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ARTICLES

RACE, DIGNITY, AND COMMERCE

Lu-in Wang



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ARTICLES

RACE, DIGNITY, AND COMMERCE

*Lu-in Wang**

INTRODUCTION

The Journal’s invitation to contribute a piece on racism and commerce was welcome and well timed. It arrived as renewed attention was focused on racialized policing following the killing of George Floyd and in the midst of the worsening pandemic that highlighted unrelenting racial, social, and economic inequities in our society. I applaud the Journal’s desire to use its platform to shed light on the ways in which racial inequality is woven through the commercial fabric of our country and thank the editors for asking me to participate in the discussion.

The connections between racism and commerce are numerous, but the relationship between discriminatory policing and commerce might not be apparent. This Essay will link them through the concept of dignity. As legal scholar John Felipe Acevedo has argued about the murder of George Floyd and racially discriminatory policing more broadly, “when police target members of a discrete community they commit a ‘dignitary taking’ against that community—in effect, the police elevate their own status at the expense of the targeted community.”¹ Sociologist Zachary Brewster and I have made a similar argument with respect to racial discrimination in one of the most mundane of commercial transactions: interactive service encounters, as

* Professor of Law, University of Pittsburgh School of Law. I am grateful to Zach Brewster, Mary Crossley, and Dave Herring for their valuable comments on an earlier draft of this Essay and to Andrew Malandra for his spot-on research assistance.

¹ John F. Acevedo, *Reclaiming Black Dignity*, 99 TEX. L. REV. ONLINE 1, 2 (2020), <https://texaslawreview.org/reclaiming-black-dignity/>.

exemplified by restaurant service. Specifically, we have argued that racial discrimination in restaurant service trades on the dignity of both customers and servers, because the racialized environments common in many restaurants promote a dynamic whereby servers shift the indignities they bear as a condition of their work onto their Black customers, by delivering inferior, inhospitable, and sometimes degrading service.² In other words, servers reclaim their own dignity by taking dignity from Black customers.

This Essay explores the parallels and connections between racially discriminatory policing and racially discriminatory restaurant service to illuminate one way in which racism influences commerce. While the forms of dignitary takings differ in these two settings, they display similar processes and effects. Furthermore, both discriminatory policing and discriminatory service are but examples of settings in which people of color are designated as acceptable targets for disregard and mistreatment, and both of them simultaneously reflect and reinforce broader racial inequities.³

The Essay then goes on to ask: How does the taking and claiming of dignity affect Black servers, who must earn their livelihoods in a system where their dignity is at stake when they engage on both sides of the transaction, as servers and as customers? It suggests that Black servers are likely to bear both greater and different burdens than their non-Black coworkers—that is, that Black servers *both* face disadvantages in performing work that is required of all servers *and* are required to do work that is not expected of White servers. On the latter point, the Essay draws on recent research into “racialized labor” or “racial tasks,” which sociologists Adia Harvey Wingfield and Renée Skeete Alston have theorized as a form of invisible work that burdens and isolates Black employees while reinforcing racial inequality in the organizational hierarchy.⁴ It ends with a call for

² See Lu-in Wang & Zachary Brewster, *Dignity Transacted: Emotional Labor and the Racialized Workplace*, 53 U. MICH. J.L. REFORM 531 (2020).

³ See, e.g., *id.* at 541–43 (discussing the broader implications of discrimination in customer service); Zachary W. Brewster & Gerald Roman Nowak III, *Racialized Workplaces, Contemporary Racial Attitudes, and Stereotype Endorsement: A Recipe for Consumer Racial Profiling*, 2020 SOC. PERSPECTIVES 1, 2–3 [hereinafter Brewster & Nowak, *Racialized Workplaces*] (noting connections among the racial profiling that occurs in a range of contexts).

⁴ Adia Harvey Wingfield & Renée Skeete Alston, *Maintaining Hierarchies in Predominantly White Organizations: A Theory of Racial Tasks*, 58 AM. BEHAV. SCIENTIST 274 (2014). See *id.* at 278, citing SHARON M. COLLINS, *BLACK CORPORATE EXECUTIVES: THE MAKING AND BREAKING OF A BLACK MIDDLE CLASS* (1997), for the term “racialized labor.”

research into the work experiences of Black servers, who labor at the intersection of race, dignity, and commerce.

I.

Others have written about the killing of George Floyd and similar assaults and killings of Black people by police officers as denials of the dignity of those individuals.⁵ But these are not just *denials* of dignity; they are takings and transfers as well. Drawing on the work of legal scholar Bernadette Atuahene, Acevedo has described racially discriminatory police misconduct as a “dignity taking” by the state analogous to a state’s taking of real property “from owners or occupiers whom it deems to be sub persons,” accompanied by “dehumanization . . . or infantilization” of those individuals or groups.⁶ As Acevedo explains, “when the police engage in brutality against a group of persons, they take the dignity of both the individual they have brutalized and the community that was targeted.”⁷ First, the act directly dehumanizes the brutalized individual and inflicts a loss of property—death or injury to their body.⁸ Second, the dignity taking extends beyond that individual, because the systematic, racialized targeting of specific communities includes over-fining, over-policing, over-incarceration, and dehumanization of that community without a legitimate public purpose.⁹

