A Critique of the Stigma Argument Against Affirmative Action in South Africa

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Abstract

One of the arguments against affirmative action is that it causes internal and external stigma towards its actual or perceived beneficiaries. In the US, the stigma argument has been so successful that it has narrowed the kinds of race-based affirmative action that can pass constitutional muster. While the stigma argument has yet to gain traction in South Africa, glimpses of this argument can be discerned in recent affirmative action cases. As is the case in the US, I fear that the stigma argument could be used to narrow the kinds of permissible affirmative action in South Africa, particularly in the employment context. This is because affirmative action in the South African employment context has features that could embolden the stigma argument. First, it targets Black people, women and persons with a disability – all groups subject to deeply entrenched systems of domination and oppression from which stigma arises. Second, the scope of permissible affirmative action in the South African employment context challenges the liberal meritocratic ideal in ways that could be said to cause stigma. In this article, I argue that while stigma is a pervasive and persistent predicament that attaches to the beneficiaries of affirmative action, it is not caused by affirmative action. Stigma predates and operates independently of affirmative action. It is rooted in unequal power relations inherent in systems of domination and oppression, in the South African employment context - white supremacy, patriarchy and ableism. I also

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show how stigma is based on the erroneous assumption that affirmative action measures necessarily allow for the admission, appointment, or promotion of unqualified or unskilled candidates. Further, I argue that even if we were to accept that affirmative action causes stigma, this impact is outweighed by the benefits of affirmative action. Accordingly, the stigma argument should not be used to narrow the nature and scope of affirmative action. To do so would entrench the inequality that affirmative action seeks to eradicate. Instead, our focus should turn to the dismantling of systems of domination and oppression from which stigma is rooted. In conclusion, I suggest that the emerging stigma argument should be seen and fiercely resisted as a part of 'white backlash' against measures intended to redress inequality in South Africa.

Keywords: Stigma; Race; Affirmative Action; Substantive Equality

1. Introduction

Writing in 1998, just after the enactment of the Employment Equity Act, 57 of 1998 (the EEA), which sets the framework for affirmative action in employment in South Africa, Brassey warned that the beneficiaries of affirmative action under the EEA would 'know how they got the job' and would 'squirm' for having swapped their pride for a job.[1] In this statement, Brassey captured the stigma argument against the use of affirmative action - that the beneficiaries of affirmative action suffer stigmatic harm caused by their status as beneficiaries. More recent, Motshabi, calling for a more radical approach to eradicating inequality, rejects affirmative action in favour of a reparatory alternative, in part because 'affirmative action creates stigma about its beneficiaries, stimulating discourses of "inferiority" and "incompetence."'[2] Responding to these arguments, and with a focus on affirmative action in the employment context, this article examines the emerging stigma argument in South Africa's affirmative action jurisprudence. The article will argue that any stigma attached to the beneficiaries of affirmative action is not caused by affirmative action. Stigma is rooted in the unequal power relations inherent in the systems of domination and oppression to which the beneficiaries of affirmative action are subject. Accordingly, the stigma argument should not be used to invalidate or limit the scope of affirmative action – to do so would entrench

[1] Martin Brassey, 'The Employment Equity Act: Bad for Employment and Bad for Equity' (1998) Industrial Law Journal 1359, 1366.

[2] Khanya Motshabi, 'Decolonising Affirmative Action in 21st-Century Africa: Reparatory Alternatives for Affirming South Africa' (2020) 2 Journal of Decolonising Disciplines 1, 6.

the inequality that affirmative action seeks to eradicate. Instead, the stigma argument should be seen as an incidence of 'white backlash' against affirmative action and other measures that seek to eliminate inequality in South Africa.[3]

My interest in the stigma argument was sparked by the South African Constitutional Court's second affirmative action judgement, *South African Police Service v Solidarity obo Barnard*[4] and a subsequent Western Cape High Court decision, *South African Restructuring and Insolvency Practitioners Association (SARIPA) v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development*.[5] In their concurring opinion in *Barnard,* judges Cameron, Froneman and Majiedt found that 'over-rigidity' when implementing affirmative action risked disadvantaging the intended beneficiaries by creating 'the impression that appointments are due only to race and exclusive of merit."[6] In *SARIPA*, the High Court used Cameron, Froneman and Majiedt's suggestion that rigid affirmative action measures harm the beneficiaries of affirmative action to support a finding that quotas were unconstitutional.[7] These two cases form the foundation of an emerging stigma argument against affirmative action in the South African court's jurisprudence.

While common in the US,[8] the stigma argument has yet to gain significant traction in South Africa's affirmative action jurisprudence. Even after its use in *SARIPA*, the subsequent appeal courts in the case did not

[3] For an analysis of the meaning of 'white backlash' see Achille Mbembe, 'Passages to Freedom: The Politics of Racial Reconciliation in South Africa' (2008) 20 Public Culture 5, 10–11; Joel M Modiri, 'Towards a "(Post-)Apartheid" Critical Race Jurisprudence: "Divining Our Racial Themes"' (2012) 27 Southern African Public Law 231, 254.

[4] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 CC.

[5] *South African Restructuring and Insolvency Practitioners Association (SARIPA) v Minister of Justice and Constitutional Development*; *In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* 2015 2 SA 430 WCC.

[6] *Barnard* (n 4) [80].

[7] *SARIPA* (n 5) [205].

[8] Angela Onwuachi-Willig, Emily Hough and Mary Campbell, 'Cracking the Egg: Which Came First: Stigma or Affirmative Action?' (2008) California Law Review 1299; Ashley Hibbett, 'The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education' (2005) Harvard BlackLetter Law Journal 75; Robin A Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context' (2004) New York Law Review 803; Andrew Halaby and Stephen McAllister, 'An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases' (1997) Michigan Journal of Race and Law 235; Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (Vintage Books 2013) 116–26; Carl Cohen and James Sterba, *Affirmative Action and Racial Preference: A Debate* (OUP 2003) 110–29 for an analysis of these arguments in the American context.

refer to this argument.[9] There is thus a lack of clarity on the role the argument *should* play in South Africa's affirmative action jurisprudence. The stigma argument has been a powerful 'substantive weapon against affirmative action' in the US.[10] In that jurisdiction, the US Supreme Court has relied on the stigma argument to reject a lower standard of review for race-based affirmative action.[11] Stigma has also been used as a substantive argument against race-based affirmative action.[12] While the South African courts take a markedly different approach to affirmative action than their US counterparts, seeing these measures as an important part of realising the right to equality as opposed to a limitation of the right to equality,[13] the emergence of the stigma argument in the South African court's jurisprudence could narrow the nature and scope of permissible affirmative action measures, as it has in the US.

In light of the well-resourced, ongoing strategic litigation against affirmative action by the conservative, Afrikaner-nationalist trade union Solidarity,[14] it is important to interrogate past and emerging arguments creeping into South Africa's affirmative action jurisprudence. Interrogating the stigma argument is particularly important because rather than an appeal to the unfairness of affirmative action measures, it takes the form of being in favour of 'protecting' the intended beneficiaries of affirmative action.[15] This form could sway many who are committed to measures

[9] *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2017 3 SA 95 SCA; *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 5 SA 349 CC (*SARIPA CC*); the courts found the affirmative action measure unconstitutional for several reasons, none related to the stigma argument.

[10] Onwuachi-Willig, Hough and Campbell (n 8) 1305.

[11] *University of California Regents v Bakke* 438 US 265 1978 358–60. See also, *Fullilove v Klutznick* 1980 448 US 448 518–19.

[12] Stephen Carter, *Reflections of an Affirmative Action Baby* (Basic Books 1991); Shelbey Steele, *The Content of Our Character: A New Vision of Race in America* (Harper Perrenial 1998); Cohen and Sterba (n 8) argue that affirmative action measures impose the demeaning burden of inferiority on its beneficiaries. See also, *Adarand Constructors, Inc v Pena* 515 US 200 1995 241; *Richmond v JA Croson Co* 488 US 469 1989 493–4.

