lawndale altogether.⁸³ North Lawndale remains one of Chicago's poorest neighborhoods where 43% of residents, predominantly Black, live below the poverty line.⁸⁴ These economic conditions are routinely described as a determinant of the health inequity experienced by North Lawndale's residents and similarly situated residents of poor neighborhoods across the country.⁸⁵ Scholars have revealed socioeconomic status—the “measure of a person's or family's income, education, and occupation in relation to another's”⁸⁶—as strongly linked to poor health outcomes.⁸⁷ Yet, the concentration of poverty in Black communities and its attendant health risks, which are further exacerbated by the COVID-19 pandemic, must be understood as a ritual of white supremacy's “sacred” past. When economic instability converges with racist societal barriers to upward mobility, such as educational inequity, racial ritualization cripples isolated communities.⁸⁸ Consider next the case of St. Louis, Missouri.

B. Educational Inequity

On August 9, 2014, an unarmed eighteen-year-old Black teenager named Michael Brown was killed by a white police officer,

83. Dahleen Glanton, *Growing up with Poverty and Violence: A North Lawndale Teen's Story*, CHI. TRIB. (Mar. 10, 2017), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-poverty-violence-glanton-met-20170309-column.html> (on file with the *Columbia Human Rights Law Review*).

84. *Id.*

85. Jeremy Deaton & Gloria Oladipo, *Mapping the Disparities That Bred an Unequal Pandemic*, BLOOMBERG CITYLAB (Sept. 30, 2020), <https://www.bloomberg.com/news/articles/2020-09-30/mapping-the-disparities-of-chicago-s-unequal-pandemic> [<https://perma.cc/7ZRF-M9W4>].

86. Benfer, *supra* note 47, at 280–81.

87. Norman Daniels, *Justice, Health, and Healthcare*, 1 AM. J. BIOETHICS 2-16, 7 (2001); Nancy E. Adler & Katherine Newman, *Socioeconomic Disparities in Health: Pathways and Policies*, HEALTH AFFS. 60, 60 (2002) (discussing how socioeconomic inequities impact health outcomes).

88. Using IRS data to track the income of families participating in the Moving to Opportunity (MTO) demonstration program, Harvard economist Raj Chetty compellingly makes the case that neighborhoods—their schools, community members, social services, government resources, economic opportunities, and cultural norms—are critical factors in determining the future success of children. See Justin Wolfers, *Why the New Research on Mobility Matters: An Economist's View*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/05/upshot/why-the-new-research-on-mobility-matters-an-economists-view.html>? (on file with the *Columbia Human Rights Law Review*).

Darren Wilson, who suspected him of stealing a box of Swisher Sweets cigars in Ferguson, Missouri.⁸⁹ The incident brought national attention to Ferguson and the resulting uprising ignited the Movement for Black Lives.⁹⁰ Building upon the righteous indignation of BLM protestors, and drawing from decades of scholarship on the concentration of disadvantage in Black neighborhoods,⁹¹ scholars quickly uncovered the societal impediments to upward mobility that rendered Michael Brown, and so many similarly situated Black Americans, vulnerable to racial ritualization in everyday life.

In *The Making of Ferguson*, Richard Rothstein explained that:

[U]ntil the mid-1960s, Ferguson was a “sundown town” from which African Americans were banned after dark. Ferguson had blocked off the main road from Kinloch with a chain and construction materials but kept a second road open during the day so housekeepers and nannies could get from Kinloch to jobs in Ferguson.⁹²

During an era of government-sanctioned apartheid, racially segregated and unequal schools in racially segregated communities ensured that young Black Americans were denied access to the resources their white counterparts enjoyed. By 1945, there were approximately three hundred neighborhood restrictive covenants in communities across St. Louis County.⁹³ Much like North Lawndale, Chicago, Black Americans in Ferguson, Missouri were unable to obtain home mortgages through the FHA or from local banks to move

89. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (on file with the *Columbia Human Rights Law Review*).

90. See generally PATRISSE KHAN-CULLORS & ASHA BANDELE, *WHEN THEY CALL YOU A TERRORIST: A BLACK LIVE MATTER MEMOIR* (2020) (recounting experiences of racial inequality that fueled the birth of the Movement for Black Lives).

91. See, e.g., Lauren J. Krivo et al., *Race, Segregation, and the Concentration of Disadvantage: 1980-1990*, 45 SOC. PROBS. 61, 75-77 (1998) (discussing geographic concentration of disadvantage in Black and white populations).

92. RICHARD ROTHSTEIN, *ECON. POL'Y INST., THE MAKING OF FERGUSON* 1, 3 (2014), available at <https://www.epi.org/publication/making-ferguson/> [<https://perma.cc/YZ2W-Y4KP>]; see also JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 132 (2005) (exposing thousands of “sundown towns” across the United States that used a range of strategies, from legal formalities to violence, to create homogenous white communities).

93. Rothstein, *supra* note 92, at 13 (“By 1945, about 300 neighborhood covenants were in force.”).

into higher opportunity areas.⁹⁴ Racial-isolation policies not only sustained educational inequity,⁹⁵ they also marginalized Black families into concentrated pockets of deprivation. According to Rothstein, “[t]he ‘spatial mismatch’ between [St. Louis] neighborhoods where African Americans mostly lived, and the better suburban jobs they had difficulty accessing,” exacerbated racial income inequality. That inequality, in turn, reinforced housing segregation.⁹⁶

By 1970, two years after the passage of the 1968 Fair Housing Act (“FHA”), Ferguson was still less than 1% Black.⁹⁷ Change happened slowly over the ensuing decades. Notwithstanding the Supreme Court’s 1954 ruling in *Brown v. Board of Education*⁹⁸ that declared “separate but equal” public schools to be unconstitutional, it would take until 1983 for a federal judge to order state, county, and city government officials to develop a plan to desegregate schools across the St. Louis metropolitan area.⁹⁹ Unfortunately, despite enabling more than seventy thousand Black students to attend predominantly white schools in suburbs across St. Louis County, the program was made voluntary under a revised settlement agreement in 1999, and the program was voted to be phased out altogether in 2016 due to concerns over the legality of indefinitely running a race-based school integration program.¹⁰⁰ With time, many of the explicitly racist housing policies in Ferguson were reformed. Nevertheless, as Rothstein argued, “[p]olicies that are no longer in effect and seemingly have been reformed still cast a long shadow.”¹⁰¹ For example, seemingly antiquated racist housing policies are ritualized daily in modern zoning laws that ensure factories, liquor stores, and nightclubs are routinely sited in low-income Black neighborhoods, yet

94. Dennis R. Judd, *The Role of Governmental Policies in Promoting Residential Segregation in the St. Louis Metropolitan Area*, 66 J. NEGRO EDUC. 214, 214 (1997).

95. *Id.*

96. Rothstein, *supra* note 92, at 30.

97. *Id.*

98. 347 U.S. 483 (1954).

99. *See* Liddell v. Bd. Of Educ. of St. Louis, 469 F. Supp. 1304, 1304 (E.D. Mo. 1979).

100. Chris Regnier, *St. Louis Voluntary Desegregation Program to Be Phased Out*, FOX2NOW (Nov. 18, 2016), <https://fox2now.com/news/deseg-program-could-close-for-new-students-in-2024> [<https://perma.cc/373D-NZVX>]; *The State of Integration in St. Louis*, VOLUNTARY INTERDIST. CHOICE CORP., <https://choicecorp.org/> [<https://perma.cc/8ZZ3-RAS4>] (discussing the legal concerns).

101. *See* Rothstein, *supra* note 92, at 4.

are prohibited elsewhere in the city.¹⁰² Between 2000 and 2012, Ferguson's low-income population doubled, and by 2012 many of Ferguson's neighborhoods had poverty rates at or above 20% of the population.¹⁰³

Historic inequities in housing, municipal services, and education in Ferguson, Missouri, persist to this day and shape opportunities for Black teenagers like Michael Brown. While the *New York Times* attempted to justify Brown's murder by painting him as "no angel,"¹⁰⁴ studies reveal that Brown's neighborhood was no heaven. The school district where Michael Brown graduated, only eight days before his murder, is among the most segregated districts in Missouri and ranks last in overall academic performance.¹⁰⁵ Unlike Brown, who planned to attend a for-profit trade school, approximately half of the Black male students at Normandy High School never graduate.¹⁰⁶ Only five miles away sits Clayton County, where public schools are predominantly white and 84% of students continue to four year colleges after graduation.¹⁰⁷ Such disparities are emblematic of public education across America.¹⁰⁸

102. *Id.* at 9 ("[N]eighborhoods zoned to permit industry, even polluting industry, but taverns, liquor stores, nightclubs, and houses of prostitution were permitted to locate in African American neighborhoods, but prohibited as violations of the zoning ordinance in residential districts elsewhere.").

103. Elizabeth Kneebone, *Ferguson, Mo. Emblematic of Growing Suburban Poverty*, BROOKINGS (Aug. 15, 2014), <https://www.brookings.edu/blog/the-avenue/2014/08/15/ferguson-mo-emblematic-of-growing-suburban-poverty/> [<https://perma.cc/ZTT3-4QF7>].

104. John Eligon, *Michael Brown Spent Last Weeks Grappling with Problems and Promise*, N.Y. TIMES (Aug. 24, 2014), <https://www.nytimes.com/2014/08/25/us/michael-brown-spent-last-weeks-grappling-with-lifes-mysteries.html> (on file with the *Columbia Human Rights Law Review*); Erik Wemple, *New York Times Defends Michael Brown Jr. "No Angel" Characterization*, WASH. POST (Aug. 25, 2014), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2014/08/25/new-york-times-defends-michael-brown-jr-no-angel-characterization/> [<https://perma.cc/JB92-E82V>].

105. Nicole Hannah-Jones, *How School Segregation Divides Ferguson—and the United States*, N.Y. TIMES (Dec. 19, 2014), <https://www.nytimes.com/2014/12/21/sunday-review/why-are-our-schools-still-segregated.html> (on file with the *Columbia Human Rights Law Review*).

106. *Id.* (noting that just one in four Black male students at Normandy go on to a four-year college).

107. *Id.*

108. Letter from Catherine E. Lhamon, Assistant Sec'y for C. R., U.S. Dep't of Educ. 3 (Oct. 1, 2014), available at <https://www.documentcloud.org/documents/1382484-ocr-letter-disparities.html> [<https://perma.cc/649X-N248>] ("[S]chools serving more students of color are less likely to offer advanced courses and gifted and talented programs than schools serving mostly white populations,

It would take a civil rights investigation by the Department of Justice to expose the pattern of civil rights violations by the Ferguson Police Department that set the stage for Brown's murder.¹⁰⁹ Tensions between law enforcement and Black neighborhoods beset with educational inequity lay bare the kinds of social strain that hinder social mobility, frustrate stable employment, and ultimately expose communities like Ferguson to the dangers of the novel coronavirus. The routinized choreography of aggressive and supervisory policing that too often results in public lynching, widely accessible via the internet (the 21st century 'public square') for all to see, embodies yet another ritual of white supremacy, one met time and time again by the moral outrage of citizen protestors. Consider next how similar tensions have surfaced in Baltimore, Maryland.

C. Social Inequity

A history of race-based public policies is not unique to North Lawndale and Ferguson. The same racist housing policies that cemented segregation in Illinois and Missouri can be found in other urban enclaves across America, including Baltimore, Maryland, where protests erupted in 2015 after the unexplained killing of Freddie Gray, a twenty-five-year-old Black man.¹¹⁰ In Baltimore, a web of historic federal, state, and local government policies isolated

and students of color are less likely than their white peers to be enrolled in those course and programs within schools that have those offerings.”); Melanie O’Gorman, *Educational Disparity and the Persistence of the Black-White Wage Gap in the U.S.*, *ECON. OF EDUC. REV.* 29:4, 526–42 (2010) (discussing racial disparities in educational resources and opportunities); Linda Darling-Hammond, *The Color Line in American Education: Race, Resources, and Student Achievement*, *DUBOIS REV. SOC. SCI. RSCH. ON RACE* (2004) 1:2, 213–46 (same).

109. See Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015) (citing Attorney General Eric Holder as stating, “this investigation found a community . . . where deep distrust and hostility often characterized interactions between police and area residents Ferguson police officers routinely violate the Fourth Amendment in stopping people without reasonable suspicion, arresting them without probable cause, and using unreasonable force”). See generally U.S. DEPT OF JUST., C. R. DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2015) (finding that unconstitutional policing practices and discriminatory court practices have undermined the legitimacy of law enforcement among African Americans in Ferguson).

110. Jean Marbella, *The Day the Baltimore Riots Erupted: New Details of Baltimore Riots After Freddie Gray's Death*, *BALT. SUN* (Oct. 23, 2015), <https://www.baltimoresun.com/news/crime/bs-md-freddie-gray-april27-20151022-story.html> [<https://perma.cc/X5P3-S88G>].

low-income Black residents into segregated and under-resourced slums.¹¹¹ Similar to Black residents of North Lawndale, Illinois and Ferguson, Missouri, Black Baltimoreans in the middle of the twentieth century were prevented from moving into white neighborhoods by racial isolation policies promulgated by the FHA.¹¹² Further, they were frequently unable to obtain affordable mortgages from local banks and were restricted to over-crowded and racially segregated neighborhoods where the rent was high, the housing contracts were corrupt, and the opportunities for social and economic mobility were slim.¹¹³ These social dynamics not only impacted the stability of Black families, but also pushed many Black people into economic hardship, igniting a racial wealth gap that has increased in recent decades.¹¹⁴

Civil rights activists have taken important measures to rectify the inequities that plague Baltimore. For example, in 1995, the ACLU of Maryland filed suit against the Department of Housing and Urban Development (“HUD”) on behalf of fourteen thousand Black families living in public housing. In *Thompson v. HUD*, the ACLU alleged that Baltimore intended to demolish a high-rise public housing development and relocate the residents into similarly segregated low-income neighborhoods, perpetuating both the

111. Richard Rothstein, *From Ferguson to Baltimore: The Fruits of Government-Sponsored Segregation*, ECON. POL’Y INST.: WORKING ECON. BLOG (Apr. 29, 2015), <https://www.epi.org/blog/from-ferguson-to-baltimore-the-fruits-of-government-sponsored-segregation/> [https://perma.cc/JCH5-5HC3] (“Baltimore’s ghetto was not created by private discrimination, income differences, personal preferences, or demographic trends, but by purposeful action of government in violation of the Fifth, Thirteenth, and Fourteenth Amendments. These constitutional violations have never been remedied, and we are paying the price . . .”).

112. *Id.* (“African Americans were prevented from moving to white neighborhoods by explicit [FHA] policy . . . [which] barred suburban subdivision developers from qualifying for federally subsidized construction loans unless the developers committed to exclude African Americans from the community.”).

113. See SATTER, *supra* note 69, at 5 (“Because black contract buyers knew how easily they could lose their homes, they struggled to make their inflated monthly payments. Husbands and wives both worked double shifts. They neglected basic maintenance. They subdivided their apartments, crammed in extra tenants . . .”).

114. See Rothstein, *supra* note 111 (“In Baltimore and elsewhere, the distressed condition of African American working- and lower-middle-class families is almost entirely attributable to federal policy that prohibited black families from accumulating housing equity during the suburban boom . . . and thus from bequeathing that wealth to their children and grandchildren, as white suburbanites have done.”).

concentration of poverty and racial segregation in the city.¹¹⁵ In 1996, a Partial Consent Decree permitted the demolition and redevelopment of several Baltimore public housing developments after such concerns were discussed.¹¹⁶ However, the court would continue to adjudicate the ACLU's broader historical claim that Baltimore and its housing authority, with HUD's approval, had intentionally created and maintained a racially segregated system of public housing that isolated poor Black families in low-income neighborhoods.

In 2005, after almost ten years of litigation, the Federal District Court held that HUD had violated its duty to "promote fair housing affirmatively" by concentrating Black public housing residents in segregated neighborhoods.¹¹⁷ The court ordered HUD to take affirmative steps to promote fair housing for the city's public housing residents by implementing regional strategies for housing mobility that would decrease poverty concentration.¹¹⁸ Additionally, the court highlighted housing vouchers as a tool to help former public housing residents move into integrated, "higher opportunity" communities.¹¹⁹

While many fair housing advocates heralded Baltimore's regional mobility solution as a model of success, it came after many years of litigation.¹²⁰ It would take until the year 2012 for the court to approve a final settlement to resolve outstanding issues stemming from the case.¹²¹ Additionally, countless Black families remain unable to take advantage of the limited housing mobility program and, consequently, continue to reside in high-poverty neighborhoods throughout Baltimore.¹²² When pushed to the brink by Baltimore's

115. *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).

116. *Id.* at 424–26 (discussing the demolition and its impact).

117. *Id.* at 409.

118. *Id.* at 462.

119. *Id.* at 459–60.

120. Nicholas Finio et al., *Metropolitan Planning in a Vacuum: Lessons on Regional Equity Planning from Baltimore's Sustainable Communities Initiative*, 48 J. URB. AFF. (2019).

121. The historic settlement called for HUD to continue the Baltimore Housing Mobility Program, conduct further study of housing opportunity throughout the region, and provide incentives for private developers to incorporate affordable housing units into their projects. See Press Release, NAACP Legal Def. Fund., Baltimore Public Housing Families Win Settlement in Fair Housing Lawsuit (Aug. 24, 2012).

122. Tanvi Misra, *Baltimore's Housing Voucher Program Almost Gets It Right*, BLOOMBERG (Jan 5, 2016), <https://www.bloomberg.com/news/articles/2016->

contentious history with local law enforcement, residents have often responded with rage.¹²³ For example, Black communities erupted in protest when Baltimore State's Attorney Marilyn Mosby revealed that the charges against the six police officers involved in Freddie Gray's arrest and his subsequent unexplained killing would be dropped.¹²⁴

Some argue that low-income families who remain in crumbling, impoverished, and highly segregated communities are to blame for their poor health, limited job skills, and perpetual exposure to crime. Others point toward the growing racial wealth gap as a roadblock that hinders social and economic mobility. However, as Ibram X. Kendi explains in his award-winning book *Stamped from the Beginning: The Definitive History of Racist Ideas in America*, such arguments merely reflect longstanding debates between segregationists, assimilationists, and anti-racists.¹²⁵ Rejecting segregationist arguments that racial groups are simply created unequal, and rejecting assimilationist arguments that the toxic cultural behaviors of Black people are the primary reasons why they are unequal, Kendi argues that "anti-racism" requires a recognition of the *inherent* equality of all racialized groups. Further, it exposes the unequal impact of racist ideas that are embedded in culture, law, and public policy. According to Kendi, racist ideas were historically crafted to justify laws and public policies that benefited the economic, political, and cultural self-interests of one citizen group at the expense of another.¹²⁶ These racist ideas—which are "born again" by rituals of white supremacy—beget hate, bigotry, and bias.