⁵ See, e.g., Acevedo, *Reclaiming Black Dignity*, *supra* note 1; Eziokwubundu Amadi, *The Value of Human Life: An African Jesuit Reflects on the Black Lives Matter Movement*, THE JESUIT POST (July 16, 2020), <https://thejesuitpost.org/2020/07/the-value-of-human-life-an-african-jesuit-reflects-on-the-black-lives-matter-movement/>; Logan Cobb, *The Most Disrespected: What does no Justice for Breonna Taylor say about the Treatment of Black Women in America?*, UAB INSTITUTE FOR HUMAN RIGHTS BLOG (Oct. 23, 2020), <https://sites.uab.edu/humanrights/2020/10/23/the-most-disrespected-what-does-no-justice-for-breonna-taylor-say-about-the-treatment-of-black-women-in-america/>; Donna Hicks, *A Matter of Dignity*, YALE UNIVERSITY PRESS BLOG (June 5, 2020), <http://blog.yalebooks.com/2020/06/05/a-matter-of-dignity/>.

⁶ See Acevedo, *Reclaiming Black Dignity*, *supra* note 1, at 3 (quoting BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM 21 (2014), and Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 178 (2016)).

⁷ Acevedo, *Reclaiming Black Dignity*, *supra* note 1, at 3–4.

⁸ *Id.* at 4; see also John F. Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOWARD L.J. 621, 628–31 (2016) [hereinafter Acevedo, *Restoring Community Dignity*] (developing the concept of dignity taking in the context of racially discriminatory police brutality).

⁹ See *id.* at 629–39 (describing examples based on a sample of Department of Justice investigations into department-wide police misconduct); see also Jeannine Bell, *The Violence of Nosy Questions*, 100 B.

Acevedo makes the further, important point that the dignity taken from the individual and community does not simply disappear. Rather, and as with a taking of real property, what was taken from one is transferred to another. But where does it go?¹⁰ Acevedo answers that it goes to the state actors or police officers themselves, in a process of dignity claiming.¹¹ Through historical and contemporary analyses of policing in England and the United States, Acevedo traces the route by which police, with help from politicians, have elevated their status and the protections afforded them, at the expense of communities of color. Acevedo documents the correlation between the use of dehumanizing, racist rhetorical tactics and the rise in militarization of and legal protections for the police.¹² As Acevedo summarizes this history,

[T]he long process of augmenting police dignity at the expense of minority communities has worked. What has been transferred, in essence, is not land, but the freedom to act and the protection of law. Police officers are able to act with impunity against the very minority communities they target.¹³

II.

Race discrimination in commercial service transactions involving private actors does not entail a taking in the constitutional sense, but the analogy to dignity taking and claiming in policing is otherwise apt. As this Part will elaborate, the dignity of the parties is a medium of exchange in interactive service encounters. In restaurant service, those encounters often take place at the intersection of two cultures: the culture of customer sovereignty, in which the dignity of customers is elevated at the expense of the dignity of servers, and the culture of White servers, which produces a racialized work environment. The burdens of performing service work in a racialized workplace promote a dynamic of dignity taking and claiming that,

U. L. REV. 935 (2020) (arguing for regulation of police officers' discretion to question motorists during investigative stops, which encourages officers to racially discriminate and engage in violent behavior, and to ask questions that intrude on drivers' dignity and privacy).

¹⁰ Acevedo, *Reclaiming Black Dignity*, *supra* note 1, at 5 (asking, "Where Does Taken Dignity Go?").

¹¹ *Id.* at 1 (stating, "When police discriminate against individuals from a particular community, they enact a dignity taking on that community and claim that dignity for themselves.").

¹² *See id.* at 5–7; *see also* Acevedo, *Restoring Community Dignity*, *supra* note 8, at 630–31.

¹³ *See* Acevedo, *Reclaiming Black Dignity*, *supra* note 1, at 6 (footnotes omitted).

despite the clear differences in severity and setting, exhibits similar patterns and effects as racialized policing.

A.

Service establishments in general, and restaurants in particular, are known to be difficult and demanding places to work, often with precarious conditions and compensation.¹⁴ Restaurant servers endure unpredictable, punishing schedules; physically taxing duties; and uncertain, inconsistent income due to their dependence on voluntary post-service gratuities (tips) from customers.¹⁵ At the same time, servers are expected to be warm, deferential, accommodating, and pleasing in appearance—that is, to perform two “invisible” forms of labor, emotional and aesthetic: Emotional labor is the work of managing one’s feelings to “create a publicly observable facial and bodily display” in exchange for a wage and in an effort to produce the right state of mind and mood in the customer.¹⁶ Aesthetic labor is the work required to act and “look the part” to meet customers’ expectations and preferences regarding what kind of person performs the service in question.¹⁷

While they might be invisible, these forms of labor are difficult and draining. Emotional labor requires servers to suppress their own feelings while being attuned to and calibrating their interactions to accommodate the feelings of their customers, whose needs and desires might vary widely.¹⁸ A server might have little control over their ability to meet aesthetic standards—a problem in and of itself to the extent that it can exclude otherwise qualified individuals from their desired jobs altogether.¹⁹ Even if one is able to act and look the part, to present and maintain that façade can

¹⁴ See, e.g., Lu-in Wang, *When the Customer is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL’Y & L. 249, 250–52 (2016).