[13] See *Minister of Finance and Other v Van Heerden* 2004 6 SA 121 CC [32]; *Barnard* (n 4) [35]; *SARIPA CC* (n 9) [1].

[14] On the nature of the strategic litigation see, Steven Budlender, Gilbert Marcus and Nick Ferreira, 'Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons' (2014) Atlantic Philanthropies 16; Nomfundo Ramalekana, '"White Backlash" Against Affirmative Action in the United States and South African Courts' (*Oxford Human Rights Hub Blog*, 11 February 2022) <https://ohrh.law.ox.ac.uk/white-backlash-against-affirmative-action-in-the-united-states-and-south-african-courts/> accessed 7 March 2022.

[15] See, Onwuachi-Willig, Hough and Campbell (n 8) 1307, the authors notes that the stigma argument in the US shifts the paradigm from the protection of 'innocent whites' to a benevolent protection of the intended beneficiaries. See also Hibbett (n 8) 78, who notes that '...many affirmative action opponents, in the interest of making their position appear

aimed at eradicating inequality to act opposite to these, believing themselves to be acting in the interest of the beneficiaries of these measures. More worrying, the stigma argument is arguably being used as a façade to dismantle affirmative action (especially that based on race) and protect the interests of privileged groups – all a part of the 'white backlash' against measures to redress inequality in South Africa.[16]

The article is structured as follows. In Section 2, I define stigma and provide an analysis of the stigma argument against affirmative action. At the outset, the section will show that stigma is rooted in unequal power relations inherent in systems of domination and oppression, of relevance to this article being white supremacy, patriarchy, and ableism. From there, the section highlights two dimensions of the stigma argument - internal and external stigma. The section will show that the US Supreme Court's use of the stigma argument *assumes* that stigma is caused by being a beneficiary of affirmative action. I argue that this assumption is problematic because the court has failed to connect stigma and existing systems of domination and oppression. Further, I show that the stigma argument, in the context of affirmative action, is rooted in an individualistic conception of the right to equality, one that centres on individual merit. The section concludes with an analysis of the impact that the stigma argument has had in the US Supreme Court's affirmative action jurisprudence – veering the court towards the infamous strict scrutiny standard of review in race-based affirmative action and limiting the kinds of affirmative action that can pass constitutional muster in that jurisdiction – a cautionary tale for the development of affirmative action in South Africa.

In Section 3, I trace the emergence of the stigma argument in *Barnard* and *SARIPA*. Starting with an analysis of the affirmative action regime in South Africa's employment context, I critically discuss three features of affirmative action under the EEA, features which would arguably strengthen the stigma argument. First, the EEA allows for affirmative action measures that target beneficiaries based on race, gender and disability (targeting Black people, women and persons with a disability) – groups subject to pervasive stigma.[17] Second, the EEA's definition of affirmative action challenges the liberal meritocratic ideal in ways that could be said to cause stigma – it allows for the preferential treatment of its beneficiaries in appointment and promotion;[18] and includes an expansive definition of 'qualified', going beyond individual skill,

benevolent, have a tendency to exaggerate the prevalence of internal stigma to suggest that the primary objection to affirmative action is that it harms its beneficiaries more than anyone else.

[16] Mbembe (n 3) 10–11; Modiri (n 3) 254.

[17] EEA, s1.

[18] ibid s15(3).

experience, and qualification[19]. I conclude the section by showing how the benign mention of the risk of stigmatic harm in *Barnard* morphed into an argument against the constitutionality of a supposedly 'rigid' affirmative action measure – quotas - in the High Court's decision in *SARIPA*.

In Section 4, I make what should be an uncontroversial argument - the stigma attached to the beneficiaries of affirmative action is not caused by affirmative action. Stigma predates and operates independently of affirmative action.[20] It is rooted in systems of domination and oppression. I suggest that even if it could (which it has not) be shown that affirmative action causes stigma, the benefits of affirmative action outweigh the cost of stigmatic harm. Thus, the stigma argument should not be used to trump otherwise genuine affirmative action measures.

In Section 5, I conclude by arguing that the stigma argument should be seen as a part of broader 'white backlash' against measures that seek to redress inequality in South Africa. It is not a benevolent argument in favour of the interests of the beneficiaries of affirmative action. Rather than rely on stigma to delegitimize affirmative action, I suggest that we acknowledge the significance of the pervasive stigma experienced by beneficiaries of affirmative action - this should buttress our commitment to eradicating systems of domination and oppression – by countering stigmatic harm. Further, acknowledging the stigma that *already* attaches to actual or perceived beneficiaries of affirmative action should be the catalyst for designing and implementing affirmative action measures in ways that can erode stigma.

2. Defining Stigma

My critique of the stigma argument against affirmative action in South Africa starts with a definition of stigma and an analysis of how it has had an impact on affirmative action in the US. This work draws from US-centric literature and judgments of the US Supreme Court, a jurisdiction where the stigma argument is a salient feature in affirmative action cases and from which the South African courts can learn.[21] It is thus important to note key differences between the approach to affirmative action in South Africa and the US.

[19] ibid s20(3) and s20(4).

[20] Richard Delgado, 'Ten Arguments Against Affirmative Action: How Valid?' (1998) Alabama Law Review 135, 140.

[21] On the value and importance of comparativism see, Sandra Fredman, 'Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law' (2015) International and Comparative Law Quarterly 631.

Section 9(2) of the South African Constitution permits affirmative action. The provision provides that the right to equality includes the full and equal enjoyment of all rights and freedoms and that in promoting the achievement of equality, 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' In its first affirmative action case, *Minister of Finance v Van Heerden*, the Court held that affirmative action measures were not a derogation from the right to equality and did not amount to unfair discrimination. They were a substantive part of the commitment to realising the right to equality.[22] The Court has specifically held that:

> *Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order.*[23]

In line with s9(2) of the Constitution, various legislation and policy have been put in place to implement affirmative action and other positive redistributive measures.[24] The legislation and policy primarily target beneficiaries based on race, gender and disability. As will be discussed in detail in Section 3, in this article, I'm interested in the emergence of the stigma argument in the employment context - where affirmative action measures are primarily regulated by the EEA. For now, it suffices to state that the South African courts have interpreted the right to equality to encompass affirmative action or 'restitutionary measures'; they are seen as a substantive part of the commitment to equality.[25] Importantly, the Court has recognised that without 'a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege', the promise of equality would ring

[22] *Van Heerden* (n 13) [32].
[23] *SARIPA CC* (n 9) [1].
[24] See for example, the Broad Based Black Economic Empowerment Act, 53 of 2003 (legislation designed to promote the participation of Black people and women in the economy) as well as the impugned measures in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 CC and *Solidariteit Helpende Hand NPC & another v Minister of Basic Education & others* 2017 ZAGPPHC 1220.
[25] *Van Heerden* (n 13) [28]-[32]; *Barnard* (n 4) [29].

hollow.[26] The Court's approach to affirmative action is aligned with the commitment to a substantive rather than a formal conception of equality.[27] Accordingly, the South African courts see affirmative action as a necessary instrument to redress the historical, group-based, and structural disadvantage rooted in systems of domination and oppression. In light of the history of our colonial and apartheid legal order, white supremacy and patriarchy are arguably the most salient of these systems of domination and oppression.

By contrast, the US Supreme Court has long treated affirmative action (especially that based on race) as a derogation from or an exception to the Fourteenth Amendment's Equal Protection clause.[28] This is evident in the fact that its jurisprudence has required race-based affirmative action measures to be subject to a high standard of judicial review - strict scrutiny.[29] Moreover, the US Supreme Court has expressly rejected the use of affirmative action to redress group disadvantage that is rooted in systems of domination and oppression (the legacies of racial slavery, Jim Crow laws and persisting white supremist and patriarchal domination and oppression), what that court calls 'societal discrimination'.[30]

While the US takes a markedly different approach to affirmative action than South Africa, an exploration of the stigma argument and the impact that it has had in affirmative action cases in the US can help map the possibilities in South Africa and serve as a cautionary tale for the South African courts. This is because it can highlight why, even though it is accepted in the US, the stigma argument does not make sense in the South African context.[31] Now that I have laid out the differences in the approach to affirmative action in South Africa and the US, the remainder of this section defines stigma and illustrates the adverse impact it has had in the US Supreme Court's affirmative action jurisprudence.

