

January 01, 2009

Transnational dimensions of race in America

Hope Lewis

Northeastern University School of Law

Recommended Citation

Lewis, Hope, "Transnational dimensions of race in America" (2009). *School of Law Faculty Publications*. Paper 2.
<http://hdl.handle.net/2047/d20001076>

This work is available open access, hosted by Northeastern University.

TRANSNATIONAL DIMENSIONS OF RACE IN AMERICA

*Hope Lewis**–“Out of many, one people.”¹

Jamaica, the nation from which my parents and grandmothers migrated to the United States, includes a motto on its national coat of arms that is at once inspiring and yet disturbingly ironic: “Out of many . . . one people.”² The emblem itself depicts only two of the “many” an indigenous man and woman from the people who were wiped out by the ravages of colonial invasion and the diseases to which they were exposed by European explorers.

The motto seems intended to reflect the fact that Jamaica, like much of the Caribbean, is a crucible of hybridity.³ The vast majority of the island’s people are of West African descent. Yet the particulars of the island’s colonial history, the Trans-Atlantic slave trade, indentured servitude, plantation economies, and global migration mean that Europeans, South Asians, and East Asians

* Copyright © 2008 Hope Lewis. All rights reserved. Professor of Law, Northeastern University School of Law; Sheila Biddle Ford Foundation Fellow, W.E.B. DuBois Institute for African & African-American Research, Harvard University (Fall 2008). Earlier versions of this essay were prepared for the “Defining Race” symposium co-sponsored by the Albany Law Review and the Albany Journal of Science & Technology (November 14, 2008) and for Harvard University’s Du Bois Colloquium (March 11, 2009). I thank the editors of both journals, Andria Bentley, Brian Borie, the high school students and teachers from the Newark Collegiate Academy and colleagues who attended the DuBois Colloquium, my mother Blossom Stephenson, and Professors Belinda Edmondson, Anthony Paul Farley, Ibrahim Gassama, Henry Louis Gates, Jr., Maria Grahn-Farley, Abdoulaye Gueye, James Hackney, David Ogungbile, and Faith Smith for their encouragement and comments. I appreciate the excellent research assistance of Rachael Bankes (Harvard Law School) and Dana Luke (Northeastern University School of Law)

¹ Jamaican national motto. A similar motto appears on United States coins: “E Pluribus Unum” (“Out of Many, One”). See U.S. Treasury, FAQs: Portraits and Designs on Coins, <http://www.treas.gov/education/faq/coins/portraits.shtml#q7>.

² See, e.g., DEBORAH A. THOMAS, MODERN BLACKNESS: NATIONALISM, GLOBALIZATION, AND THE POLITICS OF CULTURE IN JAMAICA (2004) (ethnographic study of Black popular culture and politics in late 20th and early 21st century Jamaica). Thomas argues that some elites and middle-class Jamaicans emphasize the island’s creole culture, while some urban and rural working-class youth assert an explicitly Black identity. Her introductory chapter is titled “Out of Many, One (Black) People.” *Id.* at 1.

³ *Id.*

also have long been represented in smaller numbers or mixed-race populations. Religious traditions reflect a range of influences including West African animism, Protestant and Catholic Christianity, Rastafarianism, Judaism, and Islam.

The motto, “out of many, one people,” therefore, can be “read” in different ways—as an expression of cross-cultural solidarity and nationalism, as an assertive embrace of hybridity, or even as an assimilationist claim. But the absence of the indigenous peoples who first inhabited the island from the “many” presents an uncomfortable and telling reality. It resonates of the literal eradication of a population in a context where racial and cultural difference provided a convenient excuse for European colonial powers to grab ever-more land, gold, labor, and goods.

I was struck, therefore, by the potentially positive and negative echoes of the Jamaican national motto I heard in U.S. President Barack Obama’s now famous Philadelphia speech on race relations—“A More Perfect Union.” After linking his own hybrid ancestry and experiences to the broader diversity and complexity of the United States, he asserted that “out of many . . . we are one.” He then elaborated by describing the experience of being Black in America as “at once unique and universal.”⁴

In the United States, racial identity can be seen as one element in a melting pot (one of many individual components that melt down into something new and broadly “American”). It could be viewed as a salad ingredient (one which retains its individual flavor, adding to a complex new American whole). Or racial identity can be viewed as well as an unwelcome addition to the dinner, to be discarded entirely in a post-racial society. It is just such contradictions and tensions in our encounter with race in general, and “Blackness” in particular, that I explore in this essay.

DEFINING RACE: DO WE KNOW IT WHEN WE SEE IT?

Defining “race” presents problems that make the international community uncomfortable.⁵ Such a project further exposes the privileges assigned to dominant racial groups and the costs imposed on subordinated groups; the horrendous legacy of pseudo-scientific

⁴ “Obama Race Speech: Read the Full Text,” THE HUFFINGTON POST, http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html (last visited September 21, 2009) (text and video of “A More Perfect Union” speech).

⁵ See Human Rights Education Associates, The Rights of Ethnic and Racial Minorities, http://www.hrea.org/index.php?base_id=142&&wv_print=1#top (last visited May 20, 2009).

theories that supported slavery, colonialism, the Holocaust, more recent genocides, and other efforts to determine life chances by racial category.⁶ Formal racial and ethnic categorization also raises the perceived threat to national sovereignty and stability posed by internal or cross-border racial solidarity.⁷ Defining race, as such, therefore, was to become a politically and scientifically unviable enterprise in the period following the founding of the United Nations.⁸ “Race” was left to the realm of concepts in which international actors are supposed to “know it when they see it.”

Apparently, it was easier for the international community to define “racial discrimination” instead, as it does in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):⁹

[T]he term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties

⁶ According to one U.N. resolution, “[a]ny doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous and has no justification in theory or practice . . .” Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) (preamble), available at <http://www.un-documents.net/a18r1904.htm>.

⁷ Press Release, Third Committee, Racism Often Force Behind Terrorism, Genocide, Economic Injustice and Political Oppression, Third Committee Told, U.N. Doc. GA/SHC/3487 (Oct. 27, 1998), available at <http://www.un.org/News/Press/docs/1998/19981027.gash3487.html>.

⁸ Defining terms such as “peoples” and “terrorism” under international law is similarly controversial because of their implications for state sovereignty, the right to self-determination of peoples, the permanence of borders and control over territory, and the treatment of insurgents and organized criminal groups. See, e.g., KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW, 50–51, 62–63, 74–75 (2002); Leslie Palti, *Combating Terrorism While Protecting Human Rights*, UN CHRON., Dec. 2004–Feb. 2005, at 27, available at <http://www.un.org/Pubs/chronicle/2004/issue4/0404p27.html>; Office of the High Commissioner for Human Rights, Terrorism and Human Rights, <http://www.unhchr.ch/terrorism/index.html> (last visited May 20, 2009).

⁹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), pt. I, art. I, U.N. Doc. A/RES/20/2106 (Dec. 21, 1965), available at <http://www.habitat.igc.org/open-gates/a20r2106.htm> [hereinafter ICERD].

concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

This symposium and the globe-shaking election of the first African-American President of the United States, Barack Obama,¹⁰ create a unique opportunity to explore some of those definitional problems. Simultaneously, the sixtieth anniversary of the Universal Declaration of Human Rights¹¹ presents a special moment at which to explore the implications of race for the powerful paradigm of international human rights discourse. At such a moment, we can well ask whether and how race still matters as a high priority on the international human rights agenda.

Sixty years ago, the formal human rights movement was founded on the recognition that genocide, slavery, and other forms of racial discrimination were central to the conflagrations of the early and mid-twentieth century.¹² If, therefore, a sustainable international peace and security system was to be created, it was necessary to address racism and racial conflict directly as a source of political and economic instability and civil unrest.¹³

In the six decades that followed, the U.N. adopted a legally-binding treaty—the ICERD—and included non-discrimination and equality provisions in every major human rights treaty.¹⁴ In fact, ICERD was the first of the core international human rights treaties to be adopted by the U.N. General Assembly.¹⁵ It was adopted in

¹⁰ Among the many moving commentaries on the historic election and its special historical significance for Blacks and for the U.S. as a whole, see Henry Louis Gates, Jr., *In Our Lifetime*, THE ROOT, Nov. 4, 2008, <http://www.theroot.com/views/our-lifetime> (last visited Feb. 11, 2009).