¹⁵ For discussion of existing work conditions in most American restaurants and a model for improving conditions for workers, see generally SARU JAYARAMAN, *FORKED: A NEW STANDARD FOR AMERICAN DINING* (2016). As will be discussed below, it appears that the COVID-19 pandemic has only made conditions worse for restaurant workers. See *infra* notes 25–26 and 62–65 and accompanying text.

¹⁶ ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6–7 (2012 ed.) (originating the term “emotional labor”).

¹⁷ See Wang, *supra* note 14, at 267–68; Chris Warhurst & Dennis Nickson, *Employee Experience of Aesthetic Labor in Retail and Hospitality*, 21 WORK, EMP. & SOC’Y 103 (2007).

¹⁸ See Wang, *supra* note 14, at 266–67.

¹⁹ See *id.* at 268, 271–73.

be a significant burden. It often, for example, requires servers to meet sexist and sexualized customer expectations.²⁰ And let us remember that servers must display the right image to and elicit the right feelings from customers while carrying out the many other physically and mentally exhausting tasks that their jobs entail.²¹

In addition to being hard work, restaurant service is delivered in an environment with a clear social order: the customer is “always right,” is regarded as “king,” and can get away with overly entitled, rude, and even abusive behavior.²² Restaurant customers may, for example, make unreasonable demands or be verbally or physically aggressive.²³ In addition, the sexual harassment of servers by customers is so entrenched²⁴ that it carries on even through the COVID-19 pandemic, as customers have adapted their tactics to new circumstances by engaging in a new form known as “maskual harassment”²⁵ and other ploys that not only degrade their targets but also expose them to health risks.²⁶ In this culture of “customer sovereignty,”²⁷ servers are often without recourse against such mistreatment, as managers rarely challenge customers but instead confer “social legitimacy

²⁰ See *id.* at 274–76.

²¹ See Wang & Brewster, *supra* note 2, at 552.

²² See Wang, *supra* note 14, at 268–70.

²³ See Wang & Brewster, *supra* note 2, at 553.

²⁴ See, e.g., RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (Oct. 7, 2014), https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

²⁵ “Maskual harassment” occurs when women servers are “asked to remove their masks so that male customers can judge their looks and therefore their tips on that basis[.]” Debbie Elliott & Emma Bowman, *Tipped Service Workers Are More Vulnerable Amid Pandemic Harassment Spike: Study*, Weekend Edition Sunday, National Public Radio, Dec. 6, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/12/06/943559848/tipped-service-workers-are-more-vulnerable-amid-pandemic-harassment-spike-study> (quoting Saru Jaramayan, president of One Fair Wage, on the findings of a national study). The study to which Jaramayan referred is ONE FAIR WAGE ET AL., TAKE OFF YOUR MASK SO I KNOW HOW MUCH TO TIP YOU. SERVICE WORKERS’ EXPERIENCE OF HEALTH & HARASSMENT DURING COVID-19 (Dec. 2020), https://onefairwage.site/wp-content/uploads/2020/12/OFW_COVID_WorkerExp-1.pdf [hereinafter ONE FAIR WAGE ET AL., TAKE OFF YOUR MASK].

²⁶ ONE FAIR WAGE ET AL., TAKE OFF YOUR MASK, *supra* note 25, at 10–18 (reporting that 43% of women respondents reported that they had experienced or witnessed unwanted sexual comments “specifically related to Covid-19 protocols, such as masks or physical distancing,” at 11; listing numerous examples).

²⁷ Marek Korczynski, *Understanding the Contradictory Lived Experience of Service Work: The Customer-Oriented Bureaucracy*, in SERVICE WORK: CRITICAL PERSPECTIVES 73, 78 (Marek Korczynski & Cameron L. Macdonald eds., 2009).

and a sense of inevitability”²⁸ on abusive behavior by tolerating it and even blaming the targeted server for failing to provide good customer service.²⁹ (As we will see below, however, Black customers are often not accorded such deference—in fact, quite the opposite is too often the case.) Not surprisingly, performing emotional labor in a culture of customer sovereignty can lead to feelings of injustice and dehumanization, as well as harm servers’ physical and mental health.³⁰

The deprivation of dignity that results from their subservient position is as much a condition of servers’ work as the uncertainty of their income, given their dependence on tips. Indeed, their dependence on tips is key to understanding why servers suppress their own feelings to elevate their customers’ and are often willing to endure ill treatment from those customers: servers are, in a real sense, required to trade their dignity for those tips. On one hand, servers depend on tips for their very livelihoods given the paltry wages they are paid by their actual employers.³¹ On the other hand, customers have no obligation to tip at all and have complete discretion over how much to tip if they do.³² Given this unequal relationship, servers are only being rational when they exhibit cues of subservience and suffer through abuse to maximize the odds of a good tip and minimize the risk of being tipped poorly or stiffed.³³

B.