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[26] *Van Heerden* (n 13) [31].

[27] See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 [62]; *Van Heerden* (n 13) [31].

[28] For an analysis and critique of the US Supreme Court's 'colour-blind' affirmative action jurisprudence see Kennedy (n 8); Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press 2006).

[29] *Bakke* (n 11) 290–91. For a critique of this approach see, Reva B Siegal, 'Equality Divided' [2013] Harvard Law Review 1; Devon W Carbado and Kimberle Crenshaw, 'An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection' (2019) The Yale Journal Law Forum 108.

[30] *Bakke* (n 11) 307–10.

[31] On the use of comparative jurisprudence to illustrate the need for divergence, in light of different textual, historical and doctrinal differences, see Fredman, 'Foreign Fads' (n 21) 642–43.

A. Constructing the 'Normal' and 'Stigmatised'

In his influential book, *Stigma: Notes on the Management of Spoiled Identity*, Goffman argued that society 'establishes means of categorizing persons and the complement attributes felt to be ordinary and natural.'[32] This assignment of what is "ordinary" and "natural", and what is not, leads to a bifurcation between 'the normal' – those who do not depart from the ordinary and natural and 'the stigmatized' - those who possess 'an attribute that is deeply discrediting' or 'an undesired differentness.'[33] According to Goffman, the one who bears this 'differentness', which could be related to their gender, race, disability or an intersection of these, is reduced in the minds of the normal, 'from a whole and usual person, to a tainted, discounted one.'[34] More than being marked as tainted, Goffman argued that 'the normal' believe the person with a stigma to be 'not quite human.'[35]

The understanding of stigma above makes it clear that stigma relates to more than just feelings of dislike. The stigmatised are considered, in some way or another, to be inferior to the 'the normal.'[36] As Loury puts it, stigma 'entails doubting the person's worthiness and consigning him or her to a social netherworld...it means being sceptical about whether the person can be assumed to share a common humanity with the observer.'[37] Referring to racial stigma, Lenhardt captures the dehumanization of the stigmatised and notes:

> *The person bearing the racialized attribute is not only disliked but socially dehumanized, a devalued individual whose ability to participate as a full citizen in society is fundamentally compromised by the negative meanings associated with his or her racial status. In essence, a racially stigmatized person becomes socially spoiled, dishonoured.*[38]

According to Goffman, flowing from the original location of the differentness (race or gender), 'the normal' impute other forms of

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[32] Erving Goffman, Stigma: Notes on the Management of Spoiled Identity (Prentice Hall Inc 1963) 2.
[33] ibid 3–5. See also Lenhardt (n 8) 821 who notes that racial stigma, like race itself, is a social construct.
[34] Goffman (n 32) 3.
[35] ibid 5.
[36] Lenhardt (n 8) 818.
[37] Glenn Loury, *The Anatomy of Racial Inequality* (Harvard University Press 2002) 19. See also Lenhardt (n 8) 809.
[38] Lenhardt (n 8) 818.

'imperfections' (intellectual or physical incapacity) based on the original one.[39] The imputed negative meanings on the stigmatised are not real or based on any fact but are a 'virtual social identity.'[40] What makes these virtual negative meanings real are that they are shared by the normal and imputed on all those who belong to the stigmatised group.[41] While Goffman's 'virtual social identity' sounds like stereotypes, there is a difference between stigma and stereotype. Stigma rests on underlying power; it is 'a process that is contingent on access to social, economic and political power.'[42] Accordingly, it takes power to stigmatise.[43] By contrast, stereotypes are not always rooted in underlying unequal power relations and can be positive or negative.[44] The 'virtual social identity' is always negative.[45] However, it could be said that the 'virtual social identity' encapsulates negative stereotypes *that are* underlined by unequal power relations.[46]

A brief analysis of racial stigma serves as a good example of the relationship between stigma and power. First, an important insight from critical race theory is that while race is a social construct, it is a construct that has real material meaning.[47] Within this construct, Black people are marked as inferior; they are 'the stigmatized', 'the normal' are white persons. The stigma is explained by social and, in the past, scientific theories which supported the idea that white persons were superior and thus had a right of dominance over Black persons – white supremacy.[48] From this, a 'virtual social identity' has been ascribed to the 'inferior race', including, *inter alia*, an inferior intellectual capacity.

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[39] Goffman (n 32) 5.
[40] Lenhardt (n 8) 818–21.
[41] ibid 823.
[42] For a detailed analysis of the shift from individual centric to structural conceptions of stigma see Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017) 10 and Ch 1.
[43] Bruce Link and Jo Phelan, 'Conceptualizing Stigma' (2001) Annual Review of Sociology 363, 375.
[44] Solanke (n 42) 9–10.
[45] ibid 9; see also Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 53–4 who distinguishes positive stereotypes from negative ones - the negative being those which attach to the 'socio-culturally disadvantaged.'
[46] Solanke (n 42) 9–10.
[47] Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press 2001) 7; See also, Joel M Modiri, 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) South African Journal on Human Rights 405, 412–14 for a discussion of racial reconstructionism.
[48] Charles Mills, *The Racial Contract* (Cornell University Press 1997) 1–2 defines white supremacy as the 'system of domination by which white people have historically ruled over and, in certain important ways, continue to rule over non-white people. See also Modiri (n 3) 247.

There are different kinds of stigma, and they can have many causes. However, at the core is an 'enforced social hierarchy', marking some attributes as discrediting and others as desirable.[49] They are all in relation to specific historical and socio-cultural contexts. For example, in India, caste-based stigma is rooted in the Hindu caste-hierarchy.[50] In this article, I am concerned with the institutions of white supremacy, ableism and patriarchy as the root of the different kinds of stigma that attach to beneficiaries of affirmative action under the EEA.[51] All three are complex institutions of power. What these institutions have in common is that in the workplace, they assign Black people, women and persons with disabilities as other, 'the stigmatised'. Those at the intersection of these classifications, as intersectionality theory has taught us, are the worst off. They are subject to the complex intersection of stigma arising from the different groups they belong to.[52]

The experience of stigma differs between and within different groups. In the context of race in the South African context, for example, the stigma that attaches to African, Indian and Coloured people is different and related to South Africa's history of racial domination and oppression, where legislation and social and economic policy created a hierarchy within the 'othered' non-white racial groups.[53] Within and between these groups, the kinds of stigma and how they manifest may be different and reflective of the intersection between multiple forms of privilege and disadvantage.[54]

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[49] Goffman (n 32) 44.

[50] For an analysis of the relationship between stigma and caste-hierarchy in India see Ashwini Deshpande, 'Double Jeopardy? Stigma of Identity and Affirmative Action' (2019) The Review of Black Political Economy 38; Ashwini Deshpande, 'Stigma or Redtape? Roadblocks in the Use of Affirmative Action' in Zoya Hassan and others (eds), *The Empire of Disgust: Prejudice, Discrimination and Policy in India and the US* (OUP 2018).

[51] Per s1 of the EEA, the beneficiaries are women, Black people (including African, Indian, Coloured and Chinese South Africans) and persons with disabilities.

[52] See Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) Stanford Law Review 1241; Collins Patricia Hill and Bilge Sirma, *Intersectionality* (Polity Press 2016); Devon W Carbado and Cheryl I Harris, 'Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality and Dominance Theory' (2019) Harvard Law Review 2193.

[53] In *Motala and Another v University of Natal* 1995 3 BCLR 374, the court noted the relative advantage that Indian people had to accessing education over those classified as Africans under the apartheid regime. See also *Solidarity and Others v Department of Correctional Services and Others* 2016 ZACC 18 [46].