01-05/how-baltimore-s-housing-voucher-program-almost-gets-it-right [https://perma.cc/3FDC-Y6D7] (discussing the hurdles in relocating families to high opportunity neighborhoods, such as a lack of effective regional public transportation, which strains voucher holders' ability to remain in high-opportunity areas outside of the city); Doug Donovan, *Housing Policies Still Pin Poor in Baltimore, But Some Escape to Suburbs*, BALT. SUN (Dec. 15, 2015), <https://www.baltimoresun.com/maryland/bs-md-housing-segregation-20151212-story.html> (on file with the *Columbia Human Rights Law Review*).

123. Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, THE ATLANTIC (Apr. 22, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/> [https://perma.cc/DWZ3-BW4F].

124. Jessica Anderson, *Baltimore Riots Lead to 235 Arrests, 20 Injured Officers*, BALT. SUN (Apr. 28, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-baltimore-riots-what-we-know-20150428-story.html> (on file with the *Columbia Human Rights Law Review*).

125. KENDI, *supra* note 41, at 2 (2016).

126. *Id.* at 8–10.

In the case of U.S. housing inequity, shifting blame from racist public policies to private citizen behavior downplays the continued concentration of public housing in low-opportunity communities.¹²⁷ This shifting persists notwithstanding a federal mandate under the 1968 FHA for local governments to take affirmative steps to desegregate public housing. Thus, poverty concentration often perseveres by design, as indicated by President Donald Trump's July 2020 tweet, announcing:

I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood Your housing prices will go up based on the market, and crime will go down. I have rescinded the Obama-Biden AFFH Rule. Enjoy!¹²⁸

Neither pathologizing the poverty of low-income communities, nor blaming private prejudice for contemporary segregation, inspires an honest reckoning with the state-sponsored rituals of white supremacy that perpetuate inequity in Black neighborhoods. Modern constraints on the mobility of Black Americans who desire to live in thriving neighborhoods evoke the "traditionalism" of rituals.¹²⁹ From the very invention of the Trans-Atlantic slave trade, social control over the movement of Black bodies under the guise of bettering Black lives has been a central code of white supremacy.¹³⁰ Today, fair

127. Sam Fulwood III, *The United States' History of Segregated Housing Continues to Limit Affordable Housing*, CTR. FOR AM. PROG. (Dec. 15, 2016), <https://www.americanprogress.org/issues/race/reports/2016/12/15/294374/the-united-states-history-of-segregated-housing-continues-to-limit-affordable-housing/> [<https://perma.cc/BU4J-YAMG>] (discussing the extensive nexus between racial discrimination and persistent housing disparities in the United States).

128. Donald Trump (@realDonaldTrump), TWITTER (Jul. 29, 2020, 12:19 PM), <https://twitter.com/realDonaldTrump/status/1288509568578777088?s=20> (on file with the *Columbia Human Rights Law Review*); see also Kriston Capps, *The Suburbs Take Center Stage at the Republican National Convention*, BLOOMBERG (Aug. 25, 2020), <https://www.bloomberg.com/news/articles/2020-08-26/trump-s-suburban-fear-campaign-came-to-the-rnc> [<https://perma.cc/E2Q5-L7C3>] ("Stoking fears that Democrats might pursue policies to promote integration in exclusive neighborhoods appears to be part of Trump's pitch for re-election.").

129. BELL, RITUAL: PERSPECTIVES AND DIMENSIONS, *supra* note 53, at 145 ("As a powerful tool of legitimation, traditionalization may be a matter of near-perfect repetition of activities from an earlier period, the adaptation of such activities in a new setting, or even the creation of practices that simply evoke links with the past.").

130. KENDI, *supra* note 41, at 147–48 (discussing the Enlightenment era's racist thinkers, such as Georg Wilhelm Friedrich Hegel, whose "foundational

housing policies regard so-called “Black ghettos” as devoid of social capital and bereft of use value. As a result, government leaders frequently encourage Black and minoritized residents to “move to opportunity” in better-resourced, predominantly-white areas, repeating historical “rites of passage” that ritualize white supremacy.¹³¹

After the death of Freddie Gray, BLM protestors expressed rage not merely at the allegations of police brutality, but also at the social and economic disparities that characterized Gray’s Baltimore neighborhood, like so many others.¹³² Despite assertions that we have entered an era of post-racialism, Martin Luther King, Jr.’s remarks from over half a century ago remain relevant: “it is a cruel jest to say to a bootless man that he ought to lift himself by his own bootstraps.”¹³³ To be sure, at the root of COVID-19 deaths in Black communities nationwide lies unresolved social determinants of health inequity. However, such determinants merely underscore the continued racial ritualization of Black inferiority. Consider next the case of Detroit, Michigan, where environmental inequities shape everyday life for many Black Americans.

D. Environmental Inequity

Detroit, Michigan, which contains the largest proportion of Black communities in the country, features some of the starkest examples of environmental injustice in the United States today.¹³⁴ Residents of the so-called “[B]lackest city in America”¹³⁵ regularly

racist idea justified Europe’s ongoing colonization of Africa. European colonizers would supposedly bring progress to Africa’s residents, just as European enslavers had brought progress to Africans in the Americas.”)

131. Margery Austin Turner, *Moving to Opportunity—Or Not?*, URBAN INST. (Nov. 2, 2011), <https://www.urban.org/urban-wire/moving-opportunity-or-not> [<https://perma.cc/W3TJ-LMSA>].

132. Libby Nelson, *6 Charts That Show the Huge Gap Between Black and White Lives in Baltimore*, VOX (Apr. 29, 2015), <https://www.vox.com/2015/4/29/8513259/baltimore-riots-racial-disparities> [<https://perma.cc/2UCE-FRQT>].

133. Andrew K. Franklin, *King in 1967: My Dream Has “Turned into a Nightmare,”* NBC NEWS (Aug. 27, 2013), <https://www.nbcnews.com/nightly-news/king-1967-my-dream-has-turned-nightmare-flna8C11013179> [<https://perma.cc/NE96-URFW>].

134. Drew Costley, *The Blackest City in the U.S. Is Facing an Environmental Justice Nightmare*, THE GUARDIAN (Jan. 9, 2020), <https://www.theguardian.com/us-news/2020/jan/09/the-blackest-city-in-the-is-us-facing-an-environmental-justice-nightmare> [<https://perma.cc/3QFM-H4YZ>].

135. *Id.*; see also Daniel Brook, *Won’t You Be My Neighbor?* N.Y. TIMES BOOK REV. (Jun. 7, 2017), <https://www.nytimes.com/2017/07/07/books/review/>

battle toxic air, lead poisoning, and water shutoffs, the byproduct of decades of inequitable laws and policies that segregated Black citizens into neighborhoods of concentrated disadvantage. A study that aggregated public health data to score neighborhoods on environmental justice revealed that zip codes with the highest concentrations of Black residents in Detroit also contain some of the highest levels of social disadvantage.¹³⁶ Much like Chicago, St. Louis, and Baltimore, Detroit's geography of environmental inequity is tied to a long history of racism that segregated Black citizens into environmentally vulnerable neighborhoods.¹³⁷

One of the most visible forms of environmental injustice in Black neighborhoods in Detroit can be observed by simply looking up at the sky. In the 48217 zip code of Southeast Michigan, where 71% of the population is Black, the air pollution is so egregious that the sky often looks orange.¹³⁸ Yet, beneath beautiful auburn sunsets lies an ugly history of locating oil refineries and waste incinerators in segregated Black neighborhoods. Companies like Marathon have received numerous violation notices in recent years from the Michigan Department of Environment, Great Lakes, and Energy for repeatedly exceeding emissions regulations.¹³⁹ In Detroit's Boynton

gentrification-four-books.html?referringSource=articleShare (on file with the *Columbia Human Rights Law Review*) (reviewing and quoting PETER MOSKOWITZ, *GENTRIFICATION, INEQUALITY AND THE FIGHT FOR THE NEIGHBORHOOD* (2017): "Gentrification is not integration but a new form of segregation,' he says of Michigan millennials moving from lily-white suburbs to America's blackest city . . .").

136. Laura Grier et al., *Assessing the State of Environmental Justice in Michigan*, 110 (May 2009) (M. Sc. Thesis, Univ. of Mich.), https://seas.umich.edu/sites/all/files/AssessingtheStateofEnvironmentalJusticeinMichigan_344.pdf [<https://perma.cc/YNF7-A9BJ>] (discussing qualitative data that revealed a "lack of consideration of indigenous populations' use of land, incinerators located in African American communities, and fracking companies working in low-income areas").

137. THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 36 (1996) (discussing the use of eminent domain in the 1940s and 1950s to carve out concentrated pockets of poverty in a city *whose residents are overwhelmingly Black*); JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* 29–54, 76–101 (2019) (describing the intersection of economic inequality and environmental vulnerability).

138. Costley, *supra* note 134.

139. Will Feuer, *Marathon Petroleum Responds to History of Environmental Violations in Southwest Detroit*, DET. METRO TIMES (Feb. 20, 2019), <https://www.metrotimes.com/news-hits/archives/2019/02/20/marathon->

neighborhood in the 48217 zip code, smoke stacks loom above residential homes, chemical odors seep into basement sewer drains, and Black residents suffer from high rates of asthma, cancer, and diabetes.¹⁴⁰ Moreover, the acid rain resulting from the sulfur dioxide and nitrous oxides leached by the state's four top emitters, each located within a five-mile radius of Boynton, has caused severe respiratory issues for local residents.¹⁴¹ It does not take an epidemiologist to connect Detroit's grim COVID-19 death toll—already higher than the homicide rate in Detroit in the past two years combined¹⁴²—to the high rates of asthma, diabetes, and respiratory issues caused by decades of air pollution.

In addition to the deleterious effects of air pollution,¹⁴³ Michigan's Black residents have also been challenged with limited access to clean water. Flint, Michigan—the birthplace of General Motors¹⁴⁴—made headlines in 2014 when the city switched its drinking water supply from Detroit's system to the Flint River to save money, resulting in significant reductions in water quality and health problems for Flint's majority Black and low-income population.¹⁴⁵ A report by the Michigan Civil Rights Commission concluded that 'this local policy change, which led to elevated blood lead levels in local

petroleum-responds-to-history-of-environmental-violations-in-southwest-detroit (on file with the *Columbia Human Rights Law Review*).

140. Renee Lewis, *Life in Michigan's Dirtiest ZIP Code*, AL JAZEERA (Mar. 3, 2014), <http://america.aljazeera.com/articles/2014/3/3/michigan-tar-sandsindustryaccusedofactingwithimpunity.html> [https://perma.cc/TC9M-5U6F].

141. *Id.* (discussing an increased prevalence of "memory problems, asthma and other respiratory problems, rashes, heart attacks, and cancer," among other issues).

142. *COVID-19 Has Already Killed More Detroiters than Homicides Have in the Past Two Years Combined*, FOX 2 DETROIT (Apr. 16, 2020), <https://www.fox2detroit.com/news/covid-19-has-already-killed-more-detroiters-than-homicides-have-in-the-past-two-years-combined> [https://perma.cc/26XM-AFJD].

143. LESLEY FLEISCHMAN & MARCUS FRANKLIN, NAACP, *FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES* 15, 16 (2017), available at http://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf [https://perma.cc/K4TV-W8PA].

144. Greg Migliore, *GM Returns to Its Birthplace with Renovated Flint Factory from 1886*, AUTOBLOG (May 1, 2017), <https://www.autoblog.com/2017/05/01/gm-birthplace-flint-factory/> [https://perma.cc/7U62-MMZW].

145. Anna Clark, *'Nothing to Worry About. The Water Is Fine': How Flint Poisoned Its People*, THE GUARDIAN (July 3, 2018), <https://www.theguardian.com/news/2018/jul/03/nothing-to-worry-about-the-water-is-fine-how-flint-michigan-poisoned-its-people> [https://perma.cc/UVX8-RXDC].

children,¹⁴⁶ was the result of systemic racism.¹⁴⁷ Others blamed Michigan's contested emergency management law, which they argue violates the U.S. Constitution's Equal Protection Clause due to its disproportionate impact on Black communities and perpetuation of structural racism.¹⁴⁸ Meanwhile, in 2014, following the rapid rise of the cost of water, the city of Detroit began shutting off water to residents who were at least two months late on their water bills. City records reveal that more than 112,000 homes had their water cut off since that time, with at least 11,000 homes—the vast majority occupied—disconnected for at least one week.¹⁴⁹ When coupled with the high levels of lead contamination in water, paint, and soil across the city,¹⁵⁰ Detroit emerges as an environmentally unstable region that manufactured the health inequities of its Black citizens. Such environmentally-triggered health inequities have not only have proven fatal in the era of COVID-19, they have also amplified the kinds of educational inequities witnessed in cities like Ferguson, Missouri.¹⁵¹

To be sure, environmental justice advocates have fought for a more equitable Detroit for decades. For example, Detroit recently

146. Mona Hanna-Attisha et al., *Elevated Blood Lead Levels in Children Associated with the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response*, 106 AM. J. PUB. HEALTH 283, 286 (2016).

147. MICH. C. R. COMM'N, *THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 2* (2017), available at https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf [<https://perma.cc/Y33A-DGZV>].

148. Brian McVicar, *Michigan's Emergency Manager Law is Racist, Lawsuit Argues*, MLIVE (Jan. 19, 2019), https://www.mlive.com/news/2017/12/michigans_emergency_manager_la.html [<https://perma.cc/9WS6-Z25G>]; see also Peter J. Hammer, *The Flint Water Crisis, the Karegnondi Water Authority and Strategic-Structural Racism*, 45 CRIT. SOCIO. 103, 103 (2019) (discussing that the structural racism embedded in the Karegnondi Water Authority approval process created an environment of denial, cover-up and complicity).

149. Joel Kurth, *Detroit Shut Off Water to 11,800 Homes This Year. Most Are Still Off*, BRIDGE (Aug. 19, 2019), <https://www.bridgemi.com/urban-affairs/detroit-shut-water-11800-homes-year-most-are-still> [<https://perma.cc/568Y-N2G8>].

150. Sarah Cwiek, *Detroit gets \$9.7 Million to Fight Lead Exposure in Homes*, MICH. RADIO (Oct. 3, 2019), <https://www.michiganradio.org/post/detroit-gets-97-million-fight-lead-exposure-homes> [<https://perma.cc/TE4Q-FNT9>].

151. See, e.g., Marie Lynn Miranda et al., *Environmental Contributors to the Achievement Gap*, 30 NEUROTOXICOLOGY 1019, 1019 (2009) (finding “that early childhood lead exposure is associated with lower performance on reading EOG test scores in a clear dose-response pattern, with the effects increasingly more pronounced in moving from the high end to the low end of the test score distribution”).

closed the largest municipal trash incinerator in the United States, Detroit Renewable Power, after a decades-long battle led by local environmental advocacy group, Breathe Free Detroit.¹⁵² Not only was most of the waste processed by Detroit Renewable Power presumably from affluent white neighborhoods adjacent to Detroit,¹⁵³ but also, according to a study conducted by the Wayne State University Medicine and Public Health Sciences, 90% of surveyed seniors living within a five-mile radius of the incinerator suffered from chronic respiratory diseases.¹⁵⁴

Nevertheless, Detroit remains one of the most polluted cities in the United States, arguably one of the primary reasons its funeral homes have had their phones ringing nonstop since COVID-19 emerged in their communities.¹⁵⁵ Such environmental inequities in Black neighborhoods nationwide, only to be amplified in coming years by unmitigated climate change amidst unrelenting capitalist growth,¹⁵⁶ embody yet another ritual of white supremacy that renews and revives, again and again, the unwritten rules of local governance that subjugate Black bodies and perpetuate white privilege.

E. Health Inequity

The narrative of social and economic isolation in urban America rings true in New York City, an early global epicenter for the COVID-19 pandemic, where the social determinants of health inequity converged upon the weakened immunity of an impoverished population. Several factors have made the Bronx—which, as of August 24, 2020, has the highest rate of coronavirus cases of New

152. Kat Stafford & Christina Hall, *Controversial Detroit Incinerators Shut Down After Years*, DET. FREE PRESS (Mar. 27, 2019), <https://www.freep.com/story/news/local/michigan/detroit/2019/03/27/detroit-renewable-power-incinerator/3289106002/> [<https://perma.cc/TKM5-D8TR>].

153. NICHOLAS LEONARD, GREAT LAKES ENV'TL LAW CTR., *THE DETROIT INCINERATOR PRIMER: CONSTRUCTION, DESIGN, AND OPERATION 2* (2019).

154. OKSANA BOUBROVSKI ET. AL, WAYNE STATE UNIV., *LIVING IN THE SHADOW OF DETROIT RENEWABLE POWER* (2019), available at <https://energynews.us/wp-content/uploads/2019/07/LC-2-EMEAC-Midtown-Incinerator.pdf> [<https://perma.cc/2X2U-BKVP>].

155. Tik Root, *Three Days in a Detroit Funeral Home Ravaged by the Coronavirus*, TIME (May 1, 2020), <https://time.com/5830477/funeral-home-coronavirus/> [<https://perma.cc/74D3-AA3K>].

156. See Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 820–30, 848 (2018) (discussing the environmental justice concerns for low-income communities); KATE ARONOFF ET AL., *A PLANET TO WIN: WHY WE NEED A GREEN NEW DEAL 5* (2019) (arguing that “capitalism is incompatible with environmental sustainability”).

York City's five boroughs (reported at 3,753 cases per one hundred thousand)¹⁵⁷—home to some of the poorest neighborhoods in the country. Much like Chicago, Ferguson, Baltimore, and Detroit, the Bronx experienced the “white flight” of immigrant populations—from Irish Americans to Italian and Jewish Americans—who embraced white racial classification and leveraged white privilege to move into segregated neighborhoods in the borough's northern fringes and opportunity-rich suburbs.¹⁵⁸ Between the 1960s and 1980s, the construction of the Cross Bronx Expressway and the development of clustered high-rise public housing projects, coupled with racist redlining practices, plunged a primarily working class Black American and Hispanic immigrant (largely Puerto Rican) population into poverty.¹⁵⁹

Famously, the Bronx was described by news media in the 1970s as “burning.”¹⁶⁰ Rent control policies led landlords to burn their housing developments for the insurance money, while municipal disinvestments shrunk fire departments, which kept the fires raging.¹⁶¹ While the 1980s and 1990s saw revitalization efforts that helped to rebuild the social, environmental, and economic infrastructure of the city, the crack-cocaine epidemic devastated public health and cultivated a gang culture that undermined social cohesion.¹⁶² Despite a growing grassroots movement for cooperative economic development,¹⁶³ the Bronx contains the poorest

157. John Elflein, *Rates of COVID-19 Cases in New York City as of September 6, 2020, by Borough*, STATISTA, <https://www.statista.com/statistics/1109817/coronavirus-cases-rates-by-borough-new-york-city/> [https://perma.cc/6HF8-6V3G].

158. Megan Roby, *The Push and Pull Dynamics of White Flight: A Study of the Bronx between 1950 and 1980*, BRONX CTY. HIST. SOC. J., 34, 34–38 (2008).

159. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L. J. 699, 754–757, 807 (1993).

160. JONATHAN MAHLER, LADIES AND GENTLEMEN, THE BRONX IS BURNING: 1977, BASEBALL, POLITICS, AND THE BATTLE FOR THE SOUL OF A CITY 330 (2006).

161. Roby, *supra* note 158, at 40 (noting that “residents and business owners began to watch their properties burn at a rapid pace, as landlords began to burn buildings in order to turn a profit for insurance money.”).

162. Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME & JUST. 1, 21–22 (2002).

163. See, e.g., BRONX COOP. DEV. INITIATIVE, <https://bcdi.nyc/> [https://perma.cc/5RK8-ALKT] (describing the Bronx Cooperate Development Initiative as “a community-led initiative to build an equitable, sustainable, and democratic local economy that creates wealth and ownership for low-income people of color”).

congressional district in the United States.¹⁶⁴ Consequently, public housing residents in the Bronx continue to battle environmental health risk factors, such as mold, pests, and lead paint, that shape their health outcomes.¹⁶⁵

These pre-existing social determinants have rendered Black and minoritized neighborhoods across the Bronx, and similar cities across the United States, extremely vulnerable to the health risks of COVID-19.¹⁶⁶ From being concentrated into food apartheid neighborhoods with limited access to nutrient-rich and fresh food, to being concentrated in low-wage jobs that offer inadequate health insurance and health care benefits, to simply lacking trust in the medical and healthcare industry due to its history of sacrificing Black bodies for experimentation and providing Black citizens with inadequate health care services, low-income Black communities have been uniquely primed for slaughter by COVID-19.¹⁶⁷

164. Amanda H. Santiago, *N.Y. Has the Richest, Poorest, Smallest, Most Unequal Congressional Districts*, CITY & STATE N.Y. (Dec. 5, 2019), <https://www.cityandstateny.com/articles/politics/new-york-state/ny-has-richest-poorest-smallest-most-unequal-congressional> [https://perma.cc/3JBJ-E6MW].

165. Greg B. Smith, *Mold Grows on Efforts to Clean up Public Housing Apartments*, THE CITY (Sept. 11, 2019), <https://thecity.nyc/2019/09/mold-grows-on-efforts-to-clean-up-public-housing-apartments.html> [https://perma.cc/VA36-6SKK]; Greg B. Smith, *NYCHA Conducting Its Own 2020 Census—of Rats, Mice and Roaches*, THE CITY (Feb. 18, 2020), <https://thecity.nyc/2020/02/nycha-conducting-its-own-census-of-rats-mice-and-roaches.html> [https://perma.cc/2EBM-VRWL] (discussing rodent infestations and health concerns in the Bronx); Greg B. Smith, *Health Inspectors Ignored Kids With Harmful Lead Levels, Comptroller Finds*, THE CITY (Sept. 29, 2019), <https://thecity.nyc/2019/09/health-inspectors-ignored-kids-with-harmful-lead-levels.html> [https://perma.cc/6PNT-LZVQ] (discussing lead poisoning rates and childhood health risks in the Bronx).

166. Samantha Artiga & Elizabeth Hinton, *Beyond Health Care: The Role of Social Determinants in Promoting Health and Health Equity*, KFF (May 10, 2018), <https://www.kff.org/disparities-policy/issue-brief/beyond-health-care-the-role-of-social-determinants-in-promoting-health-and-health-equity/> [https://perma.cc/C32X-KZFR].

167. See generally HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* (2008) (discussing the medical industry's legacy of exploiting Black bodies for surgical experimentation, from dissecting the bodies of sharecroppers for internal parts to sterilizing young Black women); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (discussing the history of punitive policies directed toward Black women and the degradation of their reproductive decisions); DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* (2018) (arguing that the U.S. medical industry is fundamentally indifferent when it comes to the medical treatment of Black and minoritized

To be sure, community advocates and political leaders have worked hard to make progress in recent years. For example, in 2015, a coalition of the Bronx Borough President, local hospitals, community health centers, and the City's Health Department launched the #NOT62 Campaign for a Healthy Bronx—responding to the borough's last place ranking among New York State's 62 counties for health outcomes—to reduce health disparities and expand health care resources.¹⁶⁸

Nevertheless, access to public health services in the Bronx remains scarce. Some have pointed to a lack of coronavirus testing in high-risk neighborhoods, as well as a lack of testing resources in the borough's primary public hospital, as a critical stumbling block.¹⁶⁹ But as I witnessed firsthand growing up in the South Bronx, the drivers of health inequity run far deeper than testing shortfalls. As Paulette Henriquez, executive director of Bronx Health Link, concluded, “[w]e’ve done so many things to help and address and improve the health outcomes, but nothing seems to be working.”¹⁷⁰ Systemic challenges require more than short-term and incremental fixes. Too often in the United States, Black bodies become invisible sacrifices in everyday rituals of race. As the next Part argues, our current political moment demands a radical (re)imagination of American democracy, one that wrestles with the erasure of Black sacrifice from the American consciousness and overcomes the ubiquity of racial ritualization that produces America's invisible citizens.

II. ON EQUALITY, LIBERTY, AND THE ERASURE OF SACRIFICE

The COVID-19 pandemic has exposed America's deepest flaws and starkest inequities. As this Part argues, making sense of the

patients, and the treatment such patients receive is significantly inferior to that received by their white counterparts); Leana S. Wen and Nakisa B. Sadeghi, *Addressing Racial Health Disparities In The COVID-19 Pandemic: Immediate And Long-Term Policy Solutions*, HEALTH AFFS. BLOG (July 20, 2020) <https://www.healthaffairs.org/doi/10.1377/hblog20200716.620294/full> [<https://perma.cc/7THE-7FAF>] (discussing that communities of color and Black Americans are particularly vulnerable given the prevalence of food deserts and the number of community members working low-income, front-line jobs without proper access to PPE).

168. See *New Partners Join #Not62 Campaign in Response to Bronx County Health Ranking*, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE (Mar. 16, 2020), <https://www1.nyc.gov/site/doh/about/press/pr2016/pr015-16.page> [<https://perma.cc/8MHS-YARL>].

169. Olumhense & Choi, *supra* note 5.

170. *Id.*

puzzle pieces of America's geography of health inequity demands a renewed commitment to the emancipatory language of human rights. To be sure, there has been a sustained and longstanding critique of rights-based discourse among legal scholars, notably from the Critical Legal Studies ("CLS") movement of the early 1980s,¹⁷¹ and continuing with the more recent Feminist Legal Theory¹⁷² and Critical Race Theory movements.¹⁷³ Yet, notwithstanding critiques spanning the ideological and political spectrum,¹⁷⁴ the language of human rights remains a powerful mobilizing force for social movements worldwide,¹⁷⁵ including the growing Movement for Black Lives.

The historical disjuncture between critical theory and social movement praxis in rights-based discourse raises important questions about the role of human rights law in future social and political campaigns for justice. One question, increasingly urgent in the age of COVID-19, asks whether the language of human rights can help resolve the inequality of low-income Americans who find themselves segregated into pockets of concentrated disadvantage. Using the issue of housing insecurity as an extended example, this Part argues that rights-based discourse usefully problematizes the normative underpinnings of contemporary fair housing policy, revealing strains of American colonialism at work that degrade

171. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* pt. 2, § 4 (2015); Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. L. STUDS. 1, 1–3 (1986) (discussing the CLS movement).

172. Renu Mandhane, *The Use of Human Rights Discourse to Secure Women's Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275, 297 (2004) (discussing the persuasiveness of human rights-based discourse and related critique).

173. Marvin Lynn & Laurence Parker, *Critical Race Studies in Education: Examining a Decade of Research on U.S. Schools*, 38 URB. REV. 257, 267 (2006) (noting the work of "[l]egal scholars Patricia Williams and Richard Delgado [who] articulated the strongest critiques of CLS, arguing that rights-based discourse in the law helped bring about significant changes in the law for African-Americans.").

174. ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 26 (2014); COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 32–33, 196–97 (2007) (discussing the breadth of critiques).

175. Amartya Sen, *The Global Reach of Human Rights*, 29 J. APPLIED PHIL. 91, 92–96 (2012); SAMUEL MOYN, *HUMAN RIGHTS AND THE USES OF HISTORY* 12–13 (1st ed. 2014); Ada Colau & Adrià Alemany, *Mortgaged Lives: From the Housing Bubble to The Right to Housing*, J. AESTHETICS & PROTEST 1, 40, 86 (Michelle Teran & Jessica Fuquay trans., 2014) (detailing human and housing rights movements in Spain); Peter Houtzager, *The Movement of the Landless (MST) and the Juridical Field in Brazil 1-22*, at 279 (Inst. Dev. Stud., Working Paper No. 248, 2005) (discussing human rights activism in Brazil).

democratic citizenship and exploit human vulnerability. This claim rests upon an assertion that, at its core, the question of a human right to housing engages the conflict of moral values at the heart of liberal democracy—the balancing of equality and liberty.

Section III.A begins by discussing divergent views among legal scholars on the prospect of using rights-based discourse to disentangle social and economic inequality in America across the modalities of race, class, sexuality, and gender. Section III.B. follows by revealing how equality's twin democratic ideal, liberty, has been used as silent justification for the entrenchment of white supremacy in housing policies in the United States, frustrating civil rights activism seeking to resolve longstanding racial residential segregation.

A. Equality

Legal scholars have long been skeptical of rights-based discourse as a tool to dismantle social and economic inequality. This skepticism is perhaps best exemplified by the intellectual tradition of CLS.¹⁷⁶ For example, in 1978, Alan Freeman argued that rights-based discourse fails to address the social subordination of minoritized communities, further entrenching structural racism.¹⁷⁷ In 1984, Mark Tushnet argued that rights-based discourse is threatened by the very instability, indeterminacy, and reifying nature of rights, making such discourse not only politically and culturally impractical, but also groundwork for the bureaucratic domination of the citizenry.¹⁷⁸ In 1987, Catharine MacKinnon argued that rights-based discourse entrenches the subordination and oppression of women's sexuality by framing abortion through the political and ideological lens of privacy law.¹⁷⁹ That same year, Robert Gordon argued that rights-based discourse privileges the interests of dominant parties in private

176. For pieces describing critical legal studies and their critique of rights-based discourse, see, e.g., Anthony Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541, 1559 (1984) (summarizing the various rights advocacy approaches); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178, 178 (Brown and Halley eds., 2002); UNGER, *supra* note 171; Hunt, *supra* note 171, at 1.

177. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978).

178. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384 (1984).

179. See Catharine A. Mackinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 95–97 (1987).

contracts, while hindering governmental interventions on behalf of weaker parties.¹⁸⁰ One year later, Morton Horwitz argued that U.S. constitutional rights overwhelmingly entrench the property holdings of an elite class at the expense of redistributive efforts.¹⁸¹

Numerous other scholars have engaged in the CLS rights critique, emphasizing how rights-based discourse tends to: (1) insulate the subordinating nature of private ordering from governmental regulation, (2) legitimate existing structures of social subordination, and (3) perpetuate an individualistic and atomistic conception of human nature, undermining communitarian principles offered by the concept of social solidarity.¹⁸² Central to the CLS critique has been a view that rights are inherently indeterminate, beholden to swift changes in social, cultural, and political ideology.¹⁸³ Further, many have argued that the formal recognition of rights flouts the social inequities embedded in the very structure of America's political economy,¹⁸⁴ rendering rights-based discourse as more of a distraction from the larger political project of structural reform.¹⁸⁵ According to Horowitz, the attempt to convey rights in neutral and objective terms, amidst their inherent indeterminacy, has conferred rights with an "equal logic to protect the existing structure of privilege as well as to challenge and delegitimize that

180. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 198–99 (1987).

181. See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C. L. L. REV. 393, 396–98 (1988).

182. Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714 (2011); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982–83) ("An excessive preoccupation with 'rights consciousness' tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves.").

183. Gabel & Harris, *supra* note 182, at 369 ("The expansion of legal rights has only a limited impact on people's real lives, and that even these limited gains can be wiped out by a change in the political climate.").

184. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32–34 (1993).

185. Wendy Brown, *"The Most We Can Hope For . . .": Human Rights and the Politics of Fatalism*, 103 S. ATL. Q. 451, 461–62 (2004); Makau Mutua, *Human Rights and Powerlessness: Pathologies of Choice and Substance*, 56 BUFF. L. REV. 1027, 1028 (2008) ("Inherent in the language of rights are indeterminacy, elasticity, and the double-edged nature of the rights discourse. All these characteristics open the rights language to malleability, misuse by malignant social elements, and make then a tool in the hands of those opposed to reform.").

structure.”¹⁸⁶ Similarly, Duncan Kennedy, while discussing the challenges facing the international human rights movement, remarked, “They will be led away from the economy and toward the state, away from political/social conditions and toward the forms of legal recognition.”¹⁸⁷ Recently, opining on the future of progressive movements for social justice, Robin West called for a return to the radical critique of rights in legal scholarship to emphasize their “subordinating, legitimating, and alienating effects.”¹⁸⁸ Others across various academic disciplines have chimed in with diverse opinions on the subject.¹⁸⁹

Still, many legal scholars have held fast to the promises of rights-based discourse for social transformation, suggesting that the metadiscourse critiquing right-based discourse can, itself, be rendered indeterminate and alienating if soaked in the deceptive subtext of white supremacy. Indeed, Patricia Williams, a key figure in the Critical Race Theory (“CRT”) movement,¹⁹⁰ argued that CLS had

186. See Horwitz, *supra* note 181, at 399.

187. David Kennedy, *The International Human Rights Movement: Part of the Problem*, 15 HARV. HUM. RTS. J. 101, 110 (2002).

188. West, *supra* note 182, at 715.

189. See Paul O’Connell, *On the Human Rights Question*, 40 HUM. RTS. Q. 962, 979 (2018) (“All of this, however, merely demonstrates the inaccuracy of the self-perception of dominant human rights discourses, and says little or nothing about how movements striving for fundamental social change can or should engage with the language and concept of rights as such.”); Anthony Chase, *A Note on the Aporias of Critical Constitutionalism*, 36 BUFF. L. REV. 403, 406–07 (1987) (“The enormous emphasis upon and exclusive focus given to the rhetoric of judges in (apparently) maintaining empires, civilizations, and the fabric of societies, has made CLS a unique form of social theory (if one may call it that), in existence hardly anywhere outside of the cloistered legal academy.”); Karl Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. BRIT. COLUM. L. REV. 69, 101 (1991) (“By itself, rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right. . . . One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers.”); Horwitz, *supra* note 181, at 404 (describing rights-based discourse as a “form of fundamentalism” that “substitutes dogmatism for the complexities of social life and insists on the existence of bright-line boundaries in a world of flux and ambiguity.”).

190. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C. L. L. REV. 401, 414 (1987). Williams writes:

For many white CLSers, the word “rights” seems to be overlaid with capitalist connotations of oppression, universalized alienation of the self, and excessive power of an external and distancing sort. The image of the angry bigot locked behind the

ignored the importance of rights to the freedom struggles of oppressed and marginalized populations, including the plight of Black Americans from chattel slavery to Jim Crow segregation to mass incarceration.¹⁹¹ To Williams, speaking of the Black American freedom struggle, “the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self.”¹⁹²

CRT scholars, such as Charles R. Lawrence III,¹⁹³ Cheryl Harris,¹⁹⁴ Richard Delgado,¹⁹⁵ and Derrick Bell,¹⁹⁶ among many others, similarly used rights-based discourse to launch an epistemic critique of the dominant framings of racial power that sheltered *de facto* race-based privilege embedded in law. Not only have CRT scholars unearthed the rationalized ‘property’ rights of whiteness, they also have exposed the politics of race-neutrality and colorblindness in law that reinforce racialized distributions of power and degrade constitutional liberty and equality.¹⁹⁷ Put another way,

gun-turreted, barbed wire walls of his white-only enclave, shouting “I have my rights!!” is indeed the rhetorical equivalent of apartheid For most blacks, on the other hand, running the risk—as well as having the power—of ‘stereo-typing’ (a misuse of the naming process; a reduction of considered dimension rather than an expansion) is a lesser historical evil than having been unnamed altogether. The [B]lack experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society’s inverse, beyond the dimension of any consideration at all.

Id.

191. *Id.* at 404–05.

192. *Id.* at 414.

193. See Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 9–10 (2015).

194. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709 (1993) (“Distortions in affirmative action doctrine can only be addressed by confronting and exposing the property interest in whiteness and by acknowledging the distributive justification and function of affirmative action as central to that task.”).

195. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C. L. REV. 301, 303–07 (1987).

196. Derrick Bell, “*Serving Two Masters*”: *Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471–76 (1976) (describing the conflict of interest in desegregation litigation between civil rights lawyers who “would not settle for anything less than a desegregated system” and their clients who were primarily interested in high-quality schools for their kids).

197. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV.

these scholars have revealed the inherent contribution of rights-based *discourse* to be less a matter of using the master's tools to dismantle his house, echoing Audre Lorde,¹⁹⁸ but more a matter of exposing the embeddedness of race in the lattice structure of American democracy. This revelation simultaneously unearthed the fragility of human experience amidst the terror of white supremacy. Thus, rights-based discourse became, and remains, a kind of “prophetic witness” to the hypocrisies anchored to the ongoing project of cultivating democracy in America.

Even more, the contributions of CRT scholars to the critique of rights reveal a measure of uncertainty among legal scholars on the constitutional demands of equality for democratic citizenship, especially for Black Americans. Here, the entangled nature of equality and liberty comes to the fore. According to political theorist Isaiah Berlin, the notion of political equality as a guiding ideal for the pursuit of human flourishing is shaped both by one's liberty to participate in government and one's liberty to resist state interference, or a balance of “positive liberties” and “negative liberties.”¹⁹⁹ Modern conceptions of justice, as political philosopher Danielle Allen argues, routinely privilege negative liberties, or freedom from interference (i.e., private autonomy), over positive liberties, or freedom to participate in public decision-making to avoid domination (i.e., public autonomy).²⁰⁰ Indeed, such an ordering is

1331, 1331 (1988) (analyzing the continuing role of racism in the subordination of Black Americans and the critics that continue to ignore “the singular power of racism as a hegemonic force in America”); Devon W. Carbado & Cheryle I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. R. 2193, 2193 (2019) (challenging the way scholars frame anti-essentialism, intersectionality, and dominance theory, and underscoring the critical importance of attending to how racial power is gendered and gender subordination is racialized); Devon W. Carbado, *Colorblind Intersectionality*, in SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 200, 201 (Kimberlé Williams Crenshaw et al. eds., Univ. of Cal. Press 2019) (introducing the concept of “colorblind intersectionality” by which “instances in which whiteness constitutes but is unarticulated and racially invisible as an intersectional social formation”).

198. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds., 1981).

199. See ISAIAH BERLIN AND THE POLITICS OF FREEDOM: “TWO CONCEPTS OF LIBERTY” 50 YEARS LATER 73–114 (Bruce Baum & Robert Nichols eds., 2013).