In addition to being tough places to work, restaurants as employers are both stratified and segregated by race. More prestigious, higher paying fine dining establishments are dominated by White employees, while people of

²⁸ Dana Yagil, *When the Customer is Wrong: A Review of Research on Aggression and Sexual Harassment in Service Encounters*, 13 *AGGRESSIVE & VIOLENT BEHAV.* 141, 150 (2008).

²⁹ See Wang, *supra* note 14, at 270.

³⁰ See generally Wang & Brewster, *supra* note 2, at 554.

³¹ The vast majority of states permit employers to pay tipped workers less than the full minimum wage; for some, this subminimum wage is as low as \$2.13 per hour. See U.S. Dept. of Labor, Wage and Hour Division, *Minimum Wages for Tipped Employees* (Jan. 1, 2021), <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped>.

³² See Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 *VA. J. SOC. POL’Y & L.* 101, 115–16 (2014) (discussing the power imbalance between customer and server given the customer’s freedom and the server’s dependence with regard to tips).

³³ See *id.* at 117–26.

color are more likely to work in lower end, lesser paying casual and (especially) fast food restaurants.³⁴ Within a particular restaurant, the better compensated, higher status management and front-of-the-house positions such as hostess and server tend to be held by Whites, while lower paid, less visible and often dirtier work in the back of the house generally goes to employees of color.³⁵

The racial makeup of restaurants as places of employment seems to promote and facilitate the racial environment of restaurants as places of public accommodation, for the largely White establishments that result from these employment patterns are too often unwelcoming and even abusive towards customers of color, especially Black customers.³⁶ Discriminatory restaurant service covers a broad range, from the blatant—requiring Black customers but not others to prepay for meals, denying service to customers of color, using racist slurs, and worse—to the more subtle and ambiguous,³⁷ such as neglecting Black customers or withholding emotional labor from them to deliver what has been called “service with a smirk.”³⁸ Notably—and in stark contrast to their more typical stance in the prevailing culture of customer sovereignty—managers and supervisors often do not discourage or punish, but instead permit and even join in racially discriminatory treatment of customers.³⁹

Social science research has linked discrimination by restaurant managers and servers against customers of color to a pervasive “culture of White servers” that develops through racialized interactions in the “backstage”—i.e., out of customers’ earshot—among White front-of-the-

³⁴ See, e.g., RESTAURANT OPPORTUNITIES CENTERS UNITED, ENDING JIM CROW IN AMERICA’S RESTAURANTS: RACIAL AND GENDER OCCUPATIONAL SEGREGATION IN THE RESTAURANT INDUSTRY (2015), https://chapters.rocunited.org/wp-content/uploads/2015/10/RaceGender_Report_LR.pdf [hereinafter RESTAURANT OPPORTUNITIES CENTERS UNITED, ENDING JIM CROW].

³⁵ See *id.*

³⁶ See, e.g., Wang & Brewster, *supra* note 2, at 536–39.

³⁷ See *id.*

³⁸ Danielle Dirks & Stephen K. Rice, *Dining While Black: Racial Rituals and the Black American Restaurant Experience*, in RACE AND ETHNICITY: ACROSS TIME, SPACE, AND DISCIPLINE 255, 269–71 (Rodney D. Coates ed., 2004).

³⁹ See, e.g., Zachary W. Brewster, *Racially Discriminatory Service in Full-Service Restaurants: The Problem, Cause, and Potential Solutions*, 53 CORNELL HOSP. Q. 274, 275–76 (2012); Zachary W. Brewster & Sarah N. Rusche, *Quantitative Evidence of the Continuing Significance of Race: Tableside Racism in Full-Service Restaurants*, 43 J. BLACK STUD. 359 (2012) [hereinafter Brewster & Rusche, *Tableside Racism*].

house employees.⁴⁰ The anti-Black biases held by some servers⁴¹ manifest and are reinforced in cultures of White servers when they participate in a common practice for dealing with the stresses and indignities of their work more generally: because they must maintain a pleasant, congenial demeanor on the “front stage,” where they interact with customers, servers need to alleviate stress and let off steam in backstage areas, such as break rooms, where their behavior is less constrained.⁴² There, they create “communities of coping”⁴³ where they engage in a kind of “group therapy” and build camaraderie. In these communities, one way to vent and bond is by commiserating with one another about their workplace tribulations, especially their customers.⁴⁴

In predominantly White restaurants, backstage commiseration among servers and managers often takes the form of discourse among servers and managers that draws on, disseminates, and magnifies racial stereotypes, painting customers of color—especially Black customers—as inferior, unduly demanding customers and poor tippers.⁴⁵ Such stereotypes are especially potent in an industry where workers depend and therefore fixate on customers’ tips, and they can be used to justify delivering substandard service to customers of color.⁴⁶ Consequently, racist discourse shapes the workplace culture, defines behavioral norms, and identifies which customers may acceptably be mistreated or given poor service—even for servers who do not themselves harbor anti-Black views but are influenced by their

⁴⁰ See generally Brianna Billingsley, *Racialized and Class Contexts: Shifting Audiences and Changes in Emotional Labor Among Restaurant Servers*, 86 SOC. INQUIRY 641 (2016); see Dirks & Rice, *supra* note 38; Christine Mallinson & Zachary W. Brewster, ‘Blacks and Bubbas’: Stereotypes, Ideology, and Categorization Processes in Restaurant Servers’ Discourse, 16 DISCOURSE & SOC. 787, 799 (2005).