[54] For an analysis of the Court's understanding of the relationship between intersectionality theory and discrimination law in South Africa see *Mahlangu and Another v Minister of Labour and Others* 2020 ZACC 24 [73]–[102]. For an analysis of intersectionality theory

Thus far, I've provided a broad understanding of what stigma is. This analysis is important because, by unpacking the definition of stigma, we might see why tackling the harms that arise from stigma is an important aspect of helping eradicate inequality but not a reason for rejecting measures that otherwise seek to do the same, in this context, affirmative action. Returning to the example of racial stigma, the fact that race is a social construct, underlined and perpetuated by white supremacy means that we can do something to redress it, 'we may unmake it and deprive it of much of its sting by changing the system of images, words, attitudes, unconscious feelings, scripts, and social teachings by which we convey to one another that certain people are less intelligent, reliable, hardworking, virtuous.'[55] As I will show later in this article, any stigma experienced by beneficiaries of affirmative action should be the catalyst for the process of 'unmaking', not the basis for declaring affirmative action unconstitutional. In the next section, I look at how stigma is specifically used in the affirmative action context. The literature on stigma and affirmative action identifies two dimensions - internal and external stigma.

1. Internal Stigma

In the context of affirmative action, internal stigma refers to the doubt of one's qualifications and achievements by virtue of being a beneficiary of affirmative action or the belief that one is a beneficiary of affirmative action.[56] These are said to be 'feeling[s] of dependency, and at times guilt that can strike those who believe themselves beneficiaries of affirmative action.'[57] According to Steele, this is 'one of the most troubling effects of racial preferences for blacks' - it is a 'demoralization, or...an enlargement of self-doubt.'[58] Internal stigma is said to send a 'painful message' to the beneficiaries 'that they are inferior and cannot compete on equal footing with Whites and others who gain admission to advanced study without an explicit, race-based preference.'[59] Solanke captures the internal conception of stigma in noting that 'at the individual level, stigmatisation is the consequence of interaction with oneself: it is the internal – probably intense - anticipation of stigma that is "felt".'[60]

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and anti-discrimination law see, Carbado and Harris (n 52); Crenshaw, 'Demarginalizing the Intersection' (n 52); Shreya Atrey, *Intersectional Discrimination* (OUP 2019).

[55] Delgado and Stefancic (n 47) 17.

[56] Hibbett (n 8) 77.

[57] Terry Eastland, 'The Case Against Affirmative Action' (1992) William & Mary Law Review 33, 41–2.

[58] Steele (n 12) 206.

[59] Lenhardt (n 8) 903.

[60] Solanke (n 42) 97.

The internal conception of stigma is at the core of the US Supreme Court's justice Thomas' race-based affirmative action jurisprudence. Justice Thomas has infamously argued that race-based affirmative action measures 'stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.'[61] In his opinion in *Grutter v Bollinger*, he notes:

> *Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving... When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.*[62]

The quote above captures two aspects of internal stigma. First, there is the idea that affirmative action measures brand all those who belong to groups that are beneficiaries of affirmative action as inferior. According to Steele, the marked (or perceived) beneficiaries 'feel a stab of horror' at being reflected as inferior.[63] While they may repress this feeling, he argues that it creates an 'inner realm of racial doubt.'[64] This, so the argument goes, has an impact on their behaviour and performance. On Steele's account, the stigmatised will perform poorly and not succeed because they have internalized 'the stigma of low worth that their peers place upon them.'[65] This low performance is said to further entrench the stigma imputed onto the group; they would have now shown their lack of intellectual capacity, skills, and work ethic.[66]

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[61] *Adarand* (n 12) 241.
[62] *Grutter v Bollinger* 2003 539 US 306 373.
[63] Steele (n 12) 207.
[64] ibid.
[65] Deshpande, 'Double Jeopardy' (n 50) 39.
[66] Lenhardt (n 8) 904; Cohen and Sterba (n 8) 112 writing in the context of affirmative action in higher education admissions in the US, 'Students admitted as a result of such preference are much less prepared to undertake the studies required of them than their non-minority peers'; Carter (n 12).

The second thing which the quote captures is the idea that internal stigma takes away from the achievements of candidates who, while belonging to a beneficiary group, would have 'made it on their own.'[67] This form of internal stigma is arguably what justice Powell was referring to in *University of California Regents v Bakke* as one of the 'serious problems of justice connected with the idea of preference.' [68] Supporting the application of strict scrutiny to all race-based affirmative action measures, even those that seek to redress group disadvantage or rather 'societal discrimination', he notes, 'nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.'[69]

2. External Stigma

The second dimension of stigma is external. External stigma refers to 'the burden of being treated or viewed differently by others, or as though one is unqualified, based on their assumption that one is a beneficiary of affirmative action.'[70] It is 'a collective negative reaction to a stigma that confers lower social status and power to those who possess the stigmatised attribute.'[71] The external dimension of stigma was captured in *City of Richmond v JA Croson* where justice O' Connor argued that 'classifications based on race carry a danger of stigmatic harm...they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.'[72]

Similar to the internal dimension, the external dimension of stigma has two components. The first component of external stigma in the affirmative action context is the idea that affirmative action *causes* or *promotes*, in the eyes of 'the normal', the belief that the beneficiaries of affirmative action are inferior. In *Adarand Constructors Incorporated v Pena*, justice Thomas captured this aspect, noting that – 'So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority.'[73] Similarly, in *Bakke,* justice Powell held that 'preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on

[67] Lenhardt (n 8) 904; Cohen and Sterba (n 8) 112.
[68] *Bakke* (n 11) 298.
[69] ibid.
[70] Hibbett (n 8) 77; Onwuachi-Willig, Hough and Campbell (n 8) 1303.
[71] Solanke (n 42) 88.
[72] *Croson* (n 12) 493.
[73] *Adarand* (n 12) 241.

a factor having no relationship to individual worth.'[74] The second component of external stigma in the affirmative action context is the idea that affirmative action causes or promotes resentment and hostility towards the beneficiary groups.[75] This last aspect of external stigma is captured in justice O'Connor's dissent in *Metro Broadcasting v Federal Communications Commission,* where she noted:

> *Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit.*[76]

The analysis of internal and external stigma in the US Supreme Court's jurisprudence reveals that there is an assumption that stigma is caused by being a beneficiary of affirmative action. Essentially, the US Supreme Court has not made the connection between racial stigma and the unequal power relations inherent in white supremacy. In addition, it reveals that the stigma argument against affirmative action is tied to a specific conception of the right to equality - a formal, individualistic conception of equality that elevates individual merit in a manner that would, as I argue in Section 3, entrench existing patterns of inequality. This can be seen in how the US Supreme Court judges frame affirmative action as a potential threat to, as seen in the quote above, the commitment to individual merit. In the next section, I examine the stigma argument's adverse impact on affirmative action in the US.

3. The Uses of Stigma

As is hopefully evident in the analysis above, the stigma argument has been particularly successful before the US Supreme Court.[77] It has been a core part of the construction of the narrow, 'colour-blind' affirmative action jurisprudence in that jurisdiction.[78] This can be seen in the choice of a high standard of review for race-based affirmative action – strict scrutiny.[79] The

[74] *Bakke* (n 11) 298.
[75] *Adarand* (n 12) 241.
[76] *Metro Broadcasting Inc v Federal Communications* Commission 497 US 547 1990 604.
[77] Kennedy (n 8) 115–27; Onwuachi-Willig, Hough and Campbell (n 8); Halaby and McAllister (n 8); Hibbett (n 8).
[78] See (n 28) above.
[79] See *Adarand* (n 12) 228–30; *Grutter* (n 62) 326–327; *Gratz v Bollinger* 2003 539 US 244 270.

choice of strict scrutiny has meant that very few race-based affirmative action measures, to the detriment of racial minorities in that jurisdiction, can pass constitutional muster.