200. Danielle Allen, *Political Equality and Empowering Economies—Toward a New Political Economy*, in POLITICAL EQUALITY AS JUSTICE 1, 6 (Jan. 9, 2018) (unpublished manuscript) (on file with the *Columbia Human Rights Law Review*).

reflected in John Rawls' influential theory of "justice as fairness," itself premised on an ideal theory of human nature existing within a neutral state and governed by general conceptions of the good.²⁰¹

However, we do not live in an ideal world. The CRT lens exposes the prioritization of negative liberties as not only historically contingent,²⁰² but more importantly, constitutive of ongoing systems of social subordination and racial oppression,²⁰³ what this Article calls the rituals of white supremacy. In other words, the CLS critique of rights-based discourse, while recognizing the instability and indeterminacy of rights, fails to appreciate and emphasize the importance of rights-based discourse to discerning what political equality *can become* in a world where public autonomy takes precedence, a world where all citizens collectively define what it means to flourish. This misstep might be explained by the emphasis on individualism and autonomy at the root of modern conceptions of the human condition, a sense that establishing liberty means arranging political institutions to maximize human achievement toward "a fixed teleological principle," and restraining the state from interfering with the attainment of that end.²⁰⁴

The CLS misstep might also be explained by the dominance of "racial capitalism" in American socioeconomic life.²⁰⁵ To understand

201. JOHN RAWLS, A THEORY OF JUSTICE 13 (1971) ("[A] society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair.").

202. See Toussaint, *supra* note 46, at 374 ("[P]rivileging of liberty over equality . . . [s]hould be viewed as historically contingent, a phenomenon subject to change and conditioned on the willingness of communities to reconstruct the moral values and political principles that govern human interaction.").

203. Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 189 (2007) (quoting ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 16–17 (1997) ("A liberal state exists in good part to accommodate a variety of people irrespective of their special preference for one kind of life over another; it thus allows coercion only where necessary to preserve civic order and not simply on the basis of majority preference.")).

204. See TOMMIE SHELBY & BRANDON M. TERRY, TO SHAPE A NEW WORLD: ESSAYS ON THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR. 40 (2018).

205. CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (1983) ("[Because] the development, organization, and expansion of capitalist society pursued essentially racial directions . . . it could be expected that racialism would inevitably permeate the social structures emergent from capitalism."); WALTER JOHNSON, THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES 6 (2020) (describing the emergence and evolution of racial capitalism in St. Louis as a history "in which

racial capitalism, it is useful to briefly review the conventions of economic discourse that underscore traditional legal analysis. Legal scholars of the Law and Political Economy movement are correct in noting that the language of “law and economics” has dominated legal discourse in recent history, ushering an emphasis on “market ordering” with “wealth maximization, transaction costs, and externalities” serving as “‘linking theories’ that connect analysis of legal rules and institutions with the general equilibrium model of neoclassical economics.”²⁰⁶ As a result, human conflicts have been framed as “market failures,” and human harms have been conceived of as “market externalities” reflecting market “inefficiencies” that demand modifications in accounting (e.g., via cost-benefit analysis) or pricing (e.g., via entitlement allocation).²⁰⁷ Such a “thin version of key liberal values” casts “freedom, equality, and state neutrality” as “subject to the market, rather than subjecting the market to democratic rule.”²⁰⁸ Further, the concept of a “neutral” marketplace riddled with periodic inefficiencies has enabled “a denial that constitutional liberty and equality had implications for political economy,” and has resulted in “the constitutional *erasure* of the structural subordination of the poor, people of color, and women.”²⁰⁹

However, Cedric Robinson’s articulation of racial capitalism in his 1983 masterwork, *Black Marxism: The Making of the Black Radical Tradition*, clarifies capitalism not as a negation of the discriminatory feudalism that flourished in Europe prior to the advent of America’s industrial revolution, but instead, and perhaps more fundamentally, as an outgrowth of the European feudal order, one already infused with racialism.²¹⁰ According to Robinson,

What concerns us is that we understand that racialism and its permutations persisted, rooted not in a particular era but in the civilization itself As an enduring principle of European social order, the effects of racialism were bound to appear in the social expression of every strata of every European society

white supremacy justified the terms of imperial dispossession and capitalist exploitation”).

206. Britton-Purdy et al., *supra* note 25, at 1800.

207. *Id.* at 1805–06.

208. *Id.* at 1806–07.

209. *Id.* at 1808 (emphasis added).

210. See generally ROBINSON, *supra* note 205 (discussing the roots of racial capitalism).

no matter the structures upon which they were formed. None was immune.²¹¹

Put another way, capitalism should not be conceived as a neutral economic system peppered with market inefficiencies (such as racial discrimination) and market externalities (such as pollution or unpaid housework): capitalism, properly conceived, is a system “dependent on slavery, violence, imperialism, and genocide” because “racialism had already permeated Western Feudal society” and “the first European proletarians were racial subjects (Irish, Jews, [Roma], Slavs, etc.).”²¹² Indeed, the racial subtext of capitalism in America—a country beholden to the ideology of white supremacy that vindicated the genocide of indigenous populations, the enslavement of Africans, and the racial terrorism of liberated Black Americans—stands in sharp contradistinction to America’s heralded culture of equality of opportunity, individualism, and private autonomy.²¹³ Notwithstanding the abolition of chattel slavery, racial capitalism in America *requires* a racialized other because, according to Robinson, it tends “not to homogenize but to differentiate—to exaggerate regional, subcultural, and dialectical differences into ‘racial’ ones.”²¹⁴ In such a world, the idea of rights and the concept of human flourishing emerge as necessarily relational, and the idea of neutrality is exposed as a concealer for *ex ante* racialized judgements about distribution and coercion.²¹⁵

As to be expected, racial capitalism as a political economic concept has been met with sharp criticism, often focused on the historicity of global slavery and its dubious connections to the origins of capitalism. For example, Thomas Sowell has argued, “capitalism

211. *Id.* at 28.

212. *See id.* at xiii; Robin D.G. Kelly, *What Did Cedric Robinson Mean by Racial Capitalism*, BOS. REV. (Jan. 12, 2017), <http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> [https://perma.cc/6TXB-BF8N].

213. Charisse Burden-Stelly, *Modern U.S. Racial Capitalism: Some Theoretical Insights*, MONTHLY REV. 4 (July 1, 2020) (“[M]odern U.S. racial capitalism [is] a racially hierarchical political economy constituting war and militarism, imperialist accumulation, expropriation by domination, and labor superexploitation.”).

214. ROBINSON, *supra* note 205, at 26.

215. *See* Britton-Purdy et al., *supra* note 25 at 1813–14; Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 993–1006 (2012) (discussing the distributive justice approach, and noting that distributive justice “distributes resources in a way that is sensitive to the background allocation of resources. Yet the background allocation of resources may be unjust.”).

could not possibly be the cause of slavery because slavery preceded capitalism as the dominant social order in virtually all parts of the world.”²¹⁶ Further, William Julius Wilson has argued that race is declining in significance in America, contending, “[T]he determination of industrialists to ignore racial norms of exclusion and to hire black workers was one of the main reasons why the industry-wide unions reversed their racial policies and actively recruited black workers during the New Deal era.”²¹⁷ Still, American capitalism bears the markers of historic racial oppression, a legacy manifested by a culture of anti-Blackness in the labor market.²¹⁸ As a result, efforts to promote economic equality in America should not ignore, as Du Bois put it, the problem of the color line.²¹⁹

Some scholars, evoking an Emersonian sensibility,²²⁰ describe human perfection not as a “fixed hierarchy of ends,” but instead as an “ethical injunction to strive . . . towards a higher ‘unattained yet attainable self.’”²²¹ If such thinkers are right—if the search for humanity that animates democratic citizenship calls for a conception of democracy as more than purely instrumental, more than simply a collection of formal rules and neutral institutions that protect

216. JOSEPH L. BAST & HERBERT J. WALBERG, *EDUCATION AND CAPITALISM: HOW OVERCOMING OUR FEAR OF MARKETS AND ECONOMICS CAN IMPROVE AMERICA'S SCHOOLS* 131 (2003).

217. WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 147 (3rd ed. 2012).

218. Burden-Stelly, *supra* note 213, at 5. Burden-Stelly writes:

Anti-Blackness describes the reduction of Blackness to a category of abjection and subjection through narrations of absolute biological or cultural difference; ruling-class monopolization of political power . . . various modes of segregation; and social relations in which distrust and antipathy toward those racialized as Black is normalized and in which interracial mass behavior involving violence assumes a continuously potential danger. (internal citations omitted).

219. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 1 (1903) (“the strange meaning of being black here at the dawning of the Twentieth Century . . . for the problem of the Twentieth Century is the problem of the color line”).

220. STANLEY CAVELL, *EMERSON'S TRANSCENDENTAL ETUDES* 166 (David Justin Hodge ed., 2003) (“But for Emerson we are divided not alone between intellect and sense, for we can say that each of these halves is itself split.”).

221. See SHELBY & TERRY, *supra* note 204, at 40–41 (“Democracies need their citizens to remain dissatisfied with things as they stand, and to remain open to the possibility that justice will require reconstructing both society and the self.”).

individuality and private autonomy²²²—then perhaps democracy should properly be viewed as the collective process of striving, of collective self-transformation in the face of tragedy; a work that attaches moral agency and ethical subjectivity to social transformation. This framing elevates the importance of equal political participation, notwithstanding the importance of negative liberties.²²³ Indeed, without equal political participation in shaping the demos, some citizens will unreasonably be sacrificed, robbed of agency to decide whether and how to limit their equality and liberty for the common good.²²⁴

Unfortunately, rights-based discourse has suffered from a preoccupation with protecting the private autonomy of white citizens—the inalienable rights of “life, liberty, and the pursuit of property”—while including Black and minoritized people into historically white institutions simply to diversify an historically white vision of American democracy. However, *diversity* and *inclusion* reflect not only a narrow conception of what it means to be human,²²⁵ but also a failure to embrace richer notions of equality and liberty. After all, for many Americans, equality and liberty also means *remembrance* that the natural rights enshrined in the Declaration of Independence did not include their forefathers, the enslaved Africans subjugated as human chattel who picked the cotton that lines the very fibers of that foundational document.²²⁶

222. See generally James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 CHI. KENT L. REV. 763 (1994) (explaining that Rawls viewed liberties as instrumentalities to preserve other liberties, and alternatively, to preserve the structures and processes of the whole governmental structure).

223. Danielle Allen, *Why the Dispossessed Riot*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/opinions/the-last-straw-riot/2015/04/30/6e7168aa-edcf-11e4-8abc-d6aa3bad79dd_story.html (on file with the *Columbia Human Rights Law Review*) (explaining that freedom from domination requires more than merely the protection of basic liberties, but also an equal share of control over the legal institutions that shape daily life).

224. See Allen, *supra* note 7, at 45 (“First, a legitimate sacrifice is made voluntarily and knowingly; second, democratic responsibility stems from the agreement to honor the voluntary sacrifice, which is more than a gift.”).

225. See Britton-Purdy et. al, *supra* note 25, at 1815 (“Inclusion in the market’s private ordering thus became a central aim of many accounts of individual rights and their purposes, including the rights of individuals subordinated in racialized and gendered hierarchies.”).

226. Elkhill, THOMAS JEFFERSON’S MONTICELLO, <https://www.monticello.org/site/research-and-collections/elkhill> [https://perma.cc/SQ29-YYUV].

B. Liberty

Uncertainty of the moral demands of political equality on democratic citizenship has fostered diverse opinions on the meaning of liberty for subordinated populations. This conflict of moral values has shaped civil rights advocacy seeking to resolve the housing insecurity of minoritized citizens living in so-called Black urban ghettos and is evinced by the legacy of the Fair Housing Act. The FHA addresses a fundamental question—how can American democracy *fairly* balance the democratic ideal of liberty while ensuring that citizens enjoy equal access to adequate housing? In so doing, the FHA builds upon a rich legacy of racial justice activism that sought to fortify the civil rights of Black Americans in the face of staunch racial discrimination. The history of fair housing advocacy reveals a privileging of negative liberty in the quest to promote political equality, driving a series of lawsuits and the creation of federal legislation aimed at securing freedom for Black Americans from the interference of racism on their private autonomy to pursue social and economic mobility. However, this history is relatively thin on efforts to strengthen the positive liberties of Black Americans, efforts that might politically empower Black communities to combat the dominating effects of racist housing laws and public policies by giving them tools to shape political discourse and structure economic power within their communities.

For example, as early as 1917, the Supreme Court held in *Buchanan v. Warley* that municipal ordinances designed to perpetuate racial segregation by prohibiting Black Americans from owning or renting property in certain neighborhoods were illegal.²²⁷ Racist white citizens responded by incorporating restrictive covenants into their property agreements to prohibit the sale or rental of their properties to minoritized citizens.²²⁸ The federal government also helped entrench the liberty interests of white citizens by launching the Federal Housing Administration in 1934, which legitimated existing racial segregation practices.²²⁹ In 1948, the Supreme Court held in *Shelley v. Kraemer* that racially restrictive covenants illegally

227. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

228. Rigel C. Oliveri, *Setting the State for Ferguson: Housing Discrimination and Segregation in St. Louis*, 80 MO. L. REV. 1053, 1055 (2015).

229. RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 84 (2018); CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 229 (1955) (discussing the landscape of racial segregation in housing practices).

violated the rights of Black Americans.²³⁰ Nevertheless, a segregated schooling system continued to marginalize Black families into separate neighborhoods with vastly different opportunities for their children to thrive than those offered to white families. In 1954, in the seminal case of *Brown v. Board of Education*, the Supreme Court held that it was unconstitutional to segregate children in public schooling on the basis of their race, further dismantling the barriers that had been erected to separate Black and white lives.²³¹

This legal dance appears to be primarily a conversation about negative liberty, one group of citizens fighting to prevent another group from interfering with their social and economic mobility. While civil rights advocates fought to eliminate white interference with Black mobility, racist housing policies persisted under the guise of the private autonomy of white citizens to pursue their individual well-being with limited governmental interference. The birth of the Poor People's Campaign in the late 1960s under the leadership of Martin Luther King, Jr. and other civil rights activists sought to rectify the social and economic isolation of Black urban ghettos by advocating for an Economic Bill of Rights that would remedy housing insecurity once and for all. Notably, the campaign called for the construction of five hundred thousand units of affordable housing per year until housing insecurity was alleviated.²³²

The pressure of King's grassroots movement, coupled with the social unrest bubbling in cities across the country, inspired President Lyndon B. Johnson to establish the National Advisory Commission on Civil Disorders (the "Kerner Commission"). In a 1967 report, the Kerner Commission concluded that the "growing concentrations of impoverished Negroes in our major cities" had contributed to "a growing crisis of deteriorating facilities and services and unmet human needs."²³³ King's advocacy represents public autonomy at work, the freedom of citizens to participate in shaping economic and sociopolitical life to quell the domination of those in power. Yet, such

230. *Shelley v. Kraemer*, 334 U.S. 1, 837 (1948).

231. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–96 (1954).

232. *Dr. King's Vision: The Poor People's Campaign of 1967–68*, POOR PEOPLE'S CAMPAIGN, <https://www.poorpeoplescampaign.org/history/> [<https://perma.cc/6RLF-EY52>]; DAVID GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 595–96 (1st ed. 1986) (discussing the Economic Bill of Rights campaign).

233. U.S. DEP'T OF JUST., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1967), available at <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> [<https://perma.cc/6RLF-EY52>].

positive liberties were constrained and, ultimately, squelched with King's assassination, thereby limiting the impact of King's protest.

Civil rights advocacy paved the way for the passage of Title VIII of the Civil Rights Act of 1968, the FHA, only seven days after Martin Luther King Jr.'s murder.²³⁴ The Act prohibited a broad range of conduct that either intentionally or inadvertently discriminates against those seeking housing on the basis of race, conduct that had trapped Black Americans in segregated neighborhoods by interfering with their negative liberty. Under Section 3604(a) of the Act, it became unlawful to "refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or] color."²³⁵ The Supreme Court worked to extend the civil rights goals of the FHA in cases like *Jones v. Alfred H. Mayer Co.*, which held in 1968 that "the badges and incidents of slavery that the Thirteenth Amendment empowered Congress to eliminate included restraints upon those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."²³⁶ However, racial segregation worsened in the 1970s and 1980s under a strategy of "ghetto containment and tactical retreat" employed by white citizens who fled to suburban enclaves.²³⁷ Further, for decades,²³⁸ both the federal and local governments swept the Affirmatively Furthering Fair Housing (AFFH) requirements of the FHA under the rug,²³⁹ stalling attempts to bolster the liberty of marginalized Black citizens.

234. DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-lutherking-jr-was-killed/?utm_term=.20d176437d04 (on file with the *Columbia Human Rights Law Review*).

235. 42 U.S.C. § 3604 (a) (1988).

236. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

237. DOUGLAS MASSEY, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 45 (1993).

238. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/3SE9-FA2N>].

239. Tanvi Misra, *Fair Housing Faces an Uncertain Fate*, BLOOMBERG (Feb. 3, 2017), <https://www.bloomberg.com/news/articles/2017-02-03/affirmatively-furthering-fair-housing-faces-its-fate> [<https://perma.cc/LBY9-RVNY>] ("Intentional policies at every level of government are largely responsible for funneling black and brown people into certain neighborhoods. . . . The failure to purposefully

To be sure, there have been many theories explaining why racial segregation and urban poverty persists despite fair housing advocacy in the courts and efforts to expand the breadth of the FHA's protections.²⁴⁰ Some have emphasized the personal responsibility of low-income Black residents who choose to remain in distressed neighborhoods even after opportunities for mobility arise.²⁴¹ Others have highlighted the crippling effects of overt racial discrimination from white citizens who remain wary of too many Black people moving into their neighborhoods.²⁴² Still, others point toward the policy programs of Congress, which have overwhelmingly relied upon mobility as a poverty mitigation strategy.²⁴³ Indeed, to promote the fair housing rights of marginalized Black Americans, Congress has primarily sought to integrate poor Black citizens into "high-opportunity" and predominantly white neighborhoods through the use of vouchers.²⁴⁴ The voucher system aims to enhance the negative

reverse the effect of government-sponsored racial sorting is evident in Ferguson, Flint, and Milwaukee.").

240. *Id.*

241. Marc Settles, *The Perpetuation of Racial Segregation in America: Historical Discrimination, Modern Forms and Inclusionary Remedies*, 14 J. LAND USE & ENV'TAL L. 89, 97–98 (1998).

242. ERIC M. USLANER, SEGREGATION AND MISTRUST: DIVERSITY, ISOLATION, AND SOCIAL COHESION 218 (2012) ("[D]ata show that minorities often avoid integrated neighborhoods because they fear discrimination. There is little evidence that minorities choose to live in segregated neighborhoods because they reject mainstream society." (internal citations omitted)); Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 548–49 (2009) ("studies of residential preferences find that whites are willing to live with only a handful of African American neighbors (some put the figure at around 20 percent), while African Americans are open to quite a diverse range of neighborhoods").