¹¹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/3/217A (Dec. 10, 1948), available at <http://www.un-documents.net/a3r217a.htm> [hereinafter UDHR].

¹² Office of the High Commissioner for Human Rights, Fact Sheet No. 12, The Committee on the Elimination of Racial Discrimination, <http://www.unhcr.ch/html/menu6/2/fs12.htm> (last visited May 20, 2009).

¹³ Concerns about the potential for civil unrest were also expressed in foundational international human rights instruments. For example, the Preamble to the UDHR states that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law” UDHR, *supra* note 11, at ¶3.

¹⁴ See, e.g., Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, art. 5, U.N. Doc. A/RES/61/106/Annex I (Dec. 13, 2006), available at <http://www.unhcr.org/refworld/docid/4680cd212.html> [hereinafter CRPD]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, pt. 2, art. 2, U.N. Doc. A/6316 (Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), pt. II, art. 2, (Jan. 3, 1976) [hereinafter ICESCR]; UDHR, *supra* note 11, art. 2.

¹⁵ See PAUL GORDON LAUREN, POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION 248 (2d ed. 1996) (discussing ICERD and explaining the history of

1965, one year before the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹⁶

This essay asserts that race, a key concept in international human rights law and policy from the beginning, should still be high on today's global priority list. However, to remain a useful concept in our increasingly complex world, race must be defined and explored as a transnational and multidimensional social construct.¹⁷ I reflect specifically here on the complex nature of "Blackness."

I suggest that international human rights law should engage intra-racial diversity among Blacks along cultural, gender, political, economic, and ethnic lines. Because "Blackness" itself is a product of popular social consciousness, I draw here on popular accounts of U.S. Black migration and stories about the Presidential candidacy of Barack Obama. Such stories reveal in stark relief how problematic an oversimplified approach to defining the borders of Blackness can be. Anecdotes can have limited application in comparison with broad-based social scientific data. But evocative

race as a subject of international relations).

¹⁶ *Id.* at 248–49. Remarkably, the ICERD was adopted prior to the adoption of the ICCPR and the ICESCR. The latter covenants, along with the UDHR, comprise the "International Bill of Rights," but neither was adopted by the U.N. General Assembly until 1966. For a discussion of the race relations and Cold War U.S. foreign policy conflicts that complicated the drafting and implementation of key international human rights treaties, see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955*, at 2–7 (2003); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 3, 17 (2000); *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS* 76, 85–86 (Jeanne M. Woods & Hope Lewis eds., 2005) [hereinafter Woods & Lewis] (excerpting statements on international human rights by U.S. President Franklin D. Roosevelt and U.N. Commission on Human Rights Chair Eleanor Roosevelt).

¹⁷ This essay draws on certain themes developed in the streams of legal scholarship defined as "Global Critical Race Feminism" (GCRF) and "Third World Approaches to International Law" (TWAIL). See, e.g., *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 1* (Adrien Katherine Wing ed., 2000) [hereinafter *GLOBAL CRITICAL RACE FEMINISM*] (explaining "Global Critical Race Feminism"); Makau Mutua, *What is TWAIL?*, 94 *ASIL PROC.* 31, 31 (2000) (explaining "Third World Approaches to International Law" (TWAIL)); Woods & Lewis, *supra* note 16, at 108 (discussing "TWAIL" and providing references to TWAIL scholarship). GCRF uses the interdisciplinary methodologies of law, sociology, and cultural studies to explore the transnational lives of women of color as they experience them. See *GLOBAL CRITICAL RACE FEMINISM, supra*, at 1–2. Those experiences are often "intersectional" or "multidimensional," involving the simultaneous relevance of race, gender, class, religion, nationality, sexual orientation, and disability among other life influences. TWAIL inquires into the colonial and imperial origins of international law and the possibilities for a reconceptualized approach that reasserts the interests of the Global South.¹⁷ In this context, the ambiguous term "Global South" includes non-elites in Africa, Asia, and Latin America as well as people located in North America or Europe who align themselves, or share certain interests with, them. American University: Center for Global South, <http://american.edu/academic.depts/acainst/cgs/about.html> (last visited May 20, 2009).

stories nevertheless can help make previously marginalized experiences and perceptions more visible. Once visible, such instructive stories and sources can then become a more legitimate focus of further legal and interdisciplinary research.

Underlying my discussion is the background belief that intra-racial political and cultural strategies and analyses that are cross-cultural and multidimensional¹⁸ remain relevant and helpful in the contemporary global economy. Such approaches, however, need not be inappropriately exclusionary or essentialist. Rather, they can contribute to cross-cultural engagement and enrich our ability to protect and fulfill human rights.

II. WHY BLACKNESS?

I choose to focus on the transnational and multiple dimensions of “Blackness,” not because I believe that recent African-descent constructed in historical and contemporary opposition to “whiteness” or European descent constitutes the entire range of racial meaning. Many Critical Race theorists, including some of the outstanding scholars at this symposium, have already challenged and complicated an oversimplified Black-White paradigm quite effectively.¹⁹

Rather, my long-term project is to examine the implications of “Black diversity”²⁰ or multidimensionality within Blackness. The

¹⁸ See generally HENRY J. RICHARDSON, III, *THE ORIGINS OF AFRICAN-AMERICAN INTEREST IN INTERNATIONAL LAW* XV (2008) (explaining “Black Internationalism” from its roots in the international slave trade); Jeffery M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT’L L. 807, 823 (2002) (discussing and applying “Black internationalism”); Ibrahim J. Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE & L. 133, 133 (1999) (discussing the need for analysis from a transnational perspective); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 829–30 (2000) (advocating for scholarly analysis through critical race theory); Hope Lewis, *Reflections on “BlackCrit Theory”: Human Rights*, 45 VILL. L. REV. 1075, 1075–77 (2000) (explaining the need to examine critical race theory through a global lens); TRANSAFRICA FORUM, *A RETROSPECTIVE: BLACKS IN U.S. FOREIGN POLICY* 2, 5 (Hope Lewis ed., 1987) (discussing African-American contributions to U.S. foreign policy).

¹⁹ See, e.g., ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 11 (1999); Neil Gotanda, *Disoriented: Asian Americans, Law, and the Nation-State*, 4 J. ASIAN AM. STUDIES 175, 176 (2001) (book review); Elizabeth M. Iglesias & Francisco Valdes, *Afterword to LatCrit V Symposium, LatCrit at Five: Institutionalizing a Postsubordination Future*, 78 DENV. U. L. REV. 1249, 1279–80 (2001). See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw, Neil Gotanda, Garry Peller, Kendall Thomas, eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE xv–xviii (Richard Delgado & Jean Stefancic eds., 2nd ed. 2000) (compilation of “Critical Race Theory” scholarship).

²⁰ Professor Robert Hall introduced me to the term “Black diversity” to describe the range

richness and depth of Black engagement with transnational contexts in pre- and post-TransAtlantic slavery is being explored by historians, sociologists, and anthropologists, but much remains to be done.²¹ Specifically, I hope to examine more deeply in future work the implications of the complexity of Blackness for international human rights strategies as tools in the struggle for global social justice.

III. DEFINING BLACKNESS IN MULTIPLE DIMENSIONS

The candidacy of then U.S. Senator Barack Obama for the presidency of the United States was a particularly telling example of the problems associated with defining Blackness, including the transnational implications.²² During the campaign,²³ I, like many commentators, engaged in the obvious debates about identity politics.²⁴

Some U.S. observers questioned whether a man born in Hawaii to a white woman from Kansas (an anthropologist and women's economic development advocate) and a Black Kenyan immigrant (an intellectual and political activist) and who was raised in Indonesia and Hawaii²⁵ by his mother, Indonesian step-father, and white American grandparents²⁶ could be "Black enough" or at least

of ethnicities among Blacks in the United States. See, e.g., Haya El Nasser, *Black America's New Diversity*, USA TODAY, Feb. 16, 2003, available at http://www.usatoday.com/news/nation/2003-02-16-black-america-diversity-usat_x.htm (quoting Hall discussing a 2003 report demonstrating the diversity of Black immigrants).