In the early cases searching for an appropriate standard of review for race-based affirmative action, the US courts had three options ranging from the most deferent to the highest standard of review: rationality, intermediate and strict scrutiny. For the judges who rejected strict scrutiny, rationality was not seen as an option partly because of the purported stigmatic harm of racial classifications – the courts could not apply a deferent standard of review to measures that risked stigmatic harm. Thus, in *Bakke*, justice Brennan dissented to justice Powell's strict scrutiny because the University's purposes 'did not contravene the cardinal principle that racial classifications that stigmatize— because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.'[80] However, he also rejected rationality review. Drawing from the cases on gender-based affirmative action, he argued that race-based affirmative action measures created the 'hazard of stigma...they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.'[81] Justice Brennan's rejection of rationality review in cases dealing with race-based affirmative action is summarised in the quote below:

> *In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be strict—not "strict in theory and fatal in fact," because it is stigma that causes fatality—but strict and searching nonetheless.*[82]

[80] *Bakke* (n 11) 357–58.
[81] ibid 360.
[82] ibid 361–60 [emphasis added].

The argument above was carried on in *Fullilove v Klutznick*. Rejecting rationality in favour of intermediate scrutiny to federal race-based affirmative action measures, in his concurring opinion, justice Marshall noted that 'race has often been used to stigmatize politically powerless segments of society, and that efforts to ameliorate the effects of past discrimination could be based on paternalistic stereotyping, not on a careful consideration of modern social conditions.' [83] While justice Brennan (in *Bakke*) and justice Marshall (in *Fullilove*) used the stigma argument to warn against affirmative action measures which may entrench inequality, ultimately, similar reasons are used to favour strict scrutiny – limiting the range of permissible race-based affirmative action measures in the US. In fact, justice O'Connor's majority in *Adarand* (the case that affirmed strict scrutiny for all race-based affirmative action) drew from the stigma analysis in earlier cases to conclude that the 'passages' noting the stigmatic harm of affirmative action 'make a persuasive case for requiring strict scrutiny.'[84]

In addition to supporting the high standard of review in race-based affirmative action in the US, the stigma argument was instrumental to defining the scope for permissible affirmative action measures under the Fourteenth Amendment. In *Fullilove*, justice Burger affirmed the constitutionality of the impugned race-based affirmative action measure partly because it was crafted in a manner that did not stigmatise the beneficiary groups - the beneficiaries in the case had to be qualified to do the work, the affirmative action measure did not amount to a quota, and it had a limited scope of application.[85] From this, we can legitimately gather that, at least according to justice Burger, affirmative action measures which allow for the preference of less qualified candidates, which amount to quotas, or which have a broad scope of application, could fall foul of the Fourteenth Amendment because of the purported stigmatic harm that arises therefrom. As I examine in Section 3 below, the stigma argument's impact on affirmative in the US should raise the eyebrows of anyone familiar with affirmative action measures taken under s9(2) of the South African Constitution, where there is no express prohibition of the use of

[83] *Fullilove* (n 11) 519.
[84] *Adarand* (n 12) 229.
[85] *Fullilove* (n 11) 521.

quotas,[86] and those taken under the EEA where affirmative action includes preferential treatment for 'less qualified' candidates.[87]

3. Stigma in the South African Courts

The South African courts have recognised the pervasiveness of stigma in South African society. Outside the affirmative action context, stigma has played a role in identifying the harms that the prohibition of unfair discrimination seeks to protect.[88] For example, in the landmark *Hoffman v South African Airways* case, the Court recognised HIV status as a ground on which unfair discrimination is prohibited *because* persons with HIV are a stigmatised group.[89] The recognition of HIV status as a ground on which unfair discrimination is prohibited enabled the Court to find that a policy prohibiting the employment of persons who were HIV positive amounts to unfair discrimination. According to the Court, 'In view of the prevailing prejudice against HIV positive people, any discrimination against them can...be interpreted as a fresh instance of stigmatisation.'[90]

In another case, *Centre for Child Law and Others v Media 24 Limited and Others,* the Court acknowledged that stigma has both internal and external dimensions.[91] According to justice Mhlantla, stigma is 'influenced by external factors' but is also 'an internalised struggle' whose consequences are deeply personal.[92] The case was about whether child victims should be granted anonymity in criminal proceedings. One of the arguments made in the case was that extending anonymity to child victims would entrench the stigma attached to being involved in criminal proceedings.[93] In her judgement, justice Mhlantla noted the pervasiveness of stigma in society.[94] However, rejecting the argument that the risk of entrenching stigma should detract from extending anonymity, she affirmed

[86] See, Nomfundo Ramalekana, 'What's So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution' (2020) Constitutional Court Review 252. I argue that in line with the commitment to substantive equality, s9(2) of the Constitution permits the use of quotas based on race, gender, and other criteria.
[87] See EEA s15(3) and s20(3).
[88] Section 9(3) of the South African Constitution prohibits direct and indirect discrimination on several grounds, including, race, gender, disability and sexual orientation.
[89] *Hoffmann v South African Airways* 2001 1 SA 1 [28].
[90] ibid.
[91] *Centre for Child Law and Others v Media 24 Limited and Others* 2020 1 SACR 469 CC [80].
[92] ibid.
[93] ibid [78]-[79].
[94] ibid [28].

that other considerations outweighed the risk of entrenching stigma. In that case, it was providing child survivors of crime an opportunity to exercise agency and take ownership of their experience.[95]

While the examples above do not critically engage with stigma as rooted in unequal power relations and systems of domination of oppression, they do make it clear that the South African courts are cognizant of the pervasiveness of stigma in South African society. More important, and as seen in justice Mhlantla's judgement in *Media 24*, there is recognition that other, more important considerations, will at times outweigh the risk of stigmatising specific groups or persons. In the remainder of this section, I explore the development of the stigma argument in the affirmative action context in South Africa. Before this exploration, it is important that I give a brief sense of the shape that affirmative action in South Africa can take, and why, in light of its impact on affirmative action in the US, the stigma argument could be a powerful tool against affirmative action in South Africa.

A. The Shape of Affirmative Action in South Africa

As discussed in Section 2 of this article, s9(2) of the South African Constitution permits affirmative action and other positive redistributive measures.[96] The Court has labelled affirmative action under s9(2) as 'remedial' and 'restitutionary' in nature - directly linking affirmative action with the struggle to eradicate inequality and undo the legacy of apartheid and colonial domination and oppression.[97] While s9(2) of the Constitution does not list its intended beneficiaries, the courts have affirmed criteria including race and gender – targeting disadvantaged groups in society.[98] Further, the nature of permissible affirmative action under s9(2) is broad. For example, there is no express prohibition of quotas or preferential treatment – leaving a lot of scope for innovation in the design of affirmative action under s9(2) of the Constitution. As will be discussed in detail below,

[93] ibid [83].

[96] See, *Correctional Services* (n 53); *SARIPA CC* (n 9). On the history of the equality right including the affirmative action provision see, Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' (1994) South African Journal on Human Rights 149; Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) South African Journal on Human Rights 441.

[97] *National Coalition* (n 27) [61]; *Van Heerden* (n 13) [30]; *Barnard* (n 4) [29]; *SARIPA CC* (n 9) [1]–[2].

[98] For example, in *Van Heerden* (n 13) [26]-[27] the court affirmed classifications based on race and gender; and in *SARIPA CC* (n 9) [40]-[42] the court accepted classification based on race and gender but not date of citizenship.

the possibility of quotas and preferential treatment under s9(2) creates fertile ground for the use of the stigma argument.

Similar to affirmative action taken in terms of s9(2), the purpose of affirmative action under the EEA and its definition contain features that strengthen the basis of the stigma argument in the South African employment context. What are these features? First, s2 of the EEA states that the purpose of this statute is to 'promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination' and 'implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.' Second, s15(1) of the EEA defines affirmative action as 'measures designed to ensure that *suitably qualified* people from *designated groups* have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.' As I noted earlier in the article, the designated beneficiary groups are Black people, women and persons with a disability. Third, s15(3) provides that affirmative action measures under the EEA include 'preferential treatment' and 'numerical goals' but exclude quotas. Fourth, according to s20(3) of the EEA, a person may be suitably qualified for a job as a result of any of, or a combination of the person's formal qualifications, prior learning, relevant experience *or the capacity to acquire, within a reasonable time, the ability to do the job*.