243. SHEILA CROWLEY & DANILO PELLETIERE, NAT'L LOW INCOME HOUS. COAL., AFFORDABLE HOUSING DILEMMA: THE PRESERVATION VS. MOBILITY DEBATE 2–5 (May 2012), available at https://www.novoco.com/sites/default/files/atoms/files/nlihc_affordable_housing_dilemma_report_050112.pdf [<https://perma.cc/9W7T-M24W>].

244. See Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 447 (1996); MEGAN GALLAGHER ET AL., URB. INST., MOVING TO EDUCATIONAL OPPORTUNITY: A HOUSING DEMONSTRATION TO IMPROVE SCHOOL OUTCOMES 1, 12 (2013), available at <https://www.urban.org/sites/default/files/publication/24271/412972-Moving-to-Educational-Opportunity-A-Housing-Demonstration-to-Improve-School-Outcomes.PDF> [<https://perma.cc/7YEF-VJUJ>] (discussing the employment of vouchers to help integrate children into "high-opportunity neighborhoods" which it describes as having "high-quality, low-poverty schools").

liberties of low-income citizens by eliminating barriers to their right to pursue well-being by moving to a better-resourced neighborhood.²⁴⁵

However, housing choice vouchers have produced mixed results at integrating predominantly white and well-resourced neighborhoods.²⁴⁶ In 1992, the Department of Housing and Urban Development launched a ten-year research demonstration project across five metropolitan cities called Moving to Opportunity (“MTO”) designed to expand housing mobility options for recipients of housing assistance.²⁴⁷ The MTO program helped almost five thousand families move into safer and better-resourced communities, and studies found that the children of such families, especially those under the age of thirteen, saw improved life outcomes, such as higher college attendance rates and employment earnings.²⁴⁸ But participants in housing mobility programs also experienced racial discrimination, both while seeking housing opportunities in higher opportunity neighborhoods,²⁴⁹ and after moving into new communities with the aid of housing choice vouchers.²⁵⁰ In some instances, Black residents

245. In the Housing and Community Development Act of 1974, Congress established the Housing Choice Voucher Program to help subsidize housing costs for qualifying low-income residents to move into better neighborhoods. *See Policy Basics: The Housing Choice Voucher Program*, CTR. ON BUDGET & POLY PRIORITIES (2017), available at <https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13vouch.pdf> [<https://perma.cc/3HLA-BDQG>] (“Vouchers sharply reduce homelessness . . . , lift more than a million people out of poverty, and give families an opportunity to move to safer, less poor neighborhoods. These effects, . . . are closely linked to educational, developmental, and health benefits that can improve children’s long-term prospects and reduce costs in other public programs.”).

246. *See* Alana Semuels, *How Housing Policy Is Failing America’s Poor*, THE ATLANTIC (Jun. 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/section-8-isfailing/396650/> [<https://perma.cc/D2R8-2ZDR>].

247. *Moving to Opportunity for Fair Housing*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/programdescription/mto> [<https://perma.cc/L6GN-8VAE>].

248. *See* Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project*, 106 AM. ECON. REV. 855, 859–60, 876–79 (2016).

249. LAWYERS’ COMM. FOR BETTER HOUS., INC., LOCKED OUT: BARRIERS TO CHOICE FOR HOUSING VOUCHER HOLDER 10 (2002) (“55[%] of landlords refused to accept Housing Choice Vouchers as suitable rental payment [a]nd an additional 16[%] . . . equivocate about accepting [vouchers] as a means of rental payment.”).

250. Norrinda Brown Hayat, *Urban Decolonization*, 24 MICH. J. RACE & L. 75, 92–94 (2019) (“[H]igh-opportunity neighborhoods are often so hostile that voucher holder families relocate after some time back to the communities from which they arrived, either because they were actually or constructively evicted.”); *see also* Williams v. City of Antioch, No. C-08-2301 BZ, 2008 WL 7292441, at *1

have been compelled to use “self-protective behaviors” to avoid uncomfortable confrontations with white neighbors, from avoiding playing loud music to not inviting Black guests to their homes.²⁵¹

Notwithstanding the increased gentrification of urban Black neighborhoods—a “great inversion” that is replacing low-income Black Americans with an influx of “overwhelmingly educated, wealthy, and white” citizens²⁵²—fair housing advocates continue to advocate for the expansion of housing choice vouchers as a solution. In fact, fair housing advocates have long called for “source of income” to be added to the list of protected classes under the federal FHA, meant to combat the persistent discrimination experienced by voucher holders when they apply to rent apartments in high-opportunity neighborhoods.²⁵³ However, the CRT lens exposes a subtext of white supremacy woven into current efforts to mitigate poverty with residential mobility programs.

To be sure, the social and economic isolation of Black Americans into communities of concentrated disadvantage²⁵⁴—spaces that constrain racial uplift under barriers of institutional racism; spaces that bend under the external forces of an insidious market economy; spaces that render Black bodies disposable under the everyday rituals of white supremacy—embodies a modern incarnation of American colonialism.²⁵⁵ As Kenneth Clark argued in 1965, “the dark ghettos are social, political, educational, and—above all—

(N.D. Cal. July 16, 2008) (concerning a class-action lawsuit filed by Black residents of Antioch, California against the city and police department for engaging in discriminatory actions against Black households receiving Housing Choice Voucher rental assistance).

251. Hayat, *supra* note 250, at 95.

252. *Id.* at 96 (noting that in Washington D.C., “[r]eurbanization . . . has taken place in multi-cultural hubs and displaced some people of color from neighborhoods such as Columbia Heights, U Street, and Brookland”); *see also* RICHARD FLORIDA, *THE NEW URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT* 136 (2017) (discussing the alarming increase in race and income-based segregation in America’s urban centers).

253. Ben Lane, *Prominent Senators Begin Bipartisan Push to Expand Fair Housing Act*, HOUS. WIRE (Nov. 15, 2018), <https://www.housingwire.com/articles/47416-prominent-senators-begin-bipartisan-push-to-expand-fair-housing-act/> [<https://perma.cc/5JWW-P9W6>]; *see also* Fair Housing Improvement Act, S. 3612, 115th Cong. (2018) (bipartisan legislation seeking to prohibit housing discrimination based on source of income and veteran status).

254. *See* Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 78–80 (2018).

255. ROWLAND ATKINSON & GARY BRIDGE, *GENTRIFICATION IN A GLOBAL CONTEXT: THE NEW URBAN COLONIALISM 2* (2005).

economic colonies. Their inhabitants are subject peoples.”²⁵⁶ However, laws and public policies designed to promote fair housing primarily through mobility also perpetuate a colonial mindset by framing so-called Black ghetto culture as suboptimal, and characterizing so-called Black ghetto residents as movable. By framing political equality primarily in negative liberty terms—a focus on unlawful interferences with the rights of Black citizens to enjoy private autonomy—fair housing advocates neglect the persistence of communities where Black citizens enjoy limited *public* autonomy. In other words, Black citizens often remain invisible in political discourse about community economic development. Not only do mobility efforts weaken political equality and degrade democratic citizenship for Black Americans, they engage Black lives in the most rehearsed ritual of white supremacy of them all—the dismantling of Black communities and the movement of Black bodies into white enclaves to “better” Black lives.²⁵⁷

The emphasis on mobility as a solution to the housing insecurity of low-income Black Americans also distorts the twin goals of desegregation and integration championed by leaders of the civil rights movement. The goal of desegregation that guided early civil rights advocacy focused on upholding and protecting the negative liberty rights of Black citizens to exercise private autonomy without the interference of racism. The FHA furthered this goal by ensuring that race could not be used as a basis to discriminate against those seeking housing. However, true political equality also requires that we uphold and protect the *positive* liberties of all citizens, the freedom to participate in shaping socioeconomic and cultural life through equal access to political institutions.²⁵⁸ Indeed, this was the goal of the second phase of the civil rights movement, the crucial work of

256. CLARK, *supra* note 67, at 1; *see also* STOKELY CARMICHAEL & CHARLES HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 5 (1967) (“[I]nstitutional racism has another name: colonialism.”).

257. *See* Ibram X. Kendi, *The American Nightmare*, *THE ATLANTIC* (June 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457/> [<https://perma.cc/N5VB-S55P>] (discussing the influence of historian Evelyn Hammonds’s 1896 publication, *Race Traits and Tendencies of the American Negro*, which concluded that Black Americans were better off enslaved).

258. Melvin L. Rogers, *Race, Domination, and Republicanism, in DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES* (forthcoming) (manuscript at 3) (on file with *Columbia Human Rights Law Review*) (Danielle Allen & Rohini Somanathan eds., 2020) (“[T]he security of freedom depends on (a) a republic imposing constitutional constraints that guard against arbitrary power and (b) institutional spaces that allow citizens contestatory power to ensure the proper functioning of a constitutional order.”).

integration that animated the Poor People's Campaign. Put simply, negative liberty alone cannot secure one's civil rights, especially when the economic market shapes one's experience of freedom. As Paul Gowder clarifies with the example of a grocer and grocery shopper:

If she is the only grocer whose wares are available to me, then she has the power to interfere with my choice to eat food, full stop. If she refuses to sell to me, then she has interfered with a much more significant choice, and it seems much more intuitively plausible to say that I have a claim of justice to some kind of access to the choices with which she has interfered. Many market conditions can expand the scope of the license to interfere given by the grocer's property rights.²⁵⁹

To King, integration meant far more than moving Black folk into white neighborhoods. Such a conception of integration, or *inclusion*, would only be sufficient if undoing racial injustice merely required introducing an excluded people into healthy articulations of democratic practice where they could be educated into the habits and rituals of citizenship. But, the notion of proximity to whiteness as the embodiment of justice is also a ritual of white supremacy. To King, integration represented an affirmation of the moral equality, or "dignity," of Black Americans, enabling them to become "co-creators in the kingdom of culture."²⁶⁰ Such an affirmation, as will be argued below, requires what Danielle Allen refers to as "the co-ownership of political institutions."²⁶¹ Put another way, rather than simply ask citizens to reside in adjacent spaces, true integration calls for citizens

259. Paul Gowder, *Market Unfreedom*, CRIT. REV., 26:3-4, 306-347, 326 (2014).

260. See Danielle Allen, *Integration, Freedom, and the Affirmation of Life*, in TO SHAPE A NEW WORLD 146, 148 (Brandon M. Terry & Tommie Shelby eds., 2018); Martin Luther King, Jr., *The Ethical Demands of Integration*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES 117, 124 (James M. Washington ed., 2003) ("The ultimate solution to the race problem lies in the willingness of men to obey the unenforceable. Desegregation will break down the legal barriers and bring men together physically, but something must touch the hearts and souls of men so that they will come together spiritually . . .").

261. Allen, *supra* note 200, at 9 ("[One] facet of political equality is something I call co-ownership of political institutions . . . This massive apparatus is a form of property that we own together . . . The concept of co-ownership of our political institutions should help define some limits on their usage . . .").

to enjoy equal ownership over the political institutions that craft the laws, policies, and procedures that shape their daily lives.²⁶²

Thus, while traditional rights-based discourse can help contextualize diverse human experiences, such discourse demands a more nuanced understanding of the ideals of equality and liberty, and their constitutive role in establishing democratic citizenship. When rights-based discourse occurs via the language of exclusion (i.e., formal equality), it positions subordinated citizens *outside* of the body politic.²⁶³ Alternatively, the language of power and domination reveals subjugated Black and minoritized citizens as invisible people *inside* of the body politic, sites of sacrifice that establish the (in)stability of an unjust status quo yet often go unrecognized.²⁶⁴

The conception of political equality evoked by the Poor People's Campaign suggests that *dignity* plays an equally crucial role in shaping notions of democratic citizenship. To be sure, there are some who suggests that this kind of theoretical endeavor shifts us off course from practical policy creation and hinders the overarching goal of structural reform. Accordingly, before considering the contribution of dignity to the project of re-imagining democratic citizenship, the next Part explores an alternate theory of human suffering that might offer pathways to transcend the contested rights debate altogether.

262. MARTIN LUTHER KING JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 173 (1968) ("The dignity of the individual will flourish when the decisions concerning his life are in his own hands, when he has the assurance that his income is stable and certain, and when he knows that he has the means to seek self-improvement.").

263. Danielle Allen, *Invisible Citizens: Political Exclusion And Domination in Arendt and Ellison*, 46 SOC'Y FOR POL. & LEGAL PHIL. 29, 55 (2005) ("On this exclusion-based analysis, under segregation, some people lived inside an essentially healthy political sphere although others lived outside it . . . Undoing injustice thus understood means bring the invisible into the public sphere.").

264. *Id.* at 56 ("The citizenship of the dominators is workable only because those whom they dominate have practices and habits, a citizenship if you will, of acquiescence."); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 38 (1990) (defining domination as "institutional conditions which inhibit or prevent people from participating in determining their actions or the conditions of their actions"); AXEL HONNETH, THE FRAGMENTED WORLD OF THE SOCIAL: ESSAYS IN SOCIAL AND POLITICAL PHILOSOPHY 213 (C. W. Wright ed., 1995) (defining the instruments of class domination as "methods of cultural exclusion and processes of institutional individualizing").

III. ON VULNERABILITY, DIGNITY, AND THE HUMAN CONDITION

Some scholars have called for alternative conceptions of human suffering to transcend the equality-liberty debate that has vexed rights-based discourse. Notwithstanding the benefits of diverse frames, this Article argues that rights-based discourse provides a key thread to contextualize alternative theories with the lived experiences of oppressed peoples. Section III.A explores Martha Fineman's theory of vulnerability. Section III.B places Fineman's vulnerability theory in conversation with the lived experience of Black Americans during Jim Crow segregation, as reflected by Ralph Ellison's novel, *Invisible Man*. As a project of reimagining legal subjectivity and state responsibility, this dialogue reveals fundamental questions about the human condition that remain unanswered, such as the significance of the memory of racism to notions of Black humanity in America.

These insights point toward the need for increased discourse on the meaning of *human* rights for Black Americans, and on what demands such articulations of the human condition might impose upon the state. Thus, drawing upon the radical imagination of the Movement for Black Lives,²⁶⁵ Section III.C interposes the international discourse on the human right to housing,²⁶⁶ which engages the concept of *dignity* for the housing insecure and expands the social imaginary regarding the obligations of the state.

A. Vulnerability

According to Fineman, the “autonomous and independent subject asserted in the liberal tradition” has motivated “an impoverished sense of equality” in current legal doctrine.”²⁶⁷ To Fineman, the traditional equal protection analysis guiding civil rights discourse has confined the state to a passive role characterized by

265. *National Demands for COVID-19*, MOVEMENT FOR BLACK LIVES (2020), <https://m4bl.org/covid-19-platform/> [<https://perma.cc/W83Q-EP2E>].

266. U.N., Off. of the High Comm'r for Hum. Rts., *The Right to Adequate Housing*, Fact Sheet No. 21/Rev.1, 1, https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf. [<https://perma.cc/9GPH-3Y8X>].

267. Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008) [hereinafter Fineman, *The Vulnerable Subject*]; see also Martha Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. R. 133, 134 (2017) [hereinafter Fineman, *Inevitable Inequality*] (“Equality typically is measured by comparing the circumstances of those individuals considered equals. This approach inevitably generates suspicion of unequal or differential treatment absent past discrimination or present stereotyping, particularly if practiced by the state . . .”).

“restraint and abstention.”²⁶⁸ Even more, policy discussion is dominated by a “rhetoric of non-intervention,” while contract law and private ordering is heralded as the appropriate vehicle to “reify individual choice,” so long as all citizens enjoy a “sameness of treatment” under a “formal anti-discrimination mandate enforced through the courts.”²⁶⁹ The formal model of equality that calls for sameness of treatment neither dismantles systems of subordination and domination that privilege some and disadvantage others nor prohibits discrimination on the basis of classifications that do not warrant heightened judicial scrutiny under existing law.²⁷⁰

In fact, equality arguments have been used to argue *against* the implementation of progressive public policies by an active state, such as affirmative action policies that seek to remedy historic social inequities that have produced racial disparities in educational achievement. Fineman further points toward the rise of neoliberalism as a complementary ethic alongside liberalism that frustrates traditional equal protection analysis, principally because “the power of the state is unleashed to protect the market, which is envisioned as the necessary and appropriate mechanism for ensuring individual liberty and choice, as well as economic success and the reduction of poverty.”²⁷¹

In response to the Lockean philosophy of liberal individualism that underscores notions of equality in Western intellectual thought,²⁷² and also in response to the neoliberal shift from collective to individualistic conceptions of justice, Fineman proposes a theory of vulnerability to both redefine and expand notions of state responsibility toward universal human needs.²⁷³ Fineman begins by

268. Fineman, *The Vulnerable Subject*, *supra* note 267 at 2, 5 (“Our economic institutions (such as the corporation) and our commercial practices (like those that govern wealth accumulation and distribution) are shielded by the black box of the free-market as it has been constructed in late American capitalism.”).

269. *Id.* at 2.

270. *Id.* at 3, 5 (speaking on the issue of gender inequality, Fineman notes, “[i]t seemed ironic that the remedy to existing gender inequality within both the family and workplace was deemed the imposition of a legal regime of equality that ignored the differences in social and economic positions between women and men”).

271. Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341, 347 (2019).

272. See MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 18–20 (2005); *see generally* PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018) (critiquing the focus on individual self-expression and autonomy in liberalism).

273. *Id.* at 342.

grounding her theory in an articulation of the state as an active institution—one that furthers the public values of equality and liberty because of its distinction from the profit-maximizing logic of the private market,²⁷⁴ and one whose public authority is reconstituted and reaffirmed whenever it acts on behalf of the public good. Then, Fineman presents a concept of vulnerability that does not define a group of stigmatized or subordinated peoples, but instead characterizes “a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.”²⁷⁵

Often, conceptions of vulnerability embed hidden assumptions and biases about society and culture, such as the narratives of poverty that are used to justify the existence of segregated Black ghettos. However, according to Fineman, our embodied humanity renders us all vulnerable to social dependency from the impacts of disease, epidemics, and other biologically-based harms, as well as from the impact of environmental forces that threaten our lives, such as floods, droughts, and fires. In other words, to Fineman, vulnerability is “the primal human condition.”²⁷⁶ Importantly, while our shared sense of vulnerability is universal, Fineman explains that our diverse economic and social positions lead us to experience vulnerability in different ways.²⁷⁷

Whereas an ethic of individualism, self-sufficiency, and personal responsibility has framed human nature as self-interested, rational, and entitled to liberty—the so-called “rational man of liberal legal thought”²⁷⁸—Fineman’s theory of vulnerability suggests that the universal and embodied experience of *dependency* offers a more encompassing human figure to center social policy. In contrast to ongoing debates on formal equality that tend to undermine systems of domination with the rhetoric of personal responsibility and private autonomy in an efficient economic marketplace,²⁷⁹ the vulnerability framing of the human condition—“the fact that human reality

274. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Ian Shapiro, ed., Yale Univ. Press 2003) (1689) (discussing the public-private distinction).