²¹ See, e.g., Hope Lewis, *Focus Not on the Skin-Deep*, BOSTON HERALD, Feb. 17, 2007, at 16 (discussing the nature and extent of "black diversity" and criticizing the argument that presidential candidate Obama was "not Black enough").

²² See, e.g., *id.* (examining the issue through President Obama's diverse racial and cultural background).

²³ See, e.g., *id.*; Posting of Hope Lewis to IntLawGrrls, <http://intlawgrrls.blogspot.com/2008/05/un-post-racial-america-not-yet.html> (May 31, 2008, 14:01 EST) (commentary titled, "U.N.: A Post-Racial America? Not Yet" and discussing U.N. report on race relations in the U.S.).

²⁴ See Lewis, *supra* note 21 (discussing the debate regarding black identity in America raised by the presidential candidacy of Barack Obama).

²⁵ Christine Finn & Sarah Baxter, *Long-range Love of Barack's Absent Mother*, SUNDAY TIMES (London), Nov. 23, 2008, at 24, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5213328.ece; Edmund Sanders, *Obama Not Quite His Kenyan Father's Son*, L.A. TIMES, July 17, 2008, at 1, available at <http://www.latimes.com/news/nationworld/world/la-fg-obamadad17-2008jul17,0,5778807.story>; Janny Scott, *A Free-Spirited Wanderer Who Set Obama's Path*, N.Y. TIMES, Mar. 14, 2008, at A1, available at <http://www.nytimes.com/2008/03/14/us/politics/14obama.html>.

²⁶ The debates about Obama's childhood experiences in Hawaii and in Indonesia were particularly ironic because some seemed to assign "foreign" status both to the U.S. state and to the Asian nation. Republican vice presidential candidate, Sarah Palin, caused a furor late

“African-American enough”²⁷ to represent the interests of the majority of African-Americans.

Interestingly, Obama’s mixed race and cultural background did not pose as significant a challenge for non-U.S. observers. His status as “Black” was largely unquestioned in media reports outside the United States and was seen as a key symbol of racial progress and of the American people’s rejection of the George W. Bush administration’s devastating foreign policy legacy.²⁸ For others, it was also a marker of Obama’s cosmopolitan or transnational perspective.

In a February 2007 op-ed, I made the admittedly flippant remark that Obama, as a person of African descent within one generation and as an “American” born and partly raised on North American soil, had an even more legitimate claim to be called “African” and “American” than many others.²⁹ Like many, I was annoyed at those who questioned his Blackness bona fides.³⁰

Of course, Obama’s technical “African-American-ness” was never really what most racial and cultural critics were most concerned about and we commentators knew it.³¹ The criticisms were based more on a longstanding (and somewhat underground) social, cultural, and political controversy.³² Similar whispers were overheard during former Secretary of State Colin Powell’s brief

in the campaign when she implied that people in some parts of the country were more “American” (read as “patriotic”) than others. See, e.g., Lyndsey Layton, *Palin Apologizes for “Real America” Comments*, WASH. POST, Oct. 22, 2008, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/21/AR2008102102449.html>.

²⁷ See e.g., Lewis, *supra* note 21; Michelle Obama Blasts “Black Enough” Talk, USA TODAY, Aug. 12, 2007, available at http://www.usatoday.com/news/politics/election2008/2007-08-12-michelle-obama_N.htm; Stanley Crouch, Opinion, *What Obama Isn’t: Black Like Me on Race*, N.Y. DAILY NEWS, Nov. 2, 2006, available at http://www.nydailynews.com/opinions/2006/11/02/2006-11-02_what_obama_isnt_black_like_me_on_race.html.

²⁸ *Global Electoral College: Obama Sweeps the Board*, ECONOMIST, Oct. 28, 2008, available at http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=12498538 (summarizing a pre-election global poll); see also Global Perspective, FIN. TIMES, Nov. 5, 2008, available at <http://www.ft.com/indepth/us-elections/global-reactions> (reporting the international reaction to Barack Obama’s victory in the US presidential election); Ben Macintyre, *American Voters Honour Martin Luther King’s Dream with Victory for Obama*, TIMES (London), Nov. 5, 2008, at 6, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article5085835.ec.

²⁹ Lewis, *supra* note 21.

³⁰ *Id.*

³¹ See Louis Chude-Sokei, Opinion, *Redefining “black,”* L. A. TIMES, Feb. 18, 2007, at M6, available at <http://www.latimes.com/news/opinion/la-op-chude-sokei18feb18,0,7298828.story?coll=la-opinion-center> (discussing the “historical tensions between immigrant and native-born blacks”).

³² *Id.*

flirtation with a presidential run.³³ Controversies over Black identity and representation, whether focused on prominent individuals such as President Obama and former Secretary Powell or on Black immigrant communities more generally, raise at least four problematic themes in defining Blackness: (a) Blackness as “United States-ian,” (b) Blackness as Class Limitation, (c) Blackness as Physical Appearance or “Biology,” and (d) Blackness as Cultural Essence.

Each such single-axis definition led to artificially constrained debates about the meaning and implications of Blackness in U.S. popular culture.³⁴ Each reflects the problems and constraints a unidimensional approach to racial identity can have for international human rights law as well.

A. Blackness as “United States-ian”: “Foreign-ness” and the U.S. Presence of Blacks

The assumption that geographic, national, and local historic ties constitute the sole or core defining characteristics of racial identity constitutes a significant subtext in controversies over defining Blackness.³⁵ Location of birth, citizenship, childhood influences, and inter-generational continuity certainly are all important aspects of the social construction of Blackness. It is informative to know whether a person identified as African-American was born in the United States and grew up among people who shared with her or him cultural or religious patterns and traditions associated with a local Black community. It is equally significant to know whether or not he or she experienced the broader legacy of the historical, cultural, political, and economic status of Blacks in the United States during formative years.³⁶

A classic comparison is often made between a native-born Black person from the American South who can trace his or her ancestry back to American slavery and a newly-arrived Afro-Caribbean or African immigrant who was born in a majority Black country.³⁷ The assumption is that the latter experience has left the Black

³³ *Id.* (discussing debates about Obama’s racial identity status and former Secretary of State Colin Powell’s ethnicity in the context of racial politics).

³⁴ *Id.*; Lewis, *supra* note 21.

³⁵ See Lewis, *supra* note 21 (noting the flaws inherent in treating racial identity as an essential and undifferentiated characteristic).

³⁶ *Id.*

³⁷ See, e.g., El Nasser, *supra* note 20 (comparing native-born Blacks and newly arrived Blacks from Africa and the Caribbean).

immigrant devoid of racial consciousness and inexperienced with the legacy of slavery and racism.³⁸

To be sure, a Black woman born in South Carolina, who can trace her ancestry back to slavery and shares strong Black family and community traditions cannot be said to share the same experience of Blackness as a recent immigrant from Nigeria. But American commentators rarely inquire more deeply into the racial experiences of Black immigrants (beyond the observation that once they arrive in the U.S. they “learn” that they will be discriminated against by racists based on skin color).³⁹ I argue, however, that the definition of “Blackness” must be expanded to include transnational or foreign Black experiences to be strategically useful and meaningful in transnational context given contemporary globalization.⁴⁰ Further, the more narrow term “African-American” must be seen in more complex perspective as well.⁴¹

Unfortunately, the negative experience of American racism in all its forms is likely to be a tie that binds most Blacks in America, whether they were born here or not.⁴² By contrast, one hopes that some of the positive, communitarian values said to be associated with many African traditions may also be shared cross-culturally and cross-location.⁴³

The diversity of African-American experiences would seem to indicate that there is also room for the inclusion of a range of Black immigrant experiences.⁴⁴ Some Black South Carolinians can trace their ancestry back to slavery, but some native-born Black New Yorkers might not. Some Black Texans celebrate “June-teenth.”⁴⁵ Blacks from New Orleans might have cultural experiences that include African, French, and Native American traditions. The families of some Blacks from Chicago trekked North during the Great Migration and the parents of some native-born Blacks from Hawaii and Colorado served on military bases. Black Republicans, Black Democrats, and Black Progressives are politically active.

There are native-born Black Puerto Ricans and Blacks who can

³⁸ See *id.* (arguing that Black immigrants do not connect with “America’s legacy of slavery” and “tend to cling to national identities” before “embrac[ing] racial [ones]”).