⁴¹ See Brewster & Nowak, *Racialized Workplaces*, *supra* note 3, at 10–13 (reporting that a significant number of full-service restaurant servers surveyed endorsed negative stereotypes of Black customers).

⁴² See Wang & Brewster, *supra* note 2, at 554–55.

⁴³ Marek Korczynski, *Communities of Coping: Collective Emotional Labour in Service Work*, 10 ORG. 55, 58 (2003).

⁴⁴ See *id.*; Wang & Brewster, *supra* note 2, at 557.

⁴⁵ See, e.g., Billingsley, *supra* note 40; Brewster & Nowak, *Racialized Workplaces*, *supra* note 3; Wang & Brewster, *supra* note 2, at 557–60.

⁴⁶ See Brewster & Nowak, *Racialized Workplaces*, *supra* note 3, at 18 n.1 (stating that “restaurant servers can easily justify their negativity toward black customers by claiming that they are financially rewarded by giving better service to customers who are perceived to be easier to wait on and better tippers”).

racialized work environment.⁴⁷ Through this social psychological process, a strategy that servers use to shore up their own sense of dignity in turn degrades the sense of worth accorded customers from the denigrated group and deprives customers of color of the warm and caring service that has come to be expected in a culture where the customer is king.⁴⁸

C.

While the settings and severity differ, the ways in which Black restaurant customers' dignity is taken and claimed through racialized service resembles the process of dignity taking and claiming that Acevedo has traced in racialized policing. First, it directly dehumanizes and inflicts a loss on the individual customer and extends beyond that individual to the targeted community. Second, it elevates the dignity of the server at the expense of the customer and, like racialized policing, has the backing of authority.

The "deprivation of personal dignity"⁴⁹ inherent in discriminatory restaurant service infringes on the statutorily protected right to the full and equal enjoyment of public establishments.⁵⁰ Analogous to the deprivation of

⁴⁷ See, e.g., *id.* at 10–13; Zachary W. Brewster & Sarah N. Rusche, *The Effects of Racialized Workplace Discourse on Race-Based Service in Full-Service Restaurants*, 41 J. HOSP. & TOURISM RSCH. 398, 403–07 (2017).

⁴⁸ See Wang & Brewster, *supra* note 2, at 562.

⁴⁹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872 at 16–17 (1964)).

⁵⁰ Two federal civil rights statutes establish the legal right to equal treatment and dignity in public accommodations such as restaurants: A Reconstruction Era statute, Section 1981 of the Civil Rights Act of 1866, and Title II of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000a. The subtle and ambiguous type of race discrimination in restaurant service that is most common today is, however, likely to evade accountability under current case law interpreting these statutes. See Wang & Brewster, *supra* note 2, at 543–49 (arguing that the requirements for proving a claim of race discrimination under these statutes "align almost perfectly to exclude liability for" subtle and ambiguous discrimination in restaurant service. *Id.* at 545.).

Similarly, Professor Suja A. Thomas argues that federal courts' interpretations of these statutes and Section 1982 of the Civil Rights Act of 1866 have created a "customer caste" by making legal a wide range of discrimination in public accommodations that people of color encounter on a regular basis in daily life in a variety of public establishments. Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. 141 (2021). In a reply to Professor Thomas that focuses specifically on Title II, Professor Elizabeth Sepper demonstrates that federal courts' interpretations "have defied the original meaning of Title II's central guarantee of 'full and equal enjoyment' of public accommodations," which, at the time Title II was enacted, "had a well-defined meaning" under interpretations of "near-identical state civil rights laws"—interpretations that "recognized

property or injury to one's body that results from police brutality, the provision of discriminatory restaurant service deprives the customer of something that, while not tangible like real property or the body itself, is valued—often in material and monetary terms: the feeling of being cared for and esteemed, along with the emotional labor that produces it, is an important source of the value to be expected in a full-service restaurant experience.⁵¹ Firms profit from marketing to customers the value of that feeling, and studies show that customers do value it.⁵² When customers of color are denied service that produces that feeling, they receive comparatively less than do White customers.⁵³

Furthermore, the racist tropes and stereotypes that degrade and dehumanize Black communities in policing find their counterpart in the openly racialized talk of White server culture. Racist discourse characterizes Black customers as being not just poor tipplers but as undesirable customers more generally: as overly demanding, rude, dishonest in lodging complaints in order to get free things, and “uncivilized and hedonistic.”⁵⁴ These demeaning stereotypes impose costs on Black customers who receive

that many of the more subtle examples of race discrimination that Thomas describes—slow service, discourteous treatment, and insults— . . . discriminated against Black customers.” Elizabeth Sepper, *The Original Meaning of “Full and Equal Enjoyment” of Public Accommodations*, CAL. L. REV. ONLINE (Mar. 2021), <https://www.californialawreview.org/the-original-meaning-of-full-and-equal-enjoyment-of-public-accommodations/>.