275. Fineman, *The Vulnerable Subject*, *supra* note 267, at 8.

276. *Id.* at 11.

277. *Id.* at 10 n.27 (“[W]hile vulnerability is both inevitable and universal, it is also socially constructed in its particularities.”).

278. Fineman, *Vulnerability and Social Justice*, *supra* note 271, at 342.

279. See *id.* at 350–51 (discussing the work of Philippe Van Parijs, who places the individual at the center of the social justice debate and calls for personal responsibility and equality of opportunity).

encompasses a wide range of differing and interdependent abilities over the span of a lifetime²⁸⁰—acknowledges not only the possibility of immediate harm to all of humanity, but also the cumulative effects of past harms and the potential impacts of speculative future harms.²⁸¹ By calling attention to our universal fragility, the vulnerability thesis pushes us to consider how social and political institutions respond to individual vulnerability “in lessening, ameliorating, and compensating”²⁸² terms. Fineman’s theory of vulnerability does not dictate how law and policy should respond to the existence of human vulnerability; it merely calls for such responses to reflect the nature of vulnerability as an inevitable and enduring reality of the human condition.²⁸³

Building upon the work of prominent political philosophers, including Amartya Sen and Martha Nussbaum,²⁸⁴ Fineman highlights five kinds of resources or “assets” fostered by social and political institutions that provide individuals with resilience to combat vulnerability: (1) physical, (2) human, (3) social, (4) ecological, and (5) existential.²⁸⁵ Interestingly, these assets map almost perfectly the social determinants of health inequity discussed earlier in this Article.²⁸⁶ First, physical assets, such as wealth and property, determine one’s ability to acquire resources for human flourishing. Second, human assets, such as health and education, enable individuals to confront and overcome hardship through the development of human capabilities.²⁸⁷ Third, social assets, which

280. Fineman, *The Vulnerable Subject*, *supra* note 267, at 12.

281. Fineman, *Inevitable Inequality*, *supra* note 267, at 12.

282. Fineman, *The Vulnerable Subject*, *supra* note 267, at 13 (quoting BRYAN S. TURNER, *VULNERABILITY AND HUMAN RIGHTS* 25–44 (2006)).

283. *Id.* at 1.

284. See generally AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1999) (discussing the foundations of welfare economics, and offering an assessment of well-being and advantage); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011) (describing the capabilities approach as a new theoretical paradigm in the policy world by investigating what genuine opportunities are open to people within their social, economic, and political environment).

285. Fineman, *Inevitable Inequality*, *supra* note 267, at 17 (defining resilience as that which “provides an individual with the means and ability to recover from harm, setbacks, and the misfortunes that affect our lives.”); see also Martha A. Fineman, *Vulnerability and Social Justice*, *supra* note 271, 362–64 (explaining that resilience is found in “material, cultural, social and existential resources that allow individual to respond to their vulnerability”).

286. See *supra* note 47–49 and accompanying text.

287. Fineman, *The Vulnerable Subject*, *supra* note 267, at 13–14.

include our network of relationships and associations, provide us with critical forms of social solidarity and belonging that fortify resilience. Fourth, ecological assets relate to the natural resources that facilitate the physical development of communities. Finally, existential resources—“systems of belief or aesthetics, such as religion, culture, or art, and perhaps even politics”—facilitate the cultural and intellectual development of modern civilization.²⁸⁸ According to Fineman, “[w]hile sometimes a lack of resilience can be deemed an individual failing, often it is a function of unequal access to certain societal structures or the result of unequal allocations of privilege and power within those structures.”²⁸⁹

By viewing assets through the lens of the vulnerable subject, Fineman observes the state’s role and responsibility not as avoiding interference with citizens to honor their private autonomy, but instead as actively ensuring that citizens enjoy equal access to “asset-conferring institutions” that build resilience.²⁹⁰ Building upon the work of CRT scholars such as Angela P. Harris and Kimberlé Crenshaw, who argue that a greater acknowledgement of intersecting identities can enhance equal protection analysis,²⁹¹ Fineman contends that “it is not multiple identities that intersect to produce compounded inequalities . . . but rather systems of power and privilege that interact to produce webs of advantages and disadvantages.”²⁹² As a result, instead of expanding the spectrum of classifications that factor into traditional equal protection analysis, a

288. Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 251, 272 (2010).

289. Fineman, *Inevitable Inequality*, *supra* note 267, at 19; Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 288, at 269–72 (discussing resilience as dependent on social inequality and power dynamics).

290. Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 288, at 272.

291. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990) (“Feminists have adopted the notion of multiple consciousness as appropriate to describe a world in which people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs.”); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (“Contemporary feminist and antiracist discourses have failed to consider the intersections of racism and patriarchy . . . the experiences of women of color are frequently the product of intersecting patterns of racism and sexism . . . these experiences tend not to be represented within the discourse of either feminism or antiracism.”).

292. Fineman, *The Vulnerable Subject*, *supra* note 267, at 16 (quoting Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990)).

strategy employed by fair housing advocates who advocate for “source of income” to be added as an additional classification under the federal FHA, Fineman offers vulnerability as an alternative analytical frame to interrogate “the institutional practices that produce the identities and inequalities in the first place.”²⁹³ Fineman contends that our collective “inevitable dependency” justifies a shared responsibility across social institutions.²⁹⁴

Importantly, Fineman’s focus on shared vulnerabilities shifts political discourse from providing equal protection against unjustified discrimination that hinders private autonomy to dismantling unequal institutional arrangements that create, amplify, or shelter existing human vulnerabilities. The observation of human dependency as inevitable exposes the notion of self-sufficiency as not only fallacious but also politically irresponsible.²⁹⁵ To Fineman, this means “we first need to consider general legal institutions and relationships in determining social justice . . . before looking at how specific individuals or groups fare within those social arrangements.”²⁹⁶ Further, Fineman’s conception of the embodied human condition as one characterized not by an individualistic and self-interested liberal impulse, but instead by gradations of vulnerability met by shades of resistance, shifts common assumptions of the role of the state during moments of tragedy. As such, Fineman’s vulnerability thesis reconceptualizes the role of the state as an active supervisor of asset-conferring institutions with the power to unwind or tighten social and economic inequities.

Yet, in seeking to craft a “post-identity” analysis that transcends the tensions of liberty and equality embedded in traditional equal protection analysis and rights-based discourse, Fineman’s theory of vulnerability also risks universalizing the human condition in ways that obscure the power of institutional arrangements to erase aspects of humanity from our view entirely, such as the *involuntary* sacrifices that sustain racial hierarchy and the everyday rituals of white supremacy that constitute the social

293. *Id.* at 16.

294. Martha A. Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. OF GENDER SOC. POL. & L. 13, 18 (2000).

295. Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 957–59 (1991).

296. See Fineman, *Beyond Equality and Discrimination*, *supra* note 38, at 61.

order.²⁹⁷ Similar criticism has been levied against Sen's theory of development as freedom, which scholars argue, "depends on an uncanny silence concerning the foundational violence grounding [Sen's] figure of 'modern freedom.'"²⁹⁸ In other words, while we may share an *embodied* human experience that inevitably depends upon various social networks and political institutions throughout the life-course, our individual human bodies are not equally *embedded* in modern conceptions of vulnerability and resiliency, as Fineman concedes.²⁹⁹ For our physical variations to represent merely a "horizontal assessment of difference," as Fineman suggests, the coordinates of our human condition must exist on co-equal planes, with the language of race merely plot points along an imagined x-y axis.³⁰⁰ Further, for the vertical dimension of our embodied difference to signify one of the essential insights of Fineman's vulnerability thesis—a sense that, across time during the life-course, all humans arrive at discrete moments of dependency—human experience must exist in co-equal dimensions of time for all citizens. Yet, just as identity labels tend to stigmatize individuals who fall under disfavored identity classifications,³⁰¹ so too does the stigma of identity shape the human experience of time.

Put simply, while some Americans may in fact experience a shared sense of dependency across time, others may experience a shared sense of being *time-haunted*, or chased by an American past invoked by rituals of white supremacy that circumscribe their daily lives. To neglect such haunting—what Patricia Northover calls a

297. Allen, *supra* note 7, at 37 ("A legitimate account of collective democratic action must begin by acknowledging this 'paradox of politics' that communal decisions inevitably benefit some members of a community at the expense of others, even in cases where the whole community generally benefits.").

298. Patricia Northover, *Abject Blackness, Hauntologies of Development, and the Demand for Authenticity: A Critique of Sen's "Development as Freedom*, 6 GLOB. S. 66, 66 (2012).

299. See Fineman, *supra* note 271, at 355 ("Our ideas about what it means to be human and how the state or collective should be constructed influence how we shape legal relationships and social institutions, as well as inform what we consider to be justice within those arrangements and institutions."); Martha A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2192–97 (1995) (explaining how dependency was used as a stigmatizing term to describe low-income families reliance on welfare benefits for individual well-being, justifying draconian cuts to the program).

300. Fineman, *Inevitable Inequality*, *supra* note 267 at 14–15.

301. Fineman *The Vulnerable Subject and the Responsive State*, *supra* note 288, at 257–59.

“hauntology of abject [B]lackness,” evoking Jacques Derrida,³⁰² — makes a fetish of liberty by sustaining a preoccupation with the ideal of autonomous ends, while minimizing focus on the structures of racialized violence that reduce subordinated citizens to simple means.³⁰³ Thus, while Fineman argues that it is our universal and shared sense of vulnerability that make us human, perhaps it is our profoundly different experiences of vulnerability across the modalities of race (notwithstanding its social construction) that best captures our humanity *in America*.

The critical lens of race deepens the critique by urging us to question what it means to be *vulnerable* and *resilient* over the life-course for non-white citizens who embody the memory of racial oppression on their skin in ways that constrain social mobility and hinder social uplift, notwithstanding access to asset-conferring institutions.³⁰⁴ Put another way, while the vulnerability thesis helps to expose the shortcomings of traditional rights-based discourse by shifting focus to equity, it struggles to disentangle the normative presuppositions and contextual conditions embedded in the very selection of valuation criteria and assessment metrics. What does it mean to be a *vulnerable* human when the visibility of race in the very breath of Black America stands as an ever-present reminder of the memory of chattel slavery, passed on, as James Baldwin reminds us, from generation to generation?³⁰⁵ What does it mean to be *resilient* in an America that seeks to render the memory of race invisible through

302. See generally Jacques Derrida, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING AND THE NEW INTERNATIONAL (1994) (discussing the “specter” of communism haunting Europe that Karl Marx identified in “Manifesto of the Communist Party”).

303. Northover, *supra* note 298, at 77–79 (“Freedom’s dependence on this specter throughout the different moments of modernity leaves one with the dilemma of seeking to defend this figure of freedom by inventing novel states and technologies of abjection (or breathing new life into old hauntings).”).

304. See P. J. Brendese, *The Race Of A More Perfect Union: James Baldwin, Segregated Memory, and the Presidential Race*, in A POLITICAL COMPANION TO JAMES BALDWIN 48, 50 (Susan J. McWilliams ed. 2017) (discussing the past as “not merely an object of active recollection that memory can conjure or set aside at will” but something that “lives and breathes beneath the surface of human interactions, rhythms, and aversions that shape our lived experiences of race”).

305. JAMES BALDWIN, *Many Thousand Gone*, in NOTES OF A NATIVE SON, 25, 29–30 (1964) (“In our image of the Negro breathes a past we deny Wherever the Negro face appears a tension is created, the tension of a silence filled with things unutterable. It is a sentimental error, therefore to believe that the past is dead; it means nothing to say that it is all forgotten . . .”).

doctrines of colorblindness, a kind of radical dispossession that denies a community its stories, history, and identity?³⁰⁶ Does the Black body in America experience vulnerability to racial oppression in ways that are *not* universal characteristics of the human condition? Do white citizens who profess to be colorblind remain “imprisoned by the psychic life of the fictions they inhabit,” which shape their beliefs about rights?³⁰⁷ And then, what might such an expanded dialogue mean for an active state seeking to limit vulnerability and strengthen resilience among its citizenry?

While Fineman depicts a sense of trauma arising from “profound negligence or disregard on the part of the state to attend to human vulnerability in creating its institutions and defining the social relationships that will govern society,” from a CRT-influenced discourse on vulnerability one might conclude that the state has been complicit in *creating* the vulnerability of particular groups and, consequently, owes some form of reparation. At their core, these questions suggest that Fineman’s vulnerability thesis is a strong step in the right direction, but might in fact benefit from integrating a rights-based discourse that interrogates what it means to be human in the context of *racial* capitalism in the United States.³⁰⁸ Perhaps then we might discover, in more concrete terms, what the American human condition can demand, as a human right, of its state.

B. Invisibility

The relationships between the visibility of race, the memory of racial injustice, and the complexity of the human condition that underscore Fineman’s vulnerability thesis are interwoven throughout Ralph Ellison’s novel, *Invisible Man*³⁰⁹. Widely regarded as a classic of American literature, *Invisible Man* follows the journey of an unnamed college-educated Black man during the pre-Civil Rights era from his

306. Indeed, in the wake of the Civil War, to advance reconciliation, there were active efforts to erase the history of slavery from memory in America. See Brendese, *supra* note 304, at 53 (“As Greeley insisted on the reconstruction of the Union, it became clear what he thought the price of a reunion would be—a willful forgetting: I entreat you to forget the years of slavery, and secession, and civil war now happily past . . . and remember only that you are Virginians” (internal quotation marks omitted)).

307. *Id.* at 57.

308. See Robinson, *supra* note 205; see generally Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013) (defining racial capitalism as the process of deriving social and economic value from the racial identity of another person).

309. ELLISON, *supra* note 2.

youth in the Jim Crow South to his adult years in Harlem, New York City.³¹⁰ Along the way, the narrator struggles to find success in a society riddled with racial injustice and systemic barriers to Black social mobility. Even after joining “the Brotherhood,” a political organization dedicated to racial equality for Black Americans, the narrator grows disillusioned as he learns of the organization’s hidden political agenda to exploit the plight of subordinated Black Americans for personal gain.³¹¹

Throughout the novel, Ellison uses “the everydayness of race in America” to convey “the core American failing [as] a flight from the burdens of its own past.”³¹² According to Ellison, “We’ve fled the past and trained ourselves to suppress, if not forget, troublesome details of the national memory, and a great part of our optimism . . . has been bought at the cost of ignoring the processes through which we’ve arrived at any given moment of our national existence.”³¹³ Despite our efforts to transgress race in America, the memory of racial injustice endures “in the shadows and around the corners of the most ordinary phenomena of our lives.”³¹⁴ Accordingly, as Danielle Allen argues, our world is marked by “two complementary types of citizenship: habits of domination for first-class citizens, and of acquiescence for second-class citizens.”³¹⁵ Put another way, in America today, some citizens passively observe the everyday rituals of white supremacy, while others are routinely sacrificed by them. As passive observers grow increasingly indifferent to the ubiquity of racial ritualization and the absurdity of human sacrifice to sustain the racial status quo, the memory of racial injustice seemingly melts into a colorblind post-racial consommé. Alongside the distance of *time*, such

310. The absence of the narrator’s name signifies the injustice of dispossession, a sense that in the erasure of the memory of the past, one also loses a sense of their identity and is rendered invisible. See ELLISON, *supra* note 2, at 209 (“A tremor shook me . . . and I was overcome with swift shame. I realized that I no longer knew my own name.”). Yet, coming to terms with the past is also painful, as black Americans bear the names of the people who originally owned them as slaves. See RALPH ELLISON, *Hidden Name and Complex Fate*, in SHADOW AND ACT 144, 148 (1964) (“We bear, as Negroes, names originally possessed by those who owned our enslaved grandparents, we are . . . more than ordinarily concerned with the veiled and mysterious events, the fusions of blood. . . through which our names were handed down unto us . . .”).

311. ELLISON, *supra* note 2.

312. W. James Booth, *The Color of Memory: Reading Race with Ralph Ellison*, 36 POL. THEORY 683, 687 (2008).

313. RALPH ELLISON, SHADOW AND ACT 250 (2011).

314. Booth, *supra* note 312, at 689.

315. Allen, *supra* note 263, at 56.

disremembrance finds aid from the distance of *space*. Like the “burnt cork or greasepaint” mask of the blackfaced minstrel, racial segregation functions “to veil the humanity of Negroes . . . and to repress the white audience’s awareness of its moral identification with its own acts and with the human ambiguities pushed behind the mask.”³¹⁶

From Ellison, we learn that it is in coming to terms with the memory of race, which has “a surface invisibility coupled with a subterranean presence,” that we secure our American identity and reconcile the depths of our human condition.³¹⁷ Put simply, we must take off the mask. At the end of *Invisible Man*, a race riot erupts in Harlem—not too dissimilar from the protests that emerged during the summer of 2020 while the COVID-19 pandemic spread—and the narrator find himself caught up in a plot to burn a tenement building. As the narrator flees the scene of the burning building, he falls into a manhole and lands in a coal cellar. To illuminate the darkness that engulfs him, the narrator begins to burn the items in his briefcase, one by one. By enduring this metaphoric catharsis—the burning of the symbols from the narrator’s sojourn buried inside his briefcase—the narrator garners a new awareness of and vision for the future. As Ellison explains in his essay, *Change the Joke and Slip the Yoke*, the narrator’s descent underground into the coal cellar, “a source of heat, light, power and, through association with the character’s motivation, self-perception,” ushers him into “a process of *rising* to an understanding of his human condition.”³¹⁸ What once was a source of the narrator’s plight—invisibility—becomes a site of reclamation.

Three critical insights emerge from the end of Ellison’s *Invisible Man*. First, Ellison reveals the way racial identity can significantly alter one’s experience of the human condition, rendering concepts like vulnerability and resilience as too abstract to capture the lived experience of all Americans without reckoning with the memory of racial injustice made visible on the skin of Black Americans. Indeed, there is something both tragic and comic in denying the role of identity in politics—“a kind of legal jiu jitsu of the spirit,” according to Ellison—a denial and rejection of the meaning of

316. Ralph Ellison, *Change the Joke and Slip the Yoke*, 25 *PARTISAN REV.* 212, 214–15 (1958) [hereinafter “Ellison, *Change the Joke*”].

317. ELLISON, *supra* note 2, at 507–08 (“I began to accept my past and, as I accepted it, I felt memories welling up within me . . . images of past humiliations flickered through my head and I saw that they were more than separate experiences. They were me; they defined me.”).