Why do the provisions sketched above create a particularly strong basis for the stigma argument? Read together, the provisions mean that, under the EEA's affirmative action regime, *suitably* and not *equally* qualified Black people, women and people with a disability can be *preferred* over candidates who do not belong to these groups and are required to be 'equitably represented' at all occupational levels in the workplace. The group classifications based on race, gender and disability status - the permissibility of the preferential treatment of persons who may not be *equally* qualified to the non-beneficiary group, white males, the benchmark for demographic representation, and the wide definition of suitably qualified allow an easy attachment of the argument that these beneficiaries are lacking in intellectual capacity, are unqualified, are incompetent and made it only on the back of their membership of the beneficiary groups – all to the detriment of 'meritorious' white males without a disability.

Before I turn to how the stigma argument has manifested in the South African court's affirmative action jurisprudence, it's important that I assert the necessity of the EEA's approach to affirmative action - an approach aligned with the goal of achieving substantive equality. First, the *suitably* and not *equally* qualified criteria pose a challenge to the liberal ideal of

individual merit. At its core, the principle of individual merit says that a person is entitled to a mode of treatment or a specific good because of a quality they possess.[99] For example, in the employment context, a person is said to have the requisite merit for appointment or promotion if they have the skill, educational background and experience relevant to performing the job. As Young summarises, 'The merit principle holds that positions should be awarded to the most qualified individuals...those who have the greatest aptitude and skill for performing the tasks those positions require.'[100] In the abstract, the merit principle protects the right to equality in the formal sense – that persons should be treated based on their individual merit and not based on arbitrary criteria such as race or gender.

The problem with the merit principle is that it assumes neutrality when setting the criteria for what merit requires in a given context. However, as is increasingly being accepted, merit is not neutral – it often reflects and reproduces existing relations of privilege, hierarchy and subordination.[101] Further, even if we could agree on 'neutral' or 'objective' criteria for merit, if we do not acknowledge how different forms of disadvantage serve as a barrier for some groups to acquire the necessary skills, qualifications or other benchmarks, the application of the merit principle without this context in mind, would entrench existing patterns of inequality. This is because those likely to meet our 'neutral' or 'objective' criteria would often come from privileged, non-stigmatised groups. Against the background of the colonial and apartheid exploitation, marginalisation and exclusion of Black people, women and persons with a disability from getting an education, skills development and training, many members of the designated beneficiary groups enter the labour market with less educational qualifications, skills, training and experience than white males without a disability.[102] The application of a 'neutral' or 'objective' merit principle in this context would amount to rewarding the privileged classes and perpetuating disadvantage.

The second reason why the prevailing approach to affirmative action is appropriate and necessary is that the designated groups, beneficiaries

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[99] Richard Fallon, 'To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination' (1990) Boston University Law Review 815, 822; see also, Christopher McCrudden, 'Merit Principles' (1998) Oxford Journal of Legal Studies; Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 200.

[100] Young (n 99) 200.

[101] ibid 205.

[102] In *SARIPA CC* (n 9) [78] justice Madlanga engaged with the reality of how, in the workplace, white males are disproportionately more experienced. This, he notes, is due to the impact of racist preference (in favour of white males) under the apartheid regime. See also *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 6 BLLR 539 LC [5].

classified on the basis of race, gender and disability, are all groups that are subject to systemic forms of oppression and domination in the labour market and South African society more broadly. The choice to target these groups as beneficiaries for affirmative action is to go to the heart of prevailing inequality in South Africa. It is not an acceptance of some inherent intellectual incapacity or incompetence – these arise from the stigma attached by the systems of domination and oppression to which these groups are subject. However, as will be clear below, the features of affirmative action described above sit at the core of the emerging stigma argument against affirmative action in South Africa.

B. Internal and External Stigma in the South African Courts Thus Far

The emerging stigma argument in South Africa's affirmative action jurisprudence captures the internal and external dimensions of stigma. We first see the stigma argument in *Barnard*. The *Barnard* case was the Court's second affirmative action decision and the first under the EEA. The case concerns the twice refusal to appoint a white woman because of an overrepresentation of white women for the occupational level for which she applied.[103] A core part of the argument in the case related to whether, in deciding not to appoint her, there had been a failure to take her individual skills, merit and competence into account.[104] The stigma argument emerged in justices Cameron, Froneman and Majiedt's concurring opinion. The judges warned against allowing race to be the decisive factor in employment decisions, noting:

> *We should be careful not to allow race to become the only factor in employment decisions. For this may suggest the invidious and usually false inference that the person who gets the job has done so not because of merit but only because of race. Over-rigidity therefore risks disadvantaging not only those who are not selected for a job, but also those who are.*[105]

The quote above captures the internal and external dimensions of stigma. The external dimension manifests as 'invidious and usually false' inferences – the burden placed by others on the beneficiaries or those

[103] *Barnard* (n 4) [6]-[15].
[104] ibid [53].
[105] ibid [80].

who, because of their race, gender or disability, are assumed to be beneficiaries of affirmative action and thus lacking in merit. The internal dimension is related to the purported impact that this has on the intended beneficiaries of affirmative action.

Following *Barnard,* in S*ARIPA*, the High Court used stigma to buttress the argument that the impugned affirmative action measure in that case was unconstitutional. Before examining the case, it's important to note that *SARIPA* was not decided under the EEA. The impugned affirmative action measure in the case was taken in terms of s9(2) of the Constitution.[106] However, as will be seen below, key features of the impugned affirmative action measure in the case mirrored provisions in the EEA.

The *SARIPA* case was concerned with an affirmative action measure intended to transform the insolvency industry and eliminate the hegemony of white male insolvency practitioners.[107] To do so, the policy required the Masters of the High Courts to redistribute the allocation of work to insolvency practitioners based on a list system that separated beneficiaries based on race, gender, and citizenship.[108] The list created four categories:

> *i. Category A of the policy consisted of Black women who became South African citizens before 27 April 1994;*
>
> *ii. Category B consisted of Black men who became South African citizens before 27 April 1994;*
>
> *iii. Category C consisted of white women who became South African citizens before April 1994 and;*
>
> *iv. Category D consisted of Black men and women, white women who became South African citizens on or after 27 April 1994 and white males regardless of when they became citizens.*[109]

Based on the four categories, the policy required appointments to be made in the ratio A4: B3: C2: D1. The letters represent the racial and gender categories, while the numbers represent the number of practitioners who should be appointed in each category.[110] What this meant was that, of every ten estates that came before a Master of the High Court,

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[106] *SARIPA* (n 5) [71].
[107] ibid [45].
[108] ibid [44]–[59].
[109] *SARIPA CC* (n 9) [20].
[110] ibid [23].

they had to allocate four of these to Black women on the list, then three to Black men and so on. The logic behind the prioritisation of Black women was linked to statistics that indicated that Black women historically had the lowest allocation of estates and were thus the most disadvantaged – followed by Black male insolvency practitioners.[111] In addition to the use of race and gender, another similarity with the EEA is that the policy in *SARIPA* required the beneficiaries to be *suitably* rather than *equally* qualified. Thus, individual merit and expertise beyond the threshold of suitable qualification were mostly not relevant. Only in cases where the 'complexity' of an estate warranted expertise would individual expertise, beyond suitable qualification, be considered.[112]

On challenge, one of the arguments made was that the policy was arbitrary and irrational because it would lead to fewer allocations of work for already accomplished persons in the beneficiary classes; they would not be rewarded for their 'excellence.'[113] Further, drawing on Cameron, Froneman and Majiedt's statement in *Barnard* about the harm that affirmative action measures could cause to its beneficiaries, justice Katz extended the prohibition of quotas under the EEA to include affirmative action quotas taken under s9(2) of the Constitution. For justice Katz, quotas, defined by their lack of flexibility to taking individual merit, experience and expertise into account, were constitutionally prohibited in part because of their stigmatic harm on the intended beneficiary classes.[114] As I noted earlier in the article, there is no express prohibition of quotas under the s9(2) of the Constitution.[115] In prohibiting quotas under s9(2), justice Katz's decision used stigma to narrow the range of permissible affirmative action under the Constitution.