⁵¹ See Wang & Brewster, *supra* note 2, at 539, 549–50.

⁵² See *id.* at 550–51.

⁵³ See Zachary W. Brewster, Michael Lynn, & Shelytia Cocroft, *Consumer Racial Profiling in U.S. Restaurants: Exploring Subtle Forms of Service Discrimination Against Black Diners*, 29 SOCIO. F. 476, 481, 492 (2014).

Isabel Wilkerson recounted an experience that illustrates the difference in experience and expectations between Black and White diners: During dinner “at a chic restaurant in a hip section of a major American city,” Wilkerson and a (presumably) White family friend were neglected and ignored by their waiter in a way that contrasted with his attentive treatment of customers at other tables. ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 365 (2020). As Wilkerson’s friend realized how poorly they were served in comparison with others, she grew impatient and then angry, and then loudly called out the restaurant’s racism and “stormed out of the restaurant.” *Id.* at 368. Reflecting on that evening, Wilkerson remarked on the difference between her friend’s reaction to their treatment and her own: of her friend’s reaction, she wrote, “[s]he had been radicalized in a matter of minutes. She knew full well that this was not how people treated her when she was out with others in the dominant caste.” *Id.* And of her own, “I had no interest in making a federal case out of this. If I responded like that every time I was slighted, I’d be telling someone off almost every day.” *Id.* at 367.

⁵⁴ Brewster & Rusche, *Tableside Racism*, *supra* note 39, at 378; see also, e.g., Mallinson & Brewster, *supra* note 40, at 799.

discriminatory service and who sometimes overcompensate in anticipation of receiving inferior service or in an attempt to challenge those negative stereotypes.⁵⁵ Furthermore, racist discourse and service both reflect and reinforce “the unexamined acceptance of so-called societal discrimination”⁵⁶ that pervades the mundane interactions of daily life.⁵⁷

Servers’ taking and claiming of dignity at the expense of Black customers resembles the dignitary taking and claiming of racialized policing in another important way. Servers often receive support and encouragement from management for, and are sometimes joined by management in, their delivery of racially discriminatory service.⁵⁸ Just as police officers have elevated their status and increased their protections at the expense of Black communities with the backing of politicians and the state,⁵⁹ servers can claim the dignity of Black customers with impunity.

III.

A growing body of social science research documents the dismal work conditions and discriminatory environments described above. The research, however, has focused almost exclusively on the experiences, attitudes, and behavior of White servers, both as workers and as agents of discrimination in public accommodations. That focus is not surprising given that the vast majority of restaurant servers are White.

But what about Black servers? The existing research leaves a large gap in knowledge about their experiences, both as workers and as customers of the kinds of establishments where they work. This Essay now turns to a call for research to examine the effect on Black servers of the cultures of customer sovereignty and White servers.⁶⁰ Early research in other work settings suggests that Black service workers are doubly and differently affected by

⁵⁵ See Wang & Brewster, *supra* note 2, at 540–41.

⁵⁶ Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 704 (2005).

⁵⁷ See Elijah Anderson, “*The White Space*,” 1 SOC. RACE & ETHNICITY 10, 15 (2015).

⁵⁸ See, e.g., Brewster, *supra* note 39, at 275–76; Brewster & Rusche, *Tableside Racism*, *supra* note 39, at 363.

⁵⁹ See Acevedo, *Reclaiming Black Dignity*, *supra* note 1, at 5.

⁶⁰ Cf. Wingfield & Alston, *supra* note 4, at 285 (stating that the theory of racial tasks has yet to be explicitly explored empirically and identifying “methodological approaches that could be compatible with this theoretical perspective”).

the intersection of these cultures—that is, they both face disadvantages in performing the invisible forms of labor that are expected of all service workers and are required to perform invisible labor that is expected only of them.

Before we consider how their work is harder and different, we should first understand that the hardships that servers in general experience are even worse for Black servers. For example, studies have found that Black servers earn less in tips and wages than their White counterparts.⁶¹ As with other inequities, the COVID-19 pandemic has both spotlighted and exacerbated the harsh economic situations and work conditions of restaurant servers. One national study found that restaurant workers were at high risk of contracting COVID-19, but did not have adequate protection or work under proper safety protocols.⁶² In addition, their tips declined significantly during the pandemic and even more when they tried to enforce COVID-19 safety protocols, so they were reluctant to enforce those protocols.⁶³ Furthermore, customer hostility and sexual harassment increased dramatically during the pandemic—including, as noted above, harassment that demanded workers remove their protective masks and thereby exposed them to risk of contracting the virus.⁶⁴ As bad as the situation has become for servers more broadly, however, Black servers have suffered both greater losses in income and worse abuse by customers. A February 2021 study found that—in addition to being more vulnerable to exposure to the virus than other workers—Black tipped servers experienced a greater decline in tips and wages, as well as higher levels of customer hostility and punishment through lesser tips when they tried to enforce safety protocols.⁶⁵

Black servers also face obstacles in performing the already difficult invisible labor required of all servers. First, it appears that Black service

⁶¹ See, e.g., Zachary W. Brewster & Michael Lynn, *Black-White Earnings Wage Gap Among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping*, 84 SOC. INQUIRY 545, 546 (2014); RESTAURANT OPPORTUNITIES CENTERS UNITED, ENDING JIM CROW, *supra* note 34, at 4, 14.