318. Ellison, *Change the Joke*, *supra* note 316, at 221.

race *through* agreement with its implications for the human condition.³¹⁹

Second, Ellison suggests that it is in moving *down* into the depths of our despair and choosing to reside among the subterranean mementos of our tragic past that we might discover new vision for the future.³²⁰ “Being a Negro American,” Ellison says, “has to do with the memory of slavery and the hope of emancipation.”³²¹ Yet, if we are honest, the experience of whiteness in America, once disrobed of the covering of white privilege, also wrestles with this same dialectic. As Ellison explains, “Down at the deep dark bottom of the melting pot, where the private is public and the public private, where black is white and white black, where the immoral becomes moral . . . the white man’s relish is apt to be the black man’s gall.”³²²

Perhaps a fundamental condition of our shared American identity, once stripped of the absurdities of racial ritualization, is our individual lust for well-being amidst “an ironic awareness of the joke that always lies between appearance and reality, between the discontinuity of social tradition and that sense of the past which clings to the mind.”³²³ In many ways, we are all “trapped somewhere in the mystery of hell” in view of the moral judgements of the collective.³²⁴ At bottom, perhaps it is the invisible citizens—the everyday philosophers whom Antonio Gramsci called “organic intellectuals”³²⁵—who are best situated to articulate theories of justice in relation to physical, social, and cultural oppression.³²⁶

Third, it is in recognizing and honoring the sacrifices we endure daily as citizens to sustain the status quo, and “burning” the symbols that shape our racial ritualizations of the human condition,

319. *Id.*

320. See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C. R.-C. L. L. REV. 323, 324 (1987) (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

321. Ralph Ellison, *The World and the Jug*, in THE COLLECTED ESSAYS OF RALPH ELLISON, 155, 177 (2003).

322. Ellison, *Change the Joke*, *supra* note 316, at 215.

323. *Id.* at 218.

324. *Id.* at 218.

325. Antonio Gramsci, *The Formation of Intellectuals*, in SELECTIONS FROM THE PRISON NOTEBOOKS 5, 6 (Quintin Hoare and Geoffrey Nowell Smith eds., 1971).

326. See Matsuda *supra* note 320, at 325; see also CORNEL WEST, PROPHECY OF DELIVERANCE 121–22 (1982) (discussing the organic intellectual in relation to Black American culture).

that we might discover new rituals of democratic citizenship to forge a new world.³²⁷ As Allen asserts,

[T]hose people who benefit less than others from particular political decisions, but nonetheless accede to those decisions, preserve the stability of political institutions. Their sacrifice makes collective democratic action possible. Democracy is not a static end state . . . but rather a political practice by which the diverse negative effects of collective political action, and even of just decisions, can be distributed equally, and constantly redistributed over time, on the basis of consensual interactions.³²⁸

Thus, a key step in resolving the health inequities that pervade America lies in embracing the full spectrum of our American identities, including the invisible ideals that inspire the Black freedom struggle: an ability to find hope amidst tragedy; an ability to dignify the plight of the downtrodden; an ability to sacrifice on behalf of the common good; and an ability to imagine new conceptions of democratic life by relinquishing the chains of the past.

C. Dignity

Returning to the question of the utility of rights-based discourse with new insights from Fineman's vulnerability thesis and Ellison's portrayal of the invisible man, how do we promote political equality to engender new visions of democratic citizenship? A useful framing that speaks to the emancipatory struggles of Black Americans in the age of COVID-19 and invites critical dialogue on structural reform can be found in the radical imagination of the Movement for Black Lives. Building upon the revolutionary potential of rights-based discourse found within the Marxist tradition³²⁹ and

327. Allen, *supra* note 7, at 38 ("The citizens who lose out in any given political battle need to find ways to reconcile their experience of loss and impotence with the notion that they are nonetheless sovereign.").

328. *Id.* at 48–49.

329. See Steven Lukes, *Can a Marxist Believe in Human Rights?*, 4 PRAXIS INT'L 334, 338 (1981) (asking, famously, whether a Marxist could even believe in the notion of human rights); O'Connell, *supra* note 189, at 966 (arguing that Marx distinguished the notion of "political emancipation from human emancipation" because Marx held that "the former can be achieved by the conferral of civil and political rights," but "the latter is substantive, genuine and can only be achieved through transcending existing social relations (capitalism)"); see also Drucilla Cornell, *Should a Marxist Believe in Rights?* 4 PRAXIS INT'L 45, 48 (1984) ("According to Marx, the State represents the distorted reality of civil society. What has been actualized in the modern State is the contradiction between the

evoking the “collectivist model of leadership” championed by Ella Baker,³³⁰ the Movement for Black Lives has sought to move beyond *civil* rights and focus attention on the *human* rights that underscore notions of human moral dignity. Exploring the role of *dignity* to the ideal of liberty requires an expansion of our social imaginary, a willingness to reconsider the hegemonic social and economic processes that circumscribe our daily lives.

Allen argues that liberty should be viewed as coextensive with dignity.³³¹ That is, individual freedom emerges from a collective recognition of the universality of human worth, or human moral equality. When laws, cultural practices, and social norms embed biases and stereotypes that undermine human moral equality, systems of domination emerge, and communities devolve into competitive playing fields where some lives matter more than others.³³² To avoid embedding bias and stereotype into sociopolitical life, justice demands a vision of political equality that facilitates the co-ownership of political institutions. Given the rise of neoliberalism as a political rationality, and the rise of corporate institutions as political actors,³³³ justice also demands then a vision of democratic citizenship that facilitates the co-ownership of wealth.³³⁴ As Martin

abstract freedom of civil society and the true freedom of a fully emancipated citizenry.”); Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER*, 26, 40 (2d ed., Robert C. Tucker ed., W.W. Norton & Co. 1978) (discussing the rights-based interplay between political emancipation and human emancipation).

330. See MUMIA ABU-JAMAL, *WE WANT FREEDOM: A LIFE IN THE BLACK PANTHER PARTY* 159 (2004) (“In essence, Baker was arguing against civil rights organizations mirroring the Black church model – a predominantly female membership with a predominantly male clergy—and for the inclusion of women in the leadership of these organizations.”).

331. See Spencer Lee Lenfield, *The Egalitarian*, *HARV. MAG.*, May–June 2016, at 42–43, <https://harvardmagazine.com/2016/05/the-egalitarian> [<https://perma.cc/C6KZ-E24U>] (arguing that equality is the bedrock of liberty, and is foundational to the Declaration of Independence).

332. Frank Lovett, *Domination and Distributive Justice*, 71 *J. POL.* 817, 820 (2009) (“The political and social institutions or practices of any society are just to the extent that, in expectation, they will tend to minimize the sum total domination, counting the domination of each person equally.”).

333. See generally JOHN MIKLER, *THE POLITICAL POWER OF GLOBAL CORPORATIONS* (2018) (describing global corporations as political actors that leverage economic power to influence political decision-making).

334. See Susan R. Jones, *Transactional Law, Equitable Development, and Clinical Legal Education*, 14 *J. AFFORDABLE HOUS. & CMTY. DEV. L.* 213, 213 (2005) (explaining that democratizing the ownership of capital calls for “equal access to the social and economic benefits of development” and “empowerment for residents as shareholders of a community’s economic development projects”).

Luther King, Jr. argued, the economic segregation of the haves and the have-nots should be understood as a kind of “social leprosy” that undermines human moral equality by denying dignity to the oppressed.³³⁵

The convergence of private and public autonomy as dual actors in the formation of human moral dignity embodies what philosopher Gustavo Pereira terms “reciprocal recognition autonomy”: a sense that one’s agency depends “on the relational contexts mediated by reciprocal recognition relations that intervene in the development of their practical identity providing them with the necessary self-reliance to interact with others successfully.”³³⁶ Put more simply, one’s liberty to engage in political discourse and practice citizenship is shaped by certain preconditions acquired in relation to others. Pereira identifies three such preconditions that are forms of self-perception and the result of reciprocal recognition relationships: (1) *self-respect*, which “can be conceived as an individual’s perception of him or herself as a free and equal participant in the processes of making decisions, deliberating and making demands”; (2) *self-trust*, which “consists of the most basic self-confidence a subject can have, and is acquired in intimate relationships such as those between spouses, friends, or mother and child”; and (3) *self-esteem*, which is “the result of the value that others attribute to our acts and contributions to society” and “is dependent on a symbolic network of shared values, according to which each member of a community is recognized as valuable.”³³⁷

Employing Pereira’s framework to the task of achieving human moral dignity, the realization of human autonomy requires material resources and equal opportunities to develop resilience to human vulnerability—or access to what Fineman calls asset-conferring institutions. But, it also requires “relational contexts” that enable one to develop “practical relations-to-self” necessary for engagement in public discourse.³³⁸ For some, the development of

335. Martin Luther King, Jr., *The Ethical Demands of Integration*, In A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR. 117, 121 (James Melvin Washington ed., 2003).

336. Gustavo Pereira, *What Do We Need to Be Part of Dialogue? From Discursive Ethics to Critical Social Justice*, 16 CRITICAL HORIZONS 280, 285 (2015).

337. *Id.* at 286.

338. *Id.* at 287 (“[C]ircumstances in which intersubjectivity is the distinctive feature, such as groups, cultural expressions or simply dense interpersonal relationships, in which reflection and criticism are triggered by interaction with others.”).

practical relations-to-self requires the dismantling of rituals of white supremacy that preclude the development of self-respect, self-trust, or self-esteem.

Returning to the example of housing, how can one articulate a framework of rights that speaks to the dignity of democratic citizens who are presently housing insecure? More than a notion of rights as freedom from interference, we need a conception of rights that fortifies reciprocal recognition autonomy to promote dignity and, resultantly, political equality. Much in the way Karl Marx criticized the atomistic and self-interested nature of popular conceptions of rights in his day,³³⁹ so too have Black Lives Matter activists called for a rights-based discourse that speaks to the *humanity* of oppressed peoples while exposing the limits of the prevailing social order.³⁴⁰ According to Fredrick C. Harris, speaking of traditional civil rights advocacy, while “the 1960s movement addressed the civil and political rights that were denied to black people . . . it did not directly confront the racialized degradation black people endured.”³⁴¹ While some may view Harris’s point as overstated in light of the rise of Black power during the same era,³⁴² BLM activists have embraced the more “radical” strains of the civil rights movement, not only advocating for progressive law reform, but also leveraging social media and grassroots organizing to call attention to the assault on Black humanity waged by America’s normalization of police brutality and economic injustice. By engaging a group-centered and participatory

339. See Marx *supra* note 329, at 43 (“None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice.”).

340. *Id.* at 46 (“Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when . . . he has become a *species-being*; and when he has recognized . . . his own powers . . . as *social* powers so that he no longer separates this social power from himself as *political* power.”).

341. Fredrick C. Harris, *The Next Civil Rights Movement?*, DISSENT (Apr. 28, 2015), <https://www.dissentmagazine.org/article/black-lives-matter-new-civil-rights-movement-fredrick-harris> [<https://perma.cc/5UJB-KKF8>].

342. See generally PENIEL E. JOSEPH, *THE SWORD AND THE SHIELD: THE REVOLUTIONARY LIVES OF MALCOLM X AND MARTIN LUTHER KING JR.* (2020) (revealing how the lives of Dr. Martin L. King, Jr. and Malcolm X demonstrate both the non-violent and militant strains of the civil rights movement); JOSHUA BLOOM & WALDO E. MARTIN JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2016) (discussing the history of the Black Panther Party and noting its relationship to the Movement for Black Lives).

mode of leadership, modeled after the Student Nonviolent Coordinating Committee (SNCC),³⁴³ BLM activists have highlighted the importance of political engagement to democratic citizenship.

Challenging the politics of respectability that encircled early civil rights campaigns and blamed so-called Black urban ghettos for their own subordination,³⁴⁴ BLM activists argue that the dignity interests of Black Americans demands a sharp focus on the structural barriers that perpetuate their marginality, inviting critical dialogue on the meaning of rights in the context of Black humanity.³⁴⁵ As Prabhat Patnaik suggests, framing racial discrimination in the language of human rights facilitates a broader questioning of the dominant capitalist social order.³⁴⁶ What does it mean to be politically equal in America when structural barriers in low-income Black communities hinder the attainment of reciprocal recognition autonomy by degrading self-trust, self-respect, and self-esteem? What does moral equality demand from and impart upon Black humanity? What does liberty mean for the Black ghetto in a grossly inequitable racist capitalist political economy that routinely offers mobility as the best option for human flourishing?

Much in the way questions of *liberty* and *equality* are not rendered meaningless simply due to the presence of authoritarian and elitist strains in the demos, so too should rights-based discourse, and more specifically, human rights discourse, not be deemed inconsequential simply because the language of rights has been exploited to protect the private interests of corporate elites. While human rights law in its current articulation may not be enough, as Samuel Moyn argues,³⁴⁷ human rights *discourse* can help us

343. See Stokely Carmichael, *Power and Racism*, in STOKELY SPEAKS: FROM BLACK POWER TO PAN-AFRICANISM 17, 17–30 (2007) (detailing the beginnings of the SNCC).

344. Fredrick C. Harris, *The Rise of Respectability Politics*, DISSENT (Winter 2014), <https://www.dissentmagazine.org/article/the-rise-of-respectability-politics> [<https://perma.cc/5TSD-2TFS>]; see also Harold A. McDougall, *Class Contradictions in the Civil Rights Movement: The Politics of Respectability, Disrespect, and Self-Respect*, 1 HOWARD HUM. C. R. L. R. 45, 46, 52–53 (2017) (outlining the “class tensions that have bedeviled the civil rights movement since its very beginning”).

345. Harris, *supra* note 344.

346. Prabhat Patnaik, *A Left Approach to Development*, 45 ECON. & POL. WKLY. 33, 36 (2010).

347. See Moyn, *supra* note 31, at xi (“My goal is to stake out the moderate position between those who claim that human rights are unrelated to political economy and distributive injustice . . . and those who think the human rights revolution has been a mere sham masking inhumane domination.”).

understand why. The Movement for Black Lives demonstrates that human rights dialogue can both expose the embeddedness of racism in present-day sociolegal institutions and center the freedom struggles of subordinated communities in radical imaginations of social transformation.

D. Human Rights

A full exposition of the utility of human rights discourse toward operationalizing radical imagination and disrupting the logic of American racial capitalism is beyond the scope of this Article.³⁴⁸ Instead, this final Section provides a brief introduction to the expediency of rethinking traditional rights-based discourse and America's ongoing civil rights agenda more generally. This discussion uses the issue of housing insecurity to demonstrate how human rights discourse helps to reframe ongoing debates. The devastation of COVID-19 demonstrates how governmental neglect and recklessness have socially and economically isolated countless Black and minoritized communities, not only undermining their dignity, but also rendering them invisible. Protecting the private autonomy of minoritized citizens through anti-discrimination legislation is not enough. We must relinquish the illusions of meritocracy in America's democratic project and imagine a new political economy grounded in a more expansive notion of the human condition.

The human right to "adequate housing" is protected by five prominent international conventions.³⁴⁹ However, the right to adequate housing has not been ratified by Congress and, consequently, does not enjoy the force of law in the United States.³⁵⁰ Notwithstanding, human rights principles have been used by cities across America to help establish housing goals that guide local laws,

348. Clarifying the range of conceptual variables necessary to operationalize "radical imagination" is an important and unfulfilled project, yet beyond the scope of this Article. The Author intends to provide such a conceptual framework in a subsequent Article that builds upon the arguments presented herein.

349. Emily Bergeron, *Adequate Housing Is a Human Right*, 44 HUM. RTS. MAG. 2 (Oct. 1, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol-44--no-2--housing/adequate-housing-is-a-human-right/ [<https://perma.cc/3JZ8-DWG2>] (noting the right to housing enshrined in Article 25 of the Universal Declaration of Human Rights (UDHR); Article 11 of the International Covenant on Economic, Social, and Cultural Rights; Article 5 and 14 of the Convention on the Elimination of All Forms of Racial Discrimination, among others).

350. See Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 251–52 (2015).

policies, and budgetary initiatives toward furthering urban sustainability.³⁵¹ According to Lisa T. Alexander, the international discourse on the human right to adequate housing exposes housing as “not only a primary source of refuge,” but also as “part of one’s sense of identity and purpose . . . an individual’s or a family’s connection to community or place . . . a gateway to opportunity or disadvantage . . . an outlet for human creativity and pride.”³⁵² Recognizing housing’s important role in one’s ability to secure health, well-being, and dignity, the U.N. Committee on Economic, Social and Cultural Rights characterizes adequate housing by its (1) security of tenure, (2) access to essential facilities and services, (3) affordability, (4) habitability, (5) accessibility, (6) cultural adequacy, and (7) location away from health and safety threats and near important human resources like jobs, healthcare, and schools.³⁵³ The right to adequate housing does not require the state to build housing for all of its citizens, nor does it necessarily preclude economic development that leads to displacement.³⁵⁴ Rather, it calls for the state to proactively mitigate social and institutional barriers that hinder access to adequate housing for marginalized citizens in ways that infringe upon their liberty and equality.³⁵⁵

Human rights discourse has a long history in U.S. politics, and legal scholars continue to debate whether the economic and social rights enshrined in international human rights law cohere with the intent of the U.S. Constitution.³⁵⁶ Indeed, it was President Franklin

351. Lisa T. Alexander, *Bringing Home the Right to Housing to Advance Urban Sustainability*, 4 TEX. A&M J. PROP. L. 67, 67–68 (2018).

352. *Id.* at 70–71.

353. See Alexander, *Occupying the Constitutional Right to Housing*, *supra* note 350, at 253.

354. See Alexander, *Bringing Home the Right to Housing Advance Urban Stability*, *supra* note 351, at 69.

355. Minimum requirements that ensure the governments are endeavoring to ensure a right to adequate housing include: (1) taking steps to progressively realize the right through plans of action; (2) not regressing on such commitments during economic downturns or natural disasters; (3) leveraging the maximum available resources to achieve the right to housing for all; and (4) maintaining minimum core standards to provide a minimum level of housing, as provided in the International Covenant on Economic, Social, and Cultural Rights. See U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., THE RIGHT TO ADEQUATE HOUSING, FACT SHEET NO. 21 (REV.1) (Nov. 2009), http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf [<https://perma.cc/QTE4-R9LZ>].

356. Martha F. Davis, *Bringing It Home: Human Rights Treaties and Economic, Social, and Cultural Rights in the United States*, 41 HUM. RTS. MAG. 2–3, 25 (Apr. 1, 2015), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015--vol--41/vol--41--no--2---human-rights-at-

D. Roosevelt's call for a "Second Bill of Rights" in his 1944 State of the Union address that paved the way for the United States' signing of the UDHR in 1948.³⁵⁷ Unfortunately, when Congress passed the American Housing Act of 1949 under President Harry S. Truman's Fair Deal, it downgraded the *right* to adequate housing to merely a *goal*, shifting responsibility for the provision of affordable and quality housing to private enterprise, and paving the way for the enshrinement of racist housing practices.³⁵⁸ In recent years, the "financialization of housing markets" has prioritized the "wealth creating functions of housing," shrinking the availability of affordable housing for low and middle-income citizens.³⁵⁹ As cities work to address such shortages in affordable housing due to unsustainable housing market practices, discourse on the human right to adequate housing "can serve as an important planning tool and balancing standard, empowering, rather than limiting, local governments to creatively meet future housing challenges for all of their residents."³⁶⁰ Several cities have recently embraced human rights language to achieve such goals.