In *Barnard*, the stigma argument arose in the context of an affirmative action measure perceived to be 'rigid' in its failure to take individual merit, skills and competence into account.[116] Similarly, in *SARIPA*, it arose in the context of an affirmative action measure said to amount to a quota – defined as a rigid adherence to numerical goals, leaving little room for taking individual merit into account.[117] It should already be clear and worrying that the use of the stigma argument in the South African court's affirmative action jurisprudence aligns with the US Supreme Court's approach. Recall that under the US Supreme Court's affirmative action jurisprudence, quotas are prohibited, and affirmative action measures

[111] ibid [166]–[170].
[112] *SARIPA* (n 5) [58].
[113] ibid [158].
[114] ibid [205].
[115] See (n 81) above.
[116] *Barnard* (n 4) [87]
[117] *SARIPA* (n 5) [208]–[217].

which allow the appointment or selection of persons *not equally qualified* to non-beneficiaries are marked as stigmatic. It seems our courts are suggesting the same.

In the South African context, especially in the context of the EEA, where the preferential treatment of *suitably*, rather than *equally* qualified candidates is expressly permitted – the stigma argument would at least compel a shift to requiring 'equal' qualification or the neutral or objective merit principle critiqued earlier.[118] This is because, following the logic of the US jurisprudence, to avoid stigmatic harm, affirmative action measures would have to be crafted in a manner that complied with the merit principle – failing which the beneficiaries would suffer stigmatic harm. At worst, this approach would revert to formal equality. At best, it would limit affirmative action measures to the 'tie-breaker' principle, race, gender and disability status becoming relevant only after we have established 'equal merit' between the beneficiaries and non-beneficiaries – elevating individual merit over the importance of helping eradicate inequality.

It bears emphasis that the causation between suffering internal and external stigma and being a beneficiary of affirmative action is assumed. In South Africa, it appears to be assumed in the context of 'rigid' affirmative action measures and quotas. Elsewhere, I have argued that a blanket prohibition of 'rigidity' and quotas does not fit the commitment to substantive equality under s9(2) of the Constitution and the provisions in the EEA.[119] For now, the argument that rigid affirmative action measures or quotas stigmatise their beneficiaries is relevant because it gives us some idea of how the stigma argument, if not rejected, is likely to develop.

4. Countering the Stigma Argument

As seen in the US Supreme Court's race-based affirmative action jurisprudence, a wholesale acceptance of the stigma argument against affirmative action in South Africa could result in an affirmative action jurisprudence that entrenches and reproduces inequality by limiting the forms of permissible affirmative action. More worrying, it could lead to the outright prohibition of affirmative action as we know it. The latter is unquestionably the goal behind the strategic litigation against affirmative action in South Africa. To counter this, the sections that follow suggest

[118] For a similar reading, specifically of the High Court decision in ***SARIPA***, see Kevin Minofu, 'Non-Racial Constitutionalism: Transcendent Utopia or Color-Blind Fiction' (2021) 11 Constitutional Court Review 301, 317–18.

[119] Ramalekana, 'What's So Wrong' (n 86).

arguments that should be made against the stigma argument in South Africa.

A. Stigma Came First

The first counter to the use of stigma the argument is that the adverse reaction that *could* result from being identified as a beneficiary (internal stigma) is not caused by affirmative action. Instead, it 'stems from the derogatory meaning placed upon affirmative action' and the 'inescapable inference that those needing the boost of affirmative action are inferior.'[120] Essentially, the external stigma comes first – *possibly* causing internal stigma – but it comes first. Moreover, the external stigma is itself not an outcome of affirmative action; it is rooted in the systems of domination and oppression that underlie the stigma.

The stigma argument is made without any empirical evidence to show that affirmative action either causes or entrenches stigma. However, some studies have shown that there is no causation between being a beneficiary of affirmative action and experiencing stigma.[121] In a study of internal and external stigma in higher education admissions in the United States, Onwuachi-Willig, Hough and Campbell concluded that it could not be shown that the observed stigma on beneficiaries was as a result of being a beneficiary of affirmative action.[122] This conclusion was based on their finding that there was no difference in the experience of stigma between institutions that had affirmative action policies in place and those that did not.[123] Thus, whether or not one was a beneficiary of affirmative action was irrelevant to the experience of stigma. An African American student at an institution that had no race-based affirmative action policy in effect was not better off when compared to whether they were at an institution that used race-based affirmative action in its admission. As the study focussed on race-based admissions policies, the authors concluded that stigma was rooted in institutional racism; it was not a by-product of affirmative action.[124]

In a study of the experience of internal and external stigma in the higher education sector in India, Deshpande found a higher prevalence of

[120] Kennedy (n 8) 121.
[121] For studies in the US context see, Onwuachi-Willig, Hough and Campbell, (n 8) and William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race and in College and University Admissions* (Princeton University Press 1998). In India, see Deshpande, 'Double Jeopardy' (n 50) and 'Stigma or Redtape' (n 50).
[122] Onwuachi-Willig, Hough and Campbell (n 8) 1332.
[123] ibid.
[124] ibid 1321.

external as opposed to internal stigma.[125] Essentially, while beneficiaries of affirmative action were stigmatised by their peers, they had not internalised 'the low worth' placed upon them by others as beneficiaries of affirmative action. According to Deshpande, the Scheduled Castes and Scheduled Tribes who benefit from these measures are already a stigmatized group, it was thus difficult to find a causal connection between the stigma which arises from the caste system which stigmatises them and that which arises from their position as beneficiaries of affirmative action.[126] Based on these findings, Deshpande argues that the experience of external stigma should not be used against affirmative action because the stigma exists with or without affirmative action.[127]

Considering the purported impact of stigmatization that comes from being or being perceived to be an affirmative action beneficiary, one would think that the intended beneficiaries of these policies would decline them. In another study, Deshpande explored whether the fear of stigmatisation had an impact on the uptake of positions or resources based on affirmative action.[128] The study found that the non-use of affirmative action was mostly due to bureaucratic red tape than the fear of stigmatization.[129] This was particularly the case for beneficiaries who belonged to the most stigmatised and overall more socio-economically disadvantaged groups.[130] She notes, 'for individuals who are from groups that are already highly stigmatized, the additional stigma of reservations is not a very important concern.'[131] My hypothesis is that a similar empirical study in South Africa would reveal the same – most persons eligible to benefit from affirmative action would avail themselves of the benefit.

B. Stigma's Problematic Assumptions

In addition to the very weak causation between stigma and affirmative action, the stigma argument is troubling for another reason; it is often based on the erroneous assumption that affirmative action measures necessarily allow for the admission, appointment, or promotion of unqualified or unskilled candidates – persons whose appointment attracts the stigma and prejudice related to their lack of capability, skill, and expertise. This is because, so the argument goes, once appointed or promoted, the affirmative action beneficiaries will fail to perform their

[125] Deshpande, 'Double Jeopardy' (n 50).
[126] ibid 41, 57.
[127] ibid 57.
[128] Deshpande 'Stigma or Redtape' (n 50).
[129] ibid 32–3.
[130] ibid 34.
[131] ibid 32–3.

jobs, entrenching or creating a basis for prejudice and stereotyping against their group. This need not be the case. As discussed in detail in Section 3, under the EEA, the beneficiaries are suitably qualified. They just need not be *as* qualified as persons belonging to the non-beneficiary groups. Thus, in *Barnard*, Moseneke J rightly notes that affirmative action measures are not a refuge for the mediocre or incompetent.[132] Moreover, the stigma argument assumes that the metric for merit is objective, free of prejudice and the most important principle that should guide the distribution of resources in society – as I argued in Section 3, this is not the case.[133]

C. The Benefits Outweigh the Cost

There is no empirical evidence that the harms of stigma arising from being a beneficiary of affirmative action (accepting that there are) outweigh the benefits of affirmative action. In a famous empirical study on affirmative action in higher education in the US, Bok and Bowen argued that if the charge that the stigmatic impact of affirmative action outweighed the benefits, 'those who suffered from stigma would presumably be the ones most likely to feel its effects.'[134] However, the empirical evidence did not support this, thus they concluded, 'In the eyes of those best positioned to know, any punitive costs of race-based policies have been overwhelmed by the benefits gained through enhanced access'.[135] If there is stigma that arises from being a beneficiary of affirmative action, it is outweighed by the stigma reducing impact that comes from the increase in the representation and participation of disadvantaged groups in spaces where they have been historically excluded.[136] In essence, stigma should not be used against affirmative action; reducing stigma should be seen as one of the purposes of affirmative action.