³⁹ See *id.* (“It doesn’t take long for immigrants to realize that if they look black, they’ll be treated as a black person . . .”).

⁴⁰ See, e.g., Lewis, *supra* note 21.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ See Juneteenth.com, Worldwide Celebration, <http://www.juneteenth.com/> (last visited May 20, 2009).

trace their ancestors to those who built the Capitol and the rest of Washington, DC.⁴⁶ Blacks whose parents are from different racial groups may have “light” skin or “dark” skin.

The full range of “the Black (or African-American) Experience” is only beginning to be told after a few decades of focus in university humanities departments and library collections.⁴⁷ Those experiences and perspectives are varied and complex, both domestically and transnationally.

We make a mistake, therefore, when we assign authentic Blackness to “the” American experience as if even such a single, undifferentiated Black American experience ever existed.

Beginning to unpack the notion of an essentialized native-born “African-American” can, therefore, lead us to take a more nuanced approach to the meanings of Blackness among immigrant communities. Is the Black immigrant from working-class, middle-class, or an elite class in the home country? Is the Black immigrant from an urban or rural area? Does the Black immigrant’s home country have a legacy of slavery? Does it have a legacy of colonialism? Does it have a history of the manipulation of race and skin color demarcations? Is the Black immigrant male or female? Does he or she have a physical or intellectual disability? And what perspectives do his or her children born in the U.S. share with other native-born Blacks?

International human rights literature pays little attention to the various modern Black migrations to the U.S. from the Caribbean, the Latin American mainland, the African continent, and Europe. To the extent Blacks are subjects of human rights focus, it is largely in the context of country of origin (i.e., apartheid in South Africa, Haitian political unrest, Jamaican police violence, sexual violence as a weapon of war in the Democratic Republic of Congo, and racial

⁴⁶ Michael Kranish, At Capitol, *Slavery’s Legacy Turns Full Circle*, BOSTON GLOBE, Dec. 28, 2008, at A1, available at http://www.boston.com/news/nation/washington/articles/2008/12/28/at_capitol_slaverys_story_turns_full_circle/ (noting the irony that the Capitol, where Barack Obama, the first African-American U.S. President, was inaugurated, was built by slave labor and stood in front of land previously used for slave auctions).

⁴⁷ See, e.g., W.E.B. Du Bois Institute for African & African American Research, Harvard University, <http://dubois.fas.harvard.edu/about-us> (last visited May 20, 2009) (explaining that the institute was named in honor of the African-American scholar, civil rights advocate, and internationalist W.E.B. Du Bois); Moorland-Spingarn Research Center, Howard University, <http://www.founders.howard.edu/moorland-spigarn/> (last visited May 20, 2009) (describing the center as one of the largest collections of global documentation of African culture); Arturo A. Schomburg Center for Research in Black Culture, New York Public Library, <http://www.nypl.org/research/sc/sc.html> (explaining that the institute was named in honor of scholar and curator Arturo A. Schomburg, a Black Puerto Rican) (last visited May 20, 2009).

discrimination against Blacks in the United States).⁴⁸ But the human rights implications of transnational status for Blackness are examined more rarely.

In previous work, I explore aspects of Black transnational migrant life as it is experienced by women from the English-speaking Caribbean.⁴⁹ Many working-class African-Jamaican women, for example, migrated to the United States during immigration liberalizations in the periods following World War II and the 1960s civil rights movement.⁵⁰ Some came as garment workers, but others found themselves in the “caring” sector.⁵¹ They were childcare workers, eldercare workers, household cleaners, nurses, and home health aides.⁵² The vast majority are Black, since most Jamaicans are African-descended.⁵³

As noted above, it is commonly assumed that all people from the English-speaking Caribbean arrive in the U.S. with little or no race-consciousness, having come from a majority Black, presumably homogeneous, country. The realities, however, are much more complex (as they are for U.S. native-born Blacks, who often express diverse opinions on race relations and strategies).⁵⁴

⁴⁸ Yet another significant U.S. national controversy about race ensued shortly before publication of this essay. Cambridge police sergeant James Crowley’s arrest of Harvard professor Henry Louis Gates, Jr. provoked media and popular reactions that galvanized the nation for at least several weeks and even led to an informal White House meeting on the matter. See, e.g., Posting by Hope Lewis to IntLawGrrls, 05 August 2009; 9:39AM EST, <http://intlwgrrls.blogspot.com/2009/08/race-in-america-moments-and-years.html> (Race in America: Moments and Years (I)); Posting by Hope Lewis to IntLawGrrls, 06 August 2009; 7:02 AM EST, http://intlwgrrls.blogspot.com/2009/08/race-in-america-moments-and-years_06.html (Race in America: Moments and Years (II)); Posting by Hope Lewis to IntLawGrrls 06 August 2009; 7:00 AM EST, <http://intlwgrrls.blogspot.com/2009/08/race-and-law-in-us-and-international.html> (Race and Law in U.S. and International Perspective: A Selected Bibliography).

⁴⁹ See, e.g., Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 568–70 (1997) [hereinafter Lewis, *Lionheart Gals*]; Hope Lewis, *Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas*, 5 J. GENDER RACE & JUST. 197, 197–201 (2001) [hereinafter Lewis, *Universal Mother*].

⁵⁰ See Lewis, *Lionheart Gals*, *supra* note 49, at 585–86.

⁵¹ See *id.* at 585, 589–90.

⁵² See *id.* at 589–91.

⁵³ On Caribbean history, see generally C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION* (Vintage Books 1989) (1963); ORLANDO PATTERSON, *THE SOCIOLOGY OF SLAVERY: AN ANALYSIS OF THE ORIGINS, DEVELOPMENT AND STRUCTURE OF NEGRO SLAVE SOCIETY IN JAMAICA* (Assoc. Univ. Presses 1969) (1967); JAN ROGONZISKI, *A BRIEF HISTORY OF THE CARIBBEAN: FROM THE ARAWAK AND THE CARIB TO THE PRESENT* (1994); ERIC WILLIAMS, *FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN, 1492–1969* (1970).

⁵⁴ The complex realities of Black immigrant racial and ethnic identities have been examined primarily by sociologists rather than legal academics. See, e.g., PHILIP KASINITZ, *CARIBBEAN NEW YORK: BLACK IMMIGRANTS AND THE POLITICS OF RACE* (1992); REUEL R.

Even before entry into the United States, Afro-Caribbean immigrants likely have engaged with the consciousness of race and color in many forms. Their celebrations of independence from British, French, or Spanish rule recognize the racialized character of colonial systems. Yet class and race tensions are also reflected in the phenomenon of “double-consciousness.” Some aspire to neo-colonial standards and priorities perceived to be superior to those associated with African and indigenous Caribbean approaches to education, culture, religion, political organization, or resistance.⁵⁵

If the Afro-Caribbean immigrants in question have worked in island tourism industries (often a third or more of the economy), they have encountered white and Asian middle-class or wealthy tourists from the U.S., Canada, the U.K., China, and Japan. Increasingly, poor Black women and girls experience the intersection of gender and race stereotypes with the rise of sex tourism.⁵⁶ Many Black immigrants have had their fill of racist or racialized images from U.S. and British television and films; others download racial and cultural perceptions from the internet.

Caribbean newspapers, radio, and television are filled with reports on the goings-on in the Big Brother countries of the North, including their racial aspirations and conflicts.⁵⁷ Some Afro-Caribbean immigrants to the U.S. might have seen their brothers, fathers, uncles, or sons incarcerated in U.S. prisons, then deported back to the islands. Dubbed “deportee violence,” crime waves in Caribbean urban centers were blamed on such returnees.⁵⁸

ROGERS, AFRO-CARIBBEAN IMMIGRANTS AND THE POLITICS OF INCORPORATION: ETHNICITY, EXCEPTION, OR EXIT (2006); MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES (2001).

⁵⁵ On the concept of racial “double-consciousness,” see W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 2–4 (Bantam Classic ed. 1989) (1903); see also FRANTZ FANON, BLACK SKIN, WHITE MASKS 44–47 (Charles Lam Markmann trans., 1967) (exploring interracial relationships and their perceived connotations); FRANTZ FANON, THE WRETCHED OF THE EARTH (Constance Farrington trans., First Evergreen Black Cat ed., Grove Press 1968) (1963) (discussing the dichotomy of racial and national consciousness and colonial existence); PAUL GILROY, THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS (1993) (exploring double-consciousness in transnational and contemporary theoretical contexts).