⁶² ONE FAIR WAGE ET AL., TAKE OFF YOUR MASK, *supra* note 25, at 2–8 (fall 2020 national survey study of food service workers who were employed during the pandemic).

⁶³ *Id.* at 3–5, 8–9.

⁶⁴ *Id.* at 3–5, 10–18.

⁶⁵ ONE FAIR WAGE ET AL., ENDING A LEGACY OF SLAVERY: HOW BIDEN'S COVID RELIEF PLAN CURES THE RACIST SUBMINIMUM WAGE 2 (Feb. 2021) (reporting results of national survey study conducted October 2020—January 2021).

workers need to work harder than their White coworkers to receive the same rewards. A recent study, for example, found that Black retail service workers must provide more emotional labor, including more exaggerated expressions of emotional warmth, than White workers to receive equivalent performance evaluations.⁶⁶ Second, Black servers may have greater difficulty meeting employers' and customers' expectations with respect to both emotional and aesthetic labor—the work required to act and “look” the part of the desired restaurant server—to the extent that customer preferences center, as they often do, on a White prototype.⁶⁷ These racialized standards for invisible labor could have significant effects on employment conditions and compensation, by affecting recruiting and hiring decisions, work assignments, the size of customers' tips, and workers' vulnerability to harassment and other ill treatment by managers, coworkers, and customers.⁶⁸

In addition, servers of color in predominantly White workplaces may be burdened by the need to perform a recently theorized, third form of invisible work known as racialized labor.⁶⁹ According to Wingfield and Alston, racial tasks are those that workers of color perform through “self-presentation, emotion work, and other forms of social interaction intended to help ease the difficulties associated with being in the minority,” as well as the assignment of workers of color to positions and tasks that reinforce White privilege.⁷⁰ The latter form, racialized work assignments, might explain the racial stratification and segregation of restaurant jobs described above.⁷¹ For example, relegating Black restaurant workers to back of the house jobs such as cook or dishwasher reflects racial tasks of the physical kind, which are performed mostly at the lowest levels of an organization and mostly by people of color, “in spaces designed to restrict these workers' visibility.”⁷²

The role of server, with its emphasis on emotional and aesthetic work, implicates interactional racial tasks of the former type—those that are

⁶⁶ See Alicia A. Grandey et al., *Fake It to Make It? Emotional Labor Reduces the Racial Disparity in Service Performance Judgments*, 45 J. MGMT. 2163 (2018).

⁶⁷ See Wang, *supra* note 14, at 267–68, 271–73.

⁶⁸ See *id.* at 268–85 (discussing discriminatory effects of customer preferences).

⁶⁹ Wingfield & Alston, *supra* note 4, at 278 (citing SHARON M. COLLINS, *BLACK CORPORATE EXECUTIVES: THE MAKING AND BREAKING OF A BLACK MIDDLE CLASS* (1997)).

⁷⁰ *Id.* at 274.

⁷¹ See *supra* text accompanying notes 34–35.

⁷² Wingfield & Alston, *supra* note 4, at 283.

required “to help ease the difficulties associated with being in the minority.”⁷³ The self-presentation tasks needed to meet this objective are something like the kind of work that Senator Rafael Warnock borrowed a beagle to help him perform during his recent campaign in Georgia. In a viral series of “puppy ads,” Warnock was shown walking and snuggling with Alvin the beagle—a breed that some associate with White people—in scenes that “scream[ed] that I am a Black candidate whom white people ought not be afraid of.”⁷⁴ The need to perform racialized labor raises not just the question of whether Black servers have greater difficulty meeting standards that are set by reference to a White prototype, but also whether, through their labor, Black servers are required to convey specific messages that reinforce White privilege or to ease any discomfort White customers or coworkers feel about race. (On the other hand, racialized labor also overlaps with the emotional and aesthetic labor that is required of all servers to the extent that general standards for that work are based on norms that privilege Whiteness.)⁷⁵ Racialized labor also burdens Black workers unequally because it requires them to suppress or hide their “emotions about race-related situations”⁷⁶ while White workers—as we have seen in the restaurant culture of White servers—are free to express their race-related feelings.⁷⁷

Research into Black workers’ experiences in other service roles suggests that racialized labor is a rich area for study. Dr. Wingfield’s own recent research into the experiences of Black healthcare professionals illuminates the different ways in which Black professionals experience race discrimination depending on their level in the institutional hierarchy, as well

⁷³ *Id.* at 274.

⁷⁴ Shane Goldmacher, *How Alvin the Beagle Helped Usher In a Democratic Senate*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/us/politics/raphael-warnock-puppy.html> (quoting political science professor Hakeem Jefferson). *Cf.* Wingfield & Alston, *supra* note 4, at 279 (noting the need for Black employees to “demonstrate their suitability for leadership positions more directly than their White colleagues”). Many thanks to Mary Crossley for pointing out that the puppy ads performed a function similar to racialized labor.

⁷⁵ *See* Wingfield & Alston, *supra* note 4, at 279 (describing racial tasks that constitute conformance to “the ideological norms that have been established” such as “Black women employees’ straighten[ing] their hair to fit into professional work environments”) and 284 (arguing that the presentation of soft skills such as “personability and professionalism” constitutes “an example of racial tasks” as well as “a bias against workers of color”).

⁷⁶ *Id.* at 280.

⁷⁷ *Cf.* Adia Harvey Wingfield, *Are Some Emotions Marked “Whites Only”?* *Racialized Feeling Rules in Professional Workplaces*, 57 SOC. PROBS. 251, 263–65 (2010).

as how they respond to the discrimination directed at Black coworkers and patients—often by doing extra, uncompensated, invisible equity work.⁷⁸

The research agenda would comprise a wide range of important questions concerning how their race affects the work of Black servers. The questions include examination of the frequency and form of race discrimination by managers, coworkers, and customers, as well as how Black servers respond to discrimination when it occurs or navigate the workplace to avoid it. For example: are Black servers more inclined to be vigilant in trying to identify and then objecting to perceived discrimination in scheduling or table assignments, or do they remain silent in order to ensure that managers and coworkers feel comfortable with them? To “maintain[] White[] privilege and advantage”⁷⁹ while maximizing their tips in serving White customers, do they feel compelled to appear especially accommodating or subservient? And how does backstage racist talk about customers affect their work performance, as well as their psychological and physical health?

We also need to understand how discrimination against Black workers interacts with discrimination against Black customers. Questions to explore include how Black servers perceive, are affected by, respond to, and perhaps even participate in race discrimination against customers. Servers’ responses might cut in different directions: Black servers might feel a responsibility to protect Black customers whom they view as being treated poorly by managers or other servers. On the other hand, to the extent that Black servers feel a need to assuage White coworkers’ racial anxieties or to reinforce White privilege, they might instead indicate agreement or remain silent in the face of anti-Black speech or conduct.⁸⁰ Either way, the need to calculate one’s response, as well as carrying out the choice one makes, would place on Black servers a burden that is not borne by White servers. Another compelling question is whether Black servers experience conflicts or inconsistencies in their roles as workers and as customers. Black servers, after all, are no less dependent on tips than White servers, and might themselves be influenced by stereotypes concerning the tipping behavior of customers of color despite

⁷⁸ See generally ADIA HARVEY WINGFIELD, *FLATLINING: RACE, WORK, AND HEALTH CARE IN THE NEW ECONOMY* (2019).

⁷⁹ Wingfield & Alston, *supra* note 4, at 281.

⁸⁰ See *id.* (theorizing that racial tasks include “keeping silent when confronted with expressions of racial bias”).

their own experience as recipients of discriminatory service when they patronize restaurants.

CONCLUSION

Contemplating the effects of Black servers' intersecting and somewhat conflicting roles and identities raises a question that returns to where this Essay began: How do Black law enforcement officers—"a contradiction personified"⁸¹—navigate, and how are they affected by, the "duty and burden"⁸² of serving in a culture that takes and claims the dignity of themselves and their communities? Among the poignant facts in the killing of George Floyd is that a Black police officer, rookie Alex Keung, was among the officers on the scene and was later charged with aiding and abetting in his killing.⁸³ Keung's role in Mr. Floyd's death was reported to be especially wrenching for his family in part because one reason Keung gave for joining the Minneapolis police force was to protect people against racist policing—to change the system "from the inside,"⁸⁴ a desire that is often expressed by Black police officers.⁸⁵ To help us understand why that system is so resistant to change, we should seek to understand the tensions, contradictions, and burdens borne by Black law enforcement officers, whose service places them where dignity taking and claiming meet.

⁸¹ KENNETH BOLTON JR. & JOE R. FEAGIN, *BLACK IN BLUE: AFRICAN-AMERICAN POLICE OFFICERS AND RACISM* at 1 (2004).

⁸² Dan Zak & Ellen McCarthy, *The duty and burden of the black police officer*, WASH. POST (July 6, 2020), https://www.washingtonpost.com/lifestyle/style/the-duty-and-burden-of-the-black-police-officer/2020/07/05/6508b9bc-b570-11ea-aca5-ebb63d27e1ff_story.html.

⁸³ Kim Barker, *The Black Officer Who Detained George Floyd Had Pledged to Fix the Police*, N.Y. TIMES (June 27, 2020; updated Sept. 15, 2020), <https://www.nytimes.com/2020/06/27/us/minneapolis-police-officer-kueng.html>.

⁸⁴ *Id.*

⁸⁵ See, e.g., BOLTON & FEAGIN, *supra* note 81, at 5–7; Zak & McCarthy, *supra* note 82; *What It is Like to Be A Black Police Officer*, ALL THINGS CONSIDERED, NATIONAL PUBLIC RADIO (June 18, 2020), <https://www.npr.com/2020/06/18/880513767/what-it-is-like-to-be-a-black-police-officer>.