Moreover, a rich understanding of the goals of affirmative action, as a part of the commitment to substantive equality, can help push against the stigma argument. According to Fredman, substantive equality has multiple dimensions – redressing disadvantage; countering stigma, stereotyping,

[132] *Barnard* (n 4) [41].

[133] Young (n 99) ch 7 (Affirmative action and the myth of merit).

[134] Bowen and Bok (n 121) 265; Kennedy (n 8) 125–27 who makes the argument that the stigma argument is often an exaggeration.

[135] Bowen and Bok (n 121) 265.

[136] See Lenhardt (n 8), 915, for the argument that the group-level harm of not having affirmative action outweighs the individual harm that could arise from these measures. See also Deshpande, 'Double Jeopardy' (n 50) 57, who argues that 'The presence of a greater number of qualified individuals, owing to AA in higher education, provides role models to other members of the community and weakens the stigmatizing association between group membership and incompetence.'

humiliation and violence; enhancing participation and voice; accommodating difference and achieving structural change.[137] These dimensions are derived from an analysis of the different harms that underlie equality claims.[138] They encompass a deep commitment to eliminating inequality. Under this conception of substantive equality, when weighing the benefits of an affirmative action measure that advances and protects suitably qualified persons, the drawback of the stigmatic harm on its beneficiaries could be outweighed by the other dimensions of substantive equality. In particular, that a measure allows for a redistribution of material resources to disadvantaged groups; increases their representation where they have been historically excluded and marginalised and thus increases their participation; in increasing the representation of the disadvantaged groups it helps change dominant norms, displacing 'the normal' from the centre - all these could weigh against any real or perceived stigmatic harm and could work to counter external stigma.[139] Further, this conception of substantive equality could be a tool that underlies why, as argued in my concluding thoughts below, redressing stigma should be built into the design of affirmative action measures.

5. Final Thoughts and Conclusion

> *Stigma rhetoric works because it helps to justify...privileging procedural color-blindness over substantive racial justice, and of oversimplified and a-historical analyses over more complicated and contextualized analyses. That is, it elevates superficial and decontextualized political rhetoric over substantive conversation that must occur about existing racial inequality and its myriad and complex causes.'*[140]

[137] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712.
[138] There have been multiple articulations of this ideal; see Albertyn, 'Contested Substantive Equality (n 96); Catherine Albertyn and Sandra Fredman, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' (2015) Acta Juridica 430.
[139] Ockert Dupper, 'In Defence of Affirmative Action in South Africa' (2004) South African Law Journal 187, 206 for the argument that affirmative action measures can help overcome prejudice by changing attitudes towards members of disadvantaged groups.
[140] Onwuachi-Willig, Hough and Campbell (n 8) 1323.

In a jurisdiction where it remains unclear whether beneficiaries can bring a claim arguing that an affirmative action measure has not been implemented,[141] it is problematic to turn around and say that affirmative action measures can be invalidated based on the stigmatic harm it causes them. Further, as noted in the US context, the stigma argument can be disingenuous and distracting.[142] Coming in through *Barnard*, justices Cameron, Froneman and Majiedt, likely mentioned this to paint a fuller canvas of the kinds of harms that could arise from affirmative action measures, not as a substantive basis for declaring affirmative action measures unconstitutional. But it is picked up and used in this way by the High Court in *SARIPA.*

I think that the best way to understand the stigma argument is to locate it within the context of the broader white backlash against affirmative action and other measures to redress the legacy of colonialism and apartheid in South Africa. White-backlash refers to 'the legal strategies, rhetorical discourses and discursive habits, political mobilisation efforts, conscious and unconscious practices, attitudes and mindsets by which whites seek to preserve their interests and privileged status and justify the disproportionate disadvantage suffered by Blacks.[143] As Modiri has argued, our prevailing experience of white-backlash comes 'in the form of...claims of unfair discrimination or reverse-racism against whites, the appropriation of minority rights issues, purportedly principled calls for equal opportunity, colour blindness and merit.'[144] But here it is coming in an even more veiled package – it is coming as an argument in the interests of the disadvantaged.

In a sense, the stigma argument has a redemptive quality.[145] The opponent of affirmative action is saved from having to argue that an affirmative action measure violates the rights of the non-beneficiary class – especially if this is or could be perceived as defending the position of conservative, Afrikaner-nationalist organisations such as the trade union Solidarity. As Onwuachi-Willig, Hough and Campbell note, '[T]he rhetoric of stigma, especially as it is deployed with the white innocence, serves to effect a type of "racial redemption," whereby white opponents of

[141] See Emma Fergus and Debbie Collier, 'Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation' (2014) South African Journal on Human Rights 484; Neil Coetzer, 'Affirmative Action: The Sword versus Shield Debate Continues: Analyses' (2009) 21 South African Mercantile Law Journal 92; David Thompson and Adriaan Van der Walt, 'Affirmative Action: Only a Shield? Or Also a Sword? *Harmse v City of Cape Town* (2003) 24 ILJ 1130 and *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC)'(2008) Obiter 636.

[142] Onwuachi-Willig, Hough and Campbell (n 8) 1321.

[143] Modiri (n 3) 254.

[144] ibid.

[145] Onwuachi-Willig, Hough and Campbell (n 8) 1324.

affirmative action can justify their resistance to affirmative action because their opposition is for the "good"' of those allegedly be harmed by affirmative action.[146] However, the real impact is to entrench existing patterns of inequality.

In this article, I have explored how the stigma argument could infiltrate our affirmative action jurisprudence. Particularly, I have shown that the acceptance of the stigma argument in South Africa would render many affirmative action measures unconstitutional. As a gesture against this, I have argued that the stigma experienced by beneficiaries of affirmative action, internal and external – is not caused by affirmative action. However, to the extent that the contrary could be shown, I argued that the benefits of affirmative action – understood through the lens of a multi-dimensional conception of substantive equality, outweigh its costs. Overall, I think the key takeaway from the stigma debate in the US is that in designing affirmative action measures – we must consider how we could use these measures as a tool to dismantle *already present* stigma against the beneficiaries of affirmative action.

According to Link and Phelan, there are two possible interventions to ending stigma. The first intervention would seek to change the behaviour of the dominant group – for example, one might target hiring practices to increase the employment chances of persons who belong to stigmatized groups – changing the employer's attitude and beliefs towards hiring this class of persons.[147] The problem with this approach is that it fails to go to the core of the problem – thus, whatever gains can be made will erode over time. Thus, they argue that the best intervention is one that is multifaceted, and which seeks to address the fundamental cause of stigma, a core of which must address the unequal power relations.[148]

In her work on internal and external stigma in the Indian higher education context, Deshpande recommends that the best way to address the stigma issue is by establishing anti-discrimination programmes to grapple with and counter external 'stigmatizing attitudes, microaggressions, and passive harm.'[149] These can be built into any affirmative action measure. Under the EEA, the process of drafting affirmative action measures is particularly collaborative.[150] This includes the obligation on designated employers, when drafting affirmative action measures, to consult with employees and trade unions,[151] and to analyse its employment

[146] ibid.
[147] Link and Phelan (n 43) 380.
[148] ibid 381.
[149] Deshpande, 'Double Jeopardy' (n 50) 41.
[150] EEA s 16-20.
[151] ibid 15–19.

policies, practices, procedures, and a profile of the employer's workforce.[152] These processes could be used to educate beneficiaries and non-beneficiaries about the value and importance of anti-discrimination and affirmative action laws and policies – all to challenge and undermine prevailing stereotypes, prejudice and stigma. Ultimately, none of these interventions will eradicate the unequal power relations in society and the structures of domination and oppression from which stigma is rooted. However, they will, at the very least, undermine these.

[152] ibid 19.