⁵⁶ SHARED HOPE INTERNATIONAL, DEMAND: A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES 27–29 (2007), available at <http://www.sharedhope.org/files/DEMAND.pdf>.

⁵⁷ LAURIE GUNST, BORN FI’ DEAD: A JOURNEY THROUGH THE JAMAICAN POSSE UNDERGROUND 73–74 (1995).

⁵⁸ Lewis, *Lionheart Gals*, *supra* note 49, at 607 n.152. High violent crime rates on the island were a problem long before the wave of U.S. deportations that began in the mid-1990s. Gun violence in Jamaica’s urban centers, for example, has a complex political, economic, and social history. See generally GUNST, *supra* note 57 (providing a first-hand account of experiences with Jamaica’s political gangs, and discussing the process through which some

Ironically, U.S. prosecutors targeted “Jamaican drug posses” as particularly violent expressions of anti-social behavior among young urban Blacks. By contrast, media and politicians on the islands blamed the “taint” of violent American culture and prison life for having hardened the young Black men who returned to the islands after U.S. deportation.⁵⁹

When working-class Afro-Caribbean immigrants navigate the treacherous U.S. immigration and security terrain, they see and understand the racial differences in treatment at the airport in addition to the citizen/non-citizen divide. And when they enter the nursing homes, hospitals, day-care centers, and private homes of New York, Boston, or Miami, they see the racial, gender, and class demarcations that trace their lives. Black immigrant women see the irony of spending years caring for other people’s children when their own children are being raised at home by grandparents or other relatives.⁶⁰

But Black immigrants are still placed by many American observers in an essentialized category of “foreign-born Blacks” and, therefore, exotic others. At one and the same time (and although they have far fewer economic resources than a Powell or Obama now have) they could be labeled “exceptional Blacks”—merely because of their foreign-ness, accent, or cultural differences. On the other hand, immigration or security officials might view them primarily as potential targets for racial/ethnic profiling—as undocumented workers (or visa overstays) or potential drug couriers. Others may treat them as members of the invisible underground who perform the “unskilled” labor that keeps the

Jamaican children came to be drug dealers, posse members, or gunmen). On contemporary conditions in human rights perspective, see, for example, AMNESTY INTERNATIONAL, JAMAICA: “LET THEM KILL EACH OTHER”: PUBLIC SECURITY IN JAMAICA’S INNER CITIES (2008), available at <http://www.amnesty.org/en/library/asset/AMR38/001/2008/en/c7546d90-ff39-11dc-b092-bdb020617d3d/amr380012008eng.html>.

⁵⁹ Bernard Headley, *Exhibit A: Returned Criminal, Accidental Deportee*, GLEANER, Jan. 28, 2007, available at <http://www.jamaica-gleaner.com/gleaner/20070128/focus/focus2.html>.

⁶⁰ Children whose mothers emigrated to work in North America or the U.K. and whose mothers could not return for years because of restrictive immigration laws, were called “barrel children.” The term referred to the shipping barrels of clothing, shoes, dry goods, and other remittances sent home for their care. See, e.g., Lewis, *Lionheart Gals*, *supra* note 49, at 569; Lewis, *Universal Mother*, *supra* note 49, at 219–20. The phenomenon took on U.S. notoriety when it was discovered that Lee Boyd Malvo, one of the men convicted of the “DC Sniper” killings, had been left in the care of relatives in the Caribbean by his Jamaican mother for long periods. Malvo was said to have fallen under the strong psychological influence of John Allen Muhammad (who was sentenced to death and executed shortly before publication of this essay). See *Barrel Kids Still Worth It for Emigrant Parents*, GLEANER, Aug. 18, 2003, available at http://www.accessmylibrary.com/coms2/summary_0286-24167539_ITM.

country fed, clean, and cared for.⁶¹

How Black immigrants see themselves in racial perspective is equally complicated. Some do, indeed, buy in to the exceptionalism of foreign-ness beliefs, others internalize the marginalization associated with “illegal” status, and still others identify with native-born Blacks in a complex mix of strategic, political, or cultural solidarity.

My overall critique, therefore, is that Black immigrants can sometimes be too easily defined out of Blackness in the United States. They are expected to express an essential Caribbean-ness or West Indian-ness that reveal them as (a) in racial denial, with little or no understanding or empathy for the dynamics of U.S. racism; or (b) racial traitors (or “sellouts”⁶²) who affirmatively deny their Blackness and aspire to economic or social uplift through the assertion of group superiority to native-born Blacks. By contrast, Black immigrants have also historically been essentialized as racial radicals, along the lines of Marcus Garvey, Malcolm X, or Stokely Carmichael/Kwame Toure, and labeled as having a hyper-racial, pan-African political consciousness.

The truth about Black immigrants, as always, lies in all of the above, none of the above, and somewhere in-between. The racial beliefs I’ve identified here as being associated with Black immigrants to the U.S. are also associated with class-based, regional, and other categories among native-born Blacks as well. One thinks, for example, about racial philosophies among prominent U.S.-born Blacks as different as those of Supreme Court Justice Clarence Thomas, former Secretary of State Condoleeza Rice, public intellectual Cornel West, U.N. Ambassador Susan Rice, U.N. diplomat Gay McDougall, Congresswoman Maxine Waters, businessman Vernon Jordan, and political activist Randall Robinson.

Although Obama’s father did not raise him, his childhood stint in Indonesia, along with the vague “foreign-ness” of Hawaii to mainlanders, made him subject to the foreign-Black-as-suspect-Black charge as well. My own view is that Obama is both as Black

⁶¹ In the film “Dirty Pretty Things,” about the immigrant underground in London, Okwe, the main character, summarizes the invisibility of poor migrant workers: “[W]e are the people you do not see. We are the ones who drive your cabs. We clean your rooms.” IMDb.com, Memorable Quotes for “Dirty Pretty Things” (2002), <http://www.imdb.com/title/tt0301199/quotes> (last visited May 20, 2009).

⁶² See generally RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL (2008) (discussing the idea of “selling out,” or the notion of Blacks betraying the interests of other Blacks as a means of social advancement).

and African-American as any one of us who self-identifies as such. But accepting that does not necessarily tell one much about what his economic, social, foreign, or even anti-discrimination policies will be. His racial identity is relevant, but not sufficient, to such an analysis. For that, one must examine the entirety of personality, political and substantive skills, rhetoric, and racial and social experiences.⁶³

B. Blackness as Class-Limited

Class contradictions are a particularly thorny aspect of the definition conundrum. The Obama campaign once again served as a telling example of the intersection between race and class in America. Interestingly, his campaign also paralleled the eruption of an ongoing debate in legal and academic circles that places race and class in global context.

One of the charges leveled against Obama after his “guns or religion” gaffe was that he is an elitist.⁶⁴ Over and above the particular comment itself, Obama’s educational achievements were sometimes treated as a potential drawback—something he had to be careful to tone down or keep in check. He could not appear to be too “uppity” after all.⁶⁵

A Senegalese-French colleague, a highly-educated academic himself, found the debates about Obama’s “elitism” mystifying. Why, he asked, had it suddenly become a bad thing for an African-American man running for the Presidency to have attended and performed well at top-ranked schools? Didn’t Americans want an educated and highly-skilled President?

The issue requires much further analysis and time for discussion than available to me here, but I responded to my colleague as follows. First, the elitism charge was deployed to great initial effect by Obama’s political opponents as they struggled for white working-

⁶³ Questions about the political implications of racial, ethnic, and gender identity were not limited to President Obama. Shortly before publication of this essay, President Obama nominated Judge Sonia Sotomayor of the U.S. District Court for the Second Circuit for a seat on the United States Supreme Court. The nomination and confirmation hearings rejuvenated debates about the roles of identity, experience, and perspective in law and policy. Justice Sotomayor was subsequently confirmed as the Court’s first Latina associate justice. *See, e.g.*, Jess Bravin, “Legal Realism Informs Judge’s Views,” *WALL ST. J.* at A3 (May 26, 2009).

⁶⁴ *See* Johanna Neuman & Mark Barabak, Obama Seeks to Explain “Guns or Religion” Remark, *L.A. TIMES*, Apr. 13, 2008, available at <http://articles.latimes.com/2008/apr/13/nation/na-obama13>.

⁶⁵ Mike Soraghan, Westmoreland Calls Obama “Uppity,” *THE HILL*, Sept. 4, 2008, <http://thehill.com/leading-the-news/westmoreland-calls-obama-uppity-2008-09-04.html>.

class votes. Some characterized this as a “class war” aimed at playing poor and working-class people off against someone argued to be out of touch with their goals and needs.⁶⁶ But there was also a racial layer—it was supposed to be particularly galling for the “elite” straw man to be Black as well.⁶⁷ Such a person would threaten the sometimes overt, sometimes subconscious sense that class hierarchies are also supposed to be constrained by race.

Second, many Americans are deeply ambivalent about class hierarchies. The nation was founded on inauthentic aspirations of equality, while reserving political participation and other rights to white male property owners. Later, workers were encouraged to aspire to individual fortune through boot-strapping and climbing the corporate ladder. Those at the bottom could admire and hope to become just like the self-made rich and successful, but at the same time resent the significant wealth disparities and the rarity with which such an American dream was realized.

Of course, Blackness was rarely, if ever, associated with the pinnacles of power or access for most of the country’s history. When the doors were opened to a limited few through the rise of elite Black organizations; the desegregation of some elite private and public educational institutions and businesses; and, eventually, affirmative action, hope was renewed that Blacks might be able to participate in the American dream. Blacks who “made it” were admired and hailed within Black communities (sometimes inordinately so), but there was also often a measure of distrust. Would the newly-anointed, “successful” Black “sell out” his (rarely her) less fortunate Black brothers and sisters?⁶⁸

⁶⁶ See Matt Bai, Obama Works for the Working-Class Vote, INT’L HERALD TRIB., Oct. 15, 2008, available at <http://www.iht.com/articles/2008/10/15/news/19obamat.php>; Michael Powell & Jeff Zeleny, Tagged as an Elitist, Obama Shifts Campaign From High-Flown to Folksy, INT’L HERALD TRIB., MAY 6, 2008, available at <http://www.iht.com/articles/2008/05/06/america/06obama.php>; Richard Sennett, Obama’s Campaign Needs to Focus on Working Class Expectations, GUARDIAN, Oct. 4, 2008, available at <http://www.guardian.co.uk/commentisfree/2008/oct/04/uselections2008.barackobama>; Joan Walsh, Obama and the White Working Class, SALON, Apr. 12, 2008, http://www.salon.com/opinion/walsh/election_2008/2008/04/11/pavoters.

⁶⁷ Geraldine A. Ferraro, Opinion, Healing the Wounds of Democrats’ Sexism, BOSTON GLOBE, May 30, 2008, available at http://boston.com/bostonglobe/editorial_opinion/oped/articles/2008/05/30/healing_the_wounds_of_democrats_sexism; Peter Dreier, Does Obama Really Have a Race Problem?, ALTERNET, Apr. 3, 2008, http://www.alternet.org/election08/80894/does_obama_really_have_a_race_problem (last visited May 20, 2009).

⁶⁸ See generally Kennedy, *supra* note 62. Professor Phyllis Goldfarb, a participant in this symposium, discussed the heroic anti-death penalty attorney Bryan Stevenson in her speech. As I pointed out in my oral presentation, Stevenson, who has fought tirelessly for the lives of

The contradictory, and perhaps ultimately self-defeating, aspect of this understandable discourse was this: as “Americans,” Blacks in the U.S. were/are often struggling for the same mainstream middle class or upper class ideal as do American whites and other Americans of color.⁶⁹

One of the most important aspects of the much vaunted American class mobility was/is the centrality of quality education. Rather than the common perception that most Blacks equate literacy and education with “whiteness,”⁷⁰ many Blacks in both the U.S. and Caribbean contexts see the education of their children as a necessity and even a pathway to power or resistance to racism.⁷¹

“Black Power” activist Stokely Carmichael, a member of a Trinidadian immigrant family, was an intellectual who attended elite schools.⁷² Malcolm X, although self-educated in prison, rose to prominence in part because of his phenomenal rhetorical abilities, intelligence, and wit.⁷³ And members of Black communities are always sure to give the “Reverend Dr.” Martin Luther King, Jr., his fully titled due.

Older generations sacrificed deeply so that their children could attain such educational distinctions. But the U.S. capitalist model

those most outcast by our society, attended Harvard Law School. “Elitism,” it seems to me, has much more to do with an overblown sense of one’s perceived superiority over others, than it does with where one attended school.

⁶⁹ See generally Kennedy, *supra* note 62.

⁷⁰ The term “acting white” is used pejoratively by some Blacks against those whose cultural or political motivations seem suspect. See, e.g., Andrew Gumbelin, Jesse Jackson Accuses Obama of “Acting White” in Presidential Campaign, THE INDEPENDENT, Sept. 20, 2007, available at <http://www.independent.co.uk/news/world/americas/jesse-jackson-accuses-obama-of-acting-white-in-presidential-race-402909.html>. Some assume that some Black children also use the term against other Black children to belittle academic achievement or the use of standard English. See, e.g., Henry Louis Gates, Jr., Breaking the Silence, N.Y. TIMES, Aug. 1, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9E04E0D71E3DF932A3575BC0A9629C8B63>. Others argue instead that the charge is also intended as a charge of political or cultural disloyalty, rather than an expression of anti-intellectualism. See, e.g., MICHAEL ERIC DYSON, IS BILL COSBY RIGHT? OR HAS MIDDLE CLASS BLACK AMERICA LOST ITS MIND? 84–86 (2005).

⁷¹ WATERS, *supra* note 54, at 255–56; see also KASINITZ, *supra* note 54, at 77–78 (stating that Caribbean immigrant educators and parents have created programs to ease the adjustment of Caribbean-immigrant students).

⁷² Carmichael attended the Bronx High School of Science, a prestigious public school specializing in science and math, and Howard University, one of the leading historically-Black universities in the country. See Michael T. Kaufman, Stokely Carmichael, Rights Leader who Coined “Black Power,” Dies at 57, N.Y. TIMES, Nov. 16, 1998, at B10; see also PENIEL E. JOSEPH, WAITING ’TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA 124 (2006) (noting that after Carmichael graduated from Howard University, he thrived as a community organizer in rural Mississippi).

⁷³ See Center for Contemporary Black History, The Malcolm X Project at Columbia University, <http://www.columbia.edu/cu/cbh/mxp/prison.html> (last visited May 20, 2009).

complicates the racial success stories. How is it possible to be proud of high educational achievement at elite mainstream or historically-Black schools and the economic class mobility gained thereby, while at the same time remaining true to the interests and needs of the majority of Blacks?⁷⁴

An equally troubling controversy developed at the intersection of race, class, and migration in recent years. Harvard professors Lani Guinier and Henry Louis Gates, Jr. generated robust debate and considerable media attention when they argued that a disproportionate percentage of the Blacks admitted to Harvard College were immigrants or from immigrant families.⁷⁵ An academic report provided data indicating that a similar trend was evident at a number of highly-ranked, or “elite,” colleges.⁷⁶ If that data is accurate, one would want to determine the internal or external basis of such a racialized transnational trend. The answer remains unclear. But the far more controversial issues relate to the nature and scope of affirmative action.

Guinier (herself the daughter of a Jamaican-American immigrant man and a Jewish-American woman) and Gates (a native-born African-American whose family raised him in West Virginia) argued that affirmative action policies at elite schools might therefore be misdirected.⁷⁷ If such policies were intended to level the playing field for Blacks affected by the legacy of slavery, why should recent immigrants to the U.S. benefit from it to the exclusion of native-born Blacks who could trace their ancestry to American slavery?

Given the relatively small number of Blacks of any ethnicity at elite institutions such as Harvard, one may well wonder whether the more pressing debate should be about increasing the number of Blacks of all origins in college. But the broader issue is quite central to the question of defining Blackness. Although Blackness as applied in U.S.—and even in international human rights legal contexts—is most often an issue with regard to racial discrimination and other human rights violations, it is also a category used to

⁷⁴ See generally Sara Rimer & Karen W. Arenson, Top Colleges Take More Blacks, but Which Ones?, N.Y. TIMES, June 24, 2004, at A1 (discussing a controversial report that a high percentage of Blacks admitted to “elite” colleges were immigrants or from immigrant families); see also Darryl Fears, In Diversity Push, Top Universities Enrolling More Black Immigrants, WASH. POST, Mar. 6, 2007, at A2; Scott Jaschik, The Immigrant Factor, INSIDE HIGHER EDUCATION, Feb. 1, 2007, <http://www.insidehighered.com/news/2007/02/01/black> (discussing the implications of the Princeton University report for affirmative action, among other things) (last visited May 20, 2009).

⁷⁵ See Rimer & Arenson, *supra* note 74, at A18.

⁷⁶ See *id.*

⁷⁷ See Fears, *supra* note 74.

assign remedial measures. Article 1(4) of the ICERD, for example, excludes from the definition of “racial discrimination” “special measures” (such as affirmative action policies).⁷⁸ Therefore, race or Blackness, especially when considered solely in national context, is sometimes perceived to involve a competition among groups claiming remedies based on the considerable harms of U.S. slavery and racism.⁷⁹ Again, this aspect of educational class and race conflict requires much deeper analysis, but it reveals an under-examined problem for those seeking to define race in the global economy.

C. *Blackness as Appearance/”Biology”*

The roles of (illegitimate) biology in the form of appearance distinctions and colorism⁸⁰ were also quite evident in the election. Professor Deborah Post and other participants in this symposium have deconstructed the legacy of the American “one-drop” rule under which pseudo-biological approaches to race classified anyone with identifiable African ancestry as “Black” or “Negro.”⁸¹ The rule was primarily initially intended to police white racial “purity.”

The twist is that Obama himself, like many light-skinned or bi-

⁷⁸ Article 1(4) of the Convention provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

ICERD, *supra* note 9, at art.1(4).

⁷⁹ A similar controversy arose over the question of reparations for the devastating legacy of the Trans-Atlantic slave trade. Should such reparations be limited to U.S. born Blacks who could trace their ancestry to slaves in the United States? Should they be extended to foreign-born Blacks who could trace their ancestry to slavery in other countries? Should they be extended to all Blacks who experience racism and other lingering harms without regard to an ancestral slave experience? See generally RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 199–233 (2000) (discussing the issues associated with reparations for Blacks who experienced harms in a range of contexts).

⁸⁰ On “colorism,” see generally Leonard M. Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness?: An Investigation and Analysis of the Color Hierarchy*, 75 *DENV. U. L. REV.* 131 (1997) (examining the role that skin tones have played in generating discrimination between and amongst the races); see also Leonard M. Baynes, *Who Is Black Enough For You?: The Stories of One Black Man and His Family’s Pursuit of the American Dream*, 11 *GEO. IMMIGR. L.J.* 97, 101–04 (1996) (discussing the possibility that race is a political and social construct rather than a concept grounded in biology).

⁸¹ See, e.g., Deborah Post, *The End of the One Drop Rule?: Issues of Racial Classifications and Authenticity in the Presidential Campaign of Barack Obama*, 72 *ALB. L. REV.* 901 (2009).

racial Blacks, could and did affirmatively choose Blackness and adopt its cultural styles. As discussed earlier, the authenticity of his stance was questioned by some, but if the size of the Black vote in his favor is any indication, Black voters either dismissed such concerns in favor of other priorities, or believed that Obama would represent the interests of African-Americans as well as those of other Americans.⁸²

In my view, an equally interesting question is whether he could have chosen “whiteness.” And having made the choice of Blackness, could he have captured the presidency and the ideal of representing “all” the people? Some within and outside the campaign fought to “transcend race” and to have the candidacy symbolize a “post-racial” society in which race (especially Blackness) did not matter.⁸³ Why not ask the alternative and more challenging question: “Could Blackness ever ‘represent’ all the people?”

Americans have come to see white male status as a background norm against which candidates for the presidency are to be measured.⁸⁴ But Blackness as a social, political, and cultural concept raised widespread fears that it could only represent “special interests” threatening to the interests of the mainstream.

Could identities other than mainstream identities still reflect a “United” States of America?

On a particularly bizarre note, the mere fact that Michelle Obama’s skin color was darker than her husband’s became a source of controversy for some. They questioned the political utility (or drawbacks) of her physical Blackness in relation to Obama’s candidacy.⁸⁵ They worried that she appeared “too angry” and celebrated perceived “makeovers” in physical or social style.⁸⁶ The intersection of such racial and gender stereotyping is well-known to many Black women in America.

To me as an outside observer, the controversies about whether Michelle Obama’s Blackness would be a political boon or problem for her husband’s racial authenticity seemed patently ridiculous. “Silly

⁸² See David Paul Kuhn, Exit Polls: How Obama Won, *POLITICO*, Nov. 5, 2008, <http://www.politico.com/news/stories/1108/15297.html> (last visited May 20, 2009).

⁸³ Vanessa Grigoriadis, *Black & Blacker: The Racial Politics of the Obama Marriage*, *NEW YORK MAGAZINE*, Aug. 18, 2008, at 22, available at <http://nymag.com/news/features/49139/>.

⁸⁴ See The Novelty Candidates, http://www.huffingtonpost.com/reese-schonfeld/the-novelty-candidates_b_103866.html (last visited May 20, 2009).

⁸⁵ See Grigoriadis, *supra* note 83, at 24. See generally, Verna L. Williams, *The First (Black) Lady*, 86 *DENV. U. L. REV.* 833 (2009) (discussing the influence of race and gender on popular perceptions of Michelle Obama).

⁸⁶ See Grigoriadis, *supra* note 83, at 25.

season” was at its peak. It was hard to observe the particular individuals involved without being struck with an immediate sense of authenticity in the absence of contrary evidence. But the mere fact that such questions were raised indicates the signaling importance of racial appearance in the American popular psyche. As noted above, could dark skin color and (seemingly) “unmixed” Black status ever be placed in a post-racial position on the U.S. stage?

Such struggles are not new. African-American and non-U.S. Black history is replete with complicated distinctions among Blacks based on identifiable mixed race status, skin color, facial features, hair and hairstyle,⁸⁷ clothing, and other appearance markers. Appearance markers have their transnational context as well. In both positive and negative portrayals and social movements, phenotypical attributes and clothing styles that were stereotyped as more “African” were regarded as indicators of authentic Blackness, or, by contrast, undesirable political radicalism.

A notorious *New Yorker* cover portraying the Obamas illustrated this underlying context.⁸⁸ It depicted Michelle Obama, who generally sported non-curly hairstyles in campaign appearances, wearing the long, curly “Afro” hairstyle more common among Black women in the 1960s and 1970s. She also was portrayed as wearing military combat gear—associated with militant Black nationalists (and internationalists) of the same period. Satire or not, the *New Yorker* cartoonist understood even if subconsciously that an “Afro” is a symbol of stereotypical Blackness for mainstream America.

Similarly, the traditional clothing in which the artist placed Barack Obama (who most often wore western suits on the campaign trail) was to be read as “potential Islamic terrorist.”⁸⁹ A photograph of Obama in a Kenyan ethnic group’s traditional clothing was also deployed to support this physical appearance as racial/ethnic

⁸⁷ See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 passim (1991) (discussing the race, gender, and political significance of Black women’s hairstyles).

⁸⁸ Barry Blitt, Cover Cartoon, THE NEW YORKER, July 21, 2008, available at http://www.thenewyorkerstore.com/product_details.asp?mscssid=CQGWKSHLFDH58PCQFJ0SRGH0A5D8CVB6&sitetype=1&affiliate=SEMKeywords&did=5&sid=125383&pid=&keyword=obama§ion=all&title=undefined&whichpage=2&sortBy=popular.

⁸⁹ The racist and xenophobic hysteria surrounding anti-Muslim prejudice was succinctly debunked by Republican former Secretary of State Colin Powell when he endorsed Obama. Powell first refuted rumors that Obama was a Muslim, then went further to note that Muslim faith is neither an indicator of lack of patriotism nor a political disqualifier for the presidency. Colin Powell Endorses Obama, NPR, Oct. 20, 2008, <http://www.npr.org/templates/story/story.php?storyId=95894643> (last visited May 20, 2009).

marker construct. “Muslim” had become a separate, racialized category in post-9/11 America and there was a clear racist intersection for some between Obama’s Blackness and his falsely perceived religious beliefs. It was not until former Secretary of State Colin Powell deconstructed the “Islamic beliefs” equals “terrorist beliefs” lie that this aspect of the “physical image dirty tricks game was undermined.”⁹⁰

D. Blackness as Cultural Essence

A related aspect of the effort to define authentic Blackness lies in the performance of Blackness as cultural politics. This involved the usual “cultural” and religious authenticators—the right Black church,⁹¹ the right music, the right sport (basketball), the right phrases and pop culture references. The media and political observers certainly scrutinized the Obamas for the “right” cultural signifiers. Culture is important, even crucial in defining Blackness, but, like the other categories discussed above, it is just as complex a subcategory.

More importantly, Blackness can be redefined to require both a cultural and political commitment to fighting racism and achieving social justice for the majority of Black people in coalition with, and not at the expense of, other peoples. It might involve appreciation for and the desire to learn about African and Diaspora cultures and a willingness to engage in cross-cultural dialogue about them. It might involve resurrecting our many diverse histories including histories of global and local racial conflict, but also of cultural traditions that sustained us in positive context.

From a strategic perspective, Blackness or race cannot include everything, but it must be more inclusive and flexible in order to remain a viable and politically, culturally, and economically useful

⁹⁰ See generally Jim Kuhnhehn, Obama Photo in Turban, Robe Causes Stir, HUFFINGTON POST, Feb. 25, 2008, http://www.huffingtonpost.com/2008/02/25/obama-photo-in-turban-ro_n_88272.html (last visited May 20, 2009) (showing photograph and discussing controversy).

⁹¹ Ironically, it was the Obamas’ membership in a popular and socially-active Christian church (Trinity United Methodist Church) that served both of them as a marker of authentic involvement in the African-American community. Yet that same membership was to become a source of political, racial, and cultural hazard for Obama’s campaign. See Senator Barack Obama, A More Perfect Union, Remarks at the Constitution Center, Philadelphia, PA, (Mar. 18, 2008) (transcript available at http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html) (responding to the controversial remarks by Trinity United Methodist’s then pastor, Rev. Jeremiah Wright, and discussing Obama’s views on racial attitudes in America).

concept in the twenty-first century. It must be able to cross borders along with the global economy and transnational migrants. It must be able to contemplate New Orleans jazz, West Coast and French hip-hop, and South African reggae. It must be able to imagine an African-American in Harvard Law School and in the White House without de-emphasizing the priority of preventing millions of poor Black men, women, and children from being crushed by racist structures that would rather consign them to prison than to college. It must engage racial complexity without being threatened by it.

Obama had the option to choose to do these things as he came of age. But in many respects, all Black people in the U.S. and outside it, are faced with similar choices—they are constantly in the process of choosing and of defining and redefining what Blackness means.

CONCLUSION: A FUTURE FOR GLOBAL MULTIDIMENSIONAL (NOT “POST-RACIAL”) RACE-CONSCIOUS APPROACHES IN HUMAN RIGHTS?

This informal essay has flagged and summarized some questions and implications raised by the symposium’s theme in the context of Black transnational identity. The legacy of African diasporas, contemporary cross-border labor migration, and the globalization of cultural, economic, and political trends requires that we explore the meanings and contradictions of racial criteria and categories in transnational perspective. In closing, I want to highlight what I see as a few positive indicators that a multidimensional approach to race is beginning to inform international human rights law, policy, and activism.

Despite the relatively weak enforcement mechanisms of international human rights non-discrimination and equality standards, they can serve to inform and enhance domestic understandings of race and racial discrimination. The international norms on racial discrimination take a much broader approach than U.S. jurisprudence. They impose obligations to take action aimed at eliminating laws and policies that are racially discriminatory in both intent and effect. They explicitly endorse the use of “special measures” (affirmative action) and require states to take appropriate action to end discrimination in both public and private spheres. They recognize the interdependence of economic, social, cultural, civil, and political rights in ending racial discrimination.

International human rights law has recognized the need for a multidimensional approach to race and racial discrimination. Race, although a strategically and socially important organizing

principle, should not be essentialized so as to ignore the simultaneous implications of other identities such as gender, economic class, childhood, migration status, labor status, indigenous status, sexual orientation, disability status, and collective development status.

The following thumbnail sketches illustrate what I hope will be a trend toward a more positive and effective approach to “defining race” in furtherance of social justice.⁹²

A. *“The Gender Related Dimensions of Racial Discrimination”*⁹³

This groundbreaking interpretation, influenced by the work of Gay McDougall, then a member of the Committee on the Elimination of Racial Discrimination,⁹⁴ explicitly recognizes and incorporates an intersectional/multidimensional approach. It interprets the ICERD to prohibit forms of racial discrimination that intersect with gender discrimination.⁹⁵ It thereby begins to break down the invisibility or marginalization of women of color under the broader rubric of race.⁹⁶ It notes that stereotypes associated with both race and gender can operate simultaneously to violate the human rights of women of color.⁹⁷

B. *“The Race Dimensions of Trafficking in Persons—Especially Women and Children”*⁹⁸

Prepared as part of the U.N. World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (Durban, South Africa, 31 August–7 September, 2001), this statement explores the race and ethnicity implications of sex and

⁹² I plan to explore the implications of these examples more fully as part of a larger project.

⁹³ Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, General Recommendation 25: Gender-Related Dimensions of Racial Discrimination, U.N. Doc. A/55/18/Annex (Mar. 20, 2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/76a293e49a88bd23802568bd00538d83?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83?Opendocument).

⁹⁴ See Global Rights, Gay J. McDougall, Biography, http://www.globalrights.org/site/DocServer/gaymcdougall_bio.pdf?docID=166 (last visited May 20, 2009); Posting of Diane Marie Amann to IntLawGrrls, <http://intlwgrrls.blogspot.com/2009/06/guest-blogger-gay-mcdougall.html>, 24 June 2009, 6:05 AM EST (last visited August 24, 2009) (“Guest Blogger: Gay McDougall”).

⁹⁵ See General Recommendation 25, *supra* note 93, at ¶ 3.

⁹⁶ See *id.* at ¶ 2.

⁹⁷ See *id.*

⁹⁸ Press Release, United Nations Department of Public Information, The Race Dimensions of Trafficking in Persons—Especially Women and Children, U.N. Doc. DPI/2193 (May 2001), available at <http://www.un.org/WCAR/e-kit/issues.htm>.

labor trafficking.⁹⁹ Such statements give lawyers, diplomats, and activists authoritative arguments on how stereotypical images of women from certain parts of the world or of certain cultural backgrounds are packaged and commodified with their gender for use in the global economy.¹⁰⁰

*C. CERD General Recommendation XXX on Discrimination
Against Non-Citizens (2002)*¹⁰¹

General Recommendation No. 30 is an important interpretive statement on how low-wage labor is racialized in the global economy so as to maintain the marginal status of workers in certain sectors.¹⁰² The analysis of race and migration status is also combined with gender to define the nature of work, wages, and working conditions.¹⁰³

*D. U.S. Human Rights Network ICERD Shadow Report 2008*¹⁰⁴

A coalition of non-governmental organizations, activists, and academics used the opportunity created by the U.S. submission of its 2007 periodic report to the U.N. on the ICERD¹⁰⁵ to highlight racial discrimination in the U.S. The shadow report critiques the inadequacies of the U.S. official report and places “domestic” issues such as Katrina, racial profiling, prison conditions, abuses against immigrants, education, housing, and health care, indigenous peoples’ rights, the rights of women of color, sexual orientation, and other issues on the international agenda.¹⁰⁶ The coalition’s efforts

⁹⁹ *Id.*

¹⁰⁰ *See id.* (noting how racial stereotypes influence the trafficking of women).

¹⁰¹ Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination Against Non Citizens, U.N. Doc. HRI/GEN/I/Rev.7 (Oct. 1, 2004), available at <http://www.unhcr.org/refworld/docid/45139e084.html>.

¹⁰² *See id.* at ¶¶ 33–34.

¹⁰³ *See id.* at ¶