For example, in November 2011, the City Council of Madison, Wisconsin passed a resolution recognizing housing as a human right, declaring "that all people who desire a place of shelter and stable long-term housing be prioritized to have this basic need met both temporarily and permanently."³⁶¹ Drawing from international human rights discourse, the resolution reframes the issue of housing

home/bringing-it-home--human-rights-treaties-and-economic--social--an/ [https://perma.cc/E5ZA-KW8G].

357. Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944), https://www.youtube.com/watch?v=F_ydSC9Q9yo (last visited Jan. 5, 2021).

358. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing the racist dimensions of urban planning and community economic development).

359. See Alexander, *Bringing Home the Right to Housing Advance Urban Stability*, *supra* note 351, at 70; Leilani Farha (U.N. Special Rapporteur on Adequate Housing), Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, ¶ 1, U.N. Doc. A/HRC/34/51 (Jan. 18, 2017) (covering the dearth of affordable housing for low-income individuals and families).

360. See Alexander, *Bringing Home the Right to Housing Advance Urban Stability*, *supra* note 351, at 69.

361. COLUM. LAW SCH., HUM. RTS. INST., *BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY* 17 (2012).

insecurity by affirming an obligation for Madison to affirmatively further fair housing.³⁶² In addition to identifying a need to assess housing needs and develop a responsive strategy through public funds to increase affordable housing, the resolution prioritizes the need to find shelter for homeless individuals. Further, Madison's resolution on housing as a human right calls for measures to prevent foreclosures and evictions to stabilize the community.³⁶³ In 2015, Madison launched its Affordable Housing Initiative, which plans to build one thousand low-cost housing units by 2020.³⁶⁴ As part of the initiative, the city of Madison launched a "tiny-homes-for-the-homeless" program that developed a tiny-house community where occupants pay rent through sweat equity by participating in gardening and woodworking projects.³⁶⁵

Another emerging human rights city is Eugene, Oregon, where the City Council launched the Opportunity Eugene Community Task Force on Homelessness in 2012.³⁶⁶ The Task Force, which includes community members, used human rights discourse on housing to affirm the dignity of homeless people in the community, calling for reform to local laws and zoning ordinances that criminalize homelessness.³⁶⁷ Similar to the city of Madison, Eugene launched a tiny home community for the homeless called Opportunity Village, while the city of Portland launched a tiny home community called Dignity Village.³⁶⁸ Other tiny home villages have emerged in cities across the country as a temporary solution to homelessness, from

362. CITY OF MADISON RESOLUTION ON HOUSING AS A HUMAN RIGHT, File No. 23825 (2011), <http://legistar.cityofmadison.com/attachments/a584992f-510c-46d1-b709-c81372062ac0.pdf> [<https://perma.cc/HC8P-TZ9G>].

363. *Id.*

364. Lisa Speckhard Pasque, *Affordable Housing Round-Up: Is Madison on Track to Build 1,000 Affordable Units in Five Years?*, CAP TIMES (Dec. 23, 2017), https://madison.com/ct/news/local/govt-and-politics/affordable-housing-round-up-is-madison-on-track-to-build/article_24fa66bc-9aaa-5fb8-bf66-1ad4f64e9a90.html [<https://perma.cc/3V8Q-EM4V>].

365. Alexander, *Occupying the Constitutional Right to Housing*, *supra* note 350, at 286–88 (2015).

366. LANE CNTY. LEGAL AID, PERSECUTION OF THE UNHOUSED: FINES AND JAIL TIME FOR HAVING NOWHERE ELSE TO GO IN EUGENE, OREGON 10 (2010), available at https://www.eugene-or.gov/AgendaCenter/ViewFile/Agenda/_02182020-1005 [<https://perma.cc/MK6T-PUE5>].

367. *Id.*

368. Thacher Schmid, *From Protest to a Place of Their Own*, OPEN HOUS. (June 19, 2017), <https://openhousing.net/from-protest-to-a-place-of-their-own-ac0a39a924cd> [<https://perma.cc/GQ3P-QYRR>].

Seattle, Washington,³⁶⁹ to Detroit, Michigan³⁷⁰ and Oakland, California.³⁷¹

Fueled by the language of human rights, efforts that seek to affirm the dignity of the housing insecure can guide us toward a critical self-examination of who we, as a nation, can become. Even more, public policies to prevent foreclosures and evictions find new meaning during the age of COVID-19. The surge of eviction filings across the country during the pandemic,³⁷² notwithstanding a federal moratorium on foreclosures and evictions, forewarns that Black Americans will continue to experience high rates of homelessness.³⁷³ As Alexander explains, unmitigated evictions and rampant homelessness “generates negative spillovers and externalities for cities in the form of: the costs of homelessness and rising emergency room visits; the costs of more police for crime maintenance; and rising substance abuse.”³⁷⁴

A more recent example of the value of human rights discourse emerges from the Trump administration’s response in early 2020 to the economic fallout induced by COVID-19; a patchwork of ad hoc and short-term stopgap measures that temporarily alleviated economic distress, yet ultimately sustained the extant capitalist order.³⁷⁵ In

369. Sharon Lee, *Tiny House Villages in Seattle: An Efficient Response to Our Homelessness Crisis*, SHELTERFORCE (Mar. 15, 2019), <https://shelterforce.org/2019/03/15/tiny-house-villages-in-seattle-an-efficient-response-to-our-homelessness-crisis/> [<https://perma.cc/CZM8-BKWB>] (“Over the past three years, Seattle has led the country in piloting this response to the homelessness crisis. There are now 10 tiny house villages located throughout Seattle on government, private, nonprofit, and church-owned properties.”).

370. Maureen Feighan, *Public Gets First, Only Peek at Detroit Tiny Homes*, DET. NEWS (May 25, 2017), <https://www.detroitnews.com/story/news/local/detroit-city/2017/05/25/tiny-homes-tour/102157990/> [<https://perma.cc/H2F2-G35P>].

371. Mark Hedin, *Oakland OKs Tiny Homes, Homeless Youth Housing Plans*, MERCURY NEWS (Feb. 23, 2017), <https://www.mercurynews.com/2017/02/23/4596099/> (on file with the *Columbia Human Rights Law Review*).

372. Ellis Simani et al., *Despite Federal Ban, Landlords Are Still Moving to Evict People During the Pandemic*, PROPUBLICA (Apr. 16, 2020), <https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic> [<https://perma.cc/HB3H-DB48>].

373. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 1, 118–20 (2012).

374. See Alexander, *supra* note 313, at 74.

375. Ryan Zamarripa, *5 Ways the Trump Administration’s Policy Failures Compounded the Coronavirus-Induced Economic Crisis*, CTR. FOR AM. PROGRESS (Jun. 3, 2020) <https://www.americanprogress.org/issues/economy/news/2020/06/03/485806/5-ways-trump-administrations-policy-failures-compounded-coronavirus-induced-economic-crisis/> [<https://perma.cc/2RBL-XNQU>] (discussing

response, fair housing advocates have renewed the call for universal housing vouchers for low-income renters,³⁷⁶ a proposal advanced by sociologist Matthew Desmond in his book, *Evicted: Poverty and Profit in the American City*.³⁷⁷ Universal housing vouchers offer more than simply a path toward mobility. As demand for rental housing continues to outpace supply,³⁷⁸ the universal housing voucher provides a mechanism for stability of tenure and enables residents to benefit from existing social and cultural capital, and improving neighborhood conditions amidst rising rental prices. In other words, it provides low-income residents with greater options for human flourishing than simply being forced to move away from their homes.

Low-income renters who work in service industries—essential workers in the age of COVID-19—face a high risk of eviction and homelessness due to the ongoing pandemic.³⁷⁹ Such individuals already struggle to find affordable and adequate housing, as the federal Housing Choice Voucher Program only provides funding for 17% of poor renters, roughly one in five of the households that qualify for assistance.³⁸⁰ Human rights discourse shifts attention away from anti-discrimination measures and toward increasing the availability

how the stopgap measures implemented did not help workers retain their jobs, or to prevent layoffs of state and local workers, and failed to assist small businesses struggling due to pandemic-related closures).

376. Mark K. Cunningham, *It's Time to Reinforce the Housing Safety Net by Adopting Universal Vouchers for Low-Income Renters*, URBAN INST. (Apr. 7, 2020), <https://www.urban.org/urban-wire/its-time-reinforce-housing-safety-net-adopting-universal-vouchers-low-income-renters> [https://perma.cc/2QLS-HGAJ].

377. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 308–11 (2016).

378. Julia Falcon, *Apartment Supply Exceeds Demand in Only 3 U.S. Markets*, HOUS. WIRE (Sept. 23, 2019), <https://www.housingwire.com/articles/50205-apartment-supply-exceeds-demand-in-only-3-us-markets/> [https://perma.cc/88ZV-XXYM].

379. AMHERST MKT. COMMENT, CORONAVIRUS: DON'T FORGET AMERICA'S 43.8 MILLION RENTERS 1 (2020), available at <https://files.constantcontact.com/109f2f2950/4073bccf-0f53-4b84-96bf-5622544aa7a0.pdf> [https://perma.cc/UYM6-BDYC].

380. HARV. UNIV. JOINT CTR. FOR HOUS. STUDS., *THE STATE OF THE NATION'S HOUSING* 33 (2019), available at https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf [https://perma.cc/X8UN-LC8W]; CORIANNE PAYTON SCALLY, ET AL., *THE CASE FOR MORE, NOT LESS: SHORTFALLS IN FEDERAL HOUSING ASSISTANCE AND GAPS IN EVIDENCE FOR PROPOSED POLICY CHANGES* 6–8 (2018), <https://www.urban.org/research/publication/case-more-not-less-shortfalls-federal-housing-assistance-and-gaps-evidence-proposed-policy-changes> [https://perma.cc/YJA4-C2V4] (discussing key gaps in federal housing aid and their impact on low-income Americans).

of affordable housing for the millions of Americans on housing choice voucher waiting lists.³⁸¹ A universal housing voucher, akin to the more easily accessible food stamp program, would empower the housing insecure with the private autonomy to *stay* in their neighborhoods, even as gentrification looms. And, if they stay, they enjoy the public autonomy to engage in local political discourse to help shape their future economic and sociopolitical life.

To be sure, expanding housing assistance will require significant public investment. According to the Urban Institute, covering “an additional 19.7 million people in 8.2 million households beyond those currently receiving assistance” will cost on average \$628 per month, or \$7,530 per year, for each additional household, totaling \$62 billion each year.³⁸² The projection could rise to one hundred billion dollars per year if it takes into account the income loss that has come from COVID-19.³⁸³ Still, this figure is a small percentage of the nearly two trillion dollar initial COVID-19 stimulus that has fallen short of addressing the housing insecurity of low-income renters. Further, these costs, while daunting, pale in comparison to other federal budgetary line items—such as defense spending³⁸⁴—which a broader human rights discourse might very well call into question.

The costs of universal vouchers can be decreased by reforming existing law, such as modifying current voucher funding formulas to cover smaller geographic areas, shifting from regional calculations to zip code calculations that make it more difficult for landlords to

381. *Millions of Families on Voucher and Public Housing Waiting Lists*, NAT'L LOW INCOME HOUS. COAL. (Mar. 7, 2016), <https://nlihc.org/resource/millions-families-voucher-and-public-housing-waiting-lists> [<https://perma.cc/34FA-NRTB>].

382. Cunningham, *supra* note 376.

383. Karan Kaul & Laurie Goodman, *The Price Tag for Keeping 29 Million Families in Their Homes: \$162 Billion*, URBAN INST. (Mar. 27, 2020), <https://www.urban.org/urban-wire/price-tag-keeping-29-million-families-their-homes-162-billion> [<https://perma.cc/H2RW-QQH9>].

384. Ashik Siddique, *The U.S. Spends More on Its Military Than the Next 10 Countries Combined*, NAT'L PRIORITIES (Apr. 30, 2020), <https://www.nationalpriorities.org/blog/2020/04/30/us-spends-military-spending-next-10-countries-combined/> [<https://perma.cc/V7XH-UDJG>] (“The United States was the biggest driver . . . with its \$732,000,000,000 in 2019 accounting for a full 38% of global military spending. . . . The U.S. is also still one of the largest military spenders per person [\$2,224] . . .”).

overcharge their tenants.³⁸⁵ Additionally, the provision of emergency rental vouchers during Hurricanes Rita and Katrina provide a template to offer housing assistance to families by sending payments directly to landlords.³⁸⁶ Similar legislation can be introduced to operationalize an expansion of housing vouchers. Alternatively, other scholars have recommended an expansion of the Earned Income Tax Credit to provide rental subsidies through the tax code.³⁸⁷ Importantly, both options avoid the potential for discrimination caused by the stigma of vouchers.³⁸⁸ Perhaps most important, such efforts honor the dignity of low-income Americans by granting them the freedom to remain active citizens in their communities without being forced to move to ensure their health and well-being.

CONCLUSION

“But above all we protest this genocide as human beings whose very humanity is denied and mocked.” –
We Charge Genocide Campaign, 1951

Over sixty-five years ago, on December 17, 1951, Paul Robeson and William L. Patterson presented a report to the United Nations on behalf of the Civil Rights Congress entitled, *We Charge Genocide: The Crime of Government Against the Negro People*.³⁸⁹ Building upon the U.N. Convention on the Prevention and Punishment of Genocide, which defined genocide as any action with “intent to destroy” a group, “in whole or in part,” the report argued that the U.S. government had been complicit in and ultimately responsible for a system of racial oppression characterized by the brutal legacy of lynching, political disenfranchisement, police

385. Robert Collinson & Peter Ganong, *How Do Changes in Housing Voucher Design Affect Rent and Neighborhood Quality?* (Kreisman Working Papers Series in 48 Hous. L. & Pol’y 1, 2–4, 2018).

386. CONG. RSCH. SERV., R43139, FEDERAL DISASTER ASSISTANCE AFTER HURRICANES KATRINA, RITA, WILMA, GUSTAV, AND IKE 44–45 (2019), <https://fas.org/sgp/crs/homesec/R43139.pdf> [<https://perma.cc/B5GF-DCCC>].

387. Peter Dreir, *Housing and the Working Poor*, DEMOCRACY (Mar. 29, 2016), <https://democracyjournal.org/arguments/housing-and-the-working-poor/> [<https://perma.cc/5GR3-B4QM>].

388. Emily Badger, *How Section 8 Became a ‘Racial Slur’*, WASH. POST (June 15, 2015) <https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/> [<https://perma.cc/9GEC-S2PD>].

389. C. R. CONG., WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (William L. Patterson ed., 1951).

brutality, educational inequality, economic disparity, and vast disparities in quality of life. If we substituted the savagery of COVID-19 for the practice of lynching (notwithstanding the fact that public lynching still exists at the hands of racist police officers), one might easily be convinced that the charge of genocide applies equally to Donald Trump's presidential administration.

However, while the impact of COVID-19 has been perhaps most deeply felt in the Black American community, "the politics of disposability" that characterize our current pandemic, as articulated by legal scholar Shaun Ossei-Owusu, is "not simply black/white."³⁹⁰ The truth is, as Ossei-Owusu explains, there are countless binaries—e.g., rich and poor, citizen and undocumented immigrant, red state and blue state, essential and non-essential worker, free and incarcerated—that are exposing millions of Americans to the terrors of the novel coronavirus. Far too many communities have already been overlooked by the Trump administration's short-term relief efforts, from undocumented agricultural workers in California who do not have health or unemployment insurance,³⁹¹ to Native American populations with inadequate access to water,³⁹² to homeless citizens across the country who are struggling to find food and shelter.³⁹³

As a nation, we must heed the prophetic witness of politicians,³⁹⁴ journalists,³⁹⁵ scholars³⁹⁶ and protesters³⁹⁷ who call

390. Shaun Ossei-Owusu, *Coronavirus and The Politics of Disposability*, BOS. REV. (Apr. 13, 2020), <http://bostonreview.net/class-inequality-race-politics/shaun-ossei-owusu-coronavirus-and-politics-disposability> [<https://perma.cc/F5A6-QKCX>].

391. Andrea Castillo, *Farmworkers Face Coronavirus Risk: 'You Can't Pick Strawberries Over Zoom'*, L.A. TIMES (Apr. 1, 2020), <https://www.latimes.com/california/story/2020-04-01/california-farmworkers-coronavirus> [<https://perma.cc/L2RR-YSX5>].

392. Bill Chappell, *The Coronavirus Crisis: Coronavirus Cases Spike in Navajo Nation, Where Water Service Is Often Scarce*, NPR (Mar. 26, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822037719/coronavirus-cases-spike-in-navajo-nation-where-water-service-is-often-scarce> [<https://perma.cc/6MC9-SKZ4>].

393. Samantha Melamed, *Broke in Philly: 'It's Heartbreaking': Coronavirus Puts Philly Homeless Services in Survival Mode*, PHILA. INQUIRER (Mar. 19, 2020), <https://www.inquirer.com/health/coronavirus/philadelphia-coronavirus-covid-19-homeless-response-social-distancing-20200319.html> [<https://perma.cc/MXK3-TSAG>].

394. Aaron Morrison, *Elizabeth Warren and Ayanna Pressley Are Calling for Racial Data on Coronavirus Tests*, ASSOC. PRESS (Mar. 30, 2020), <https://www.boston.com/news/politics/2020/03/30/Elizabeth-warren-ayanna-pressley-are-racial-data-coronavirus-tests> [<https://perma.cc/XF5X-L5W6>].

attention to the sufferings of our fellow Americans, citizen and non-citizen alike. We must use this national moment of collective stillness to engage in a Socratic self-examination of American democracy. And we must draw strength from the rich tradition of tragicomic hope exemplified by the freedom struggles of America's downtrodden, the so-called invisible man. By infusing these democratic traditions with the language of human rights, we honor the idealism of America's youngest generation and the radical imagination of some of our nation's most progressive political candidates in recent history.³⁹⁸ Even more, we mark the beginnings of a new era for American democracy, one where rights-based discourse can further the goals of human emancipation and begin to piece together American fragility.

395. Charles M. Blow, Opinion, *The Racial Time Bomb in the Covid-19 Crisis*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/opinion/coronavirus-black-people.html> (on file with the *Columbia Human Rights Law Review*).

396. Ibram X. Kendi, *Why Don't We Know Who the Coronavirus Victims Are?*, THE ATLANTIC (Apr. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/stop-looking-away-race-covid-19-victims/609250/> [https://perma.cc/E894-FFLJ].

397. Larry Buchanan, Quoc Trung Bui & Jugal K. Pate, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (on file with the *Columbia Human Rights Law Review*).

398. Derek Thompson, *The Millennials-Versus-Boomers Fight Divides the Democratic Party*, THE ATLANTIC (Dec. 10, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/young-left-third-party/603232/> [https://perma.cc/4PCD-8Z6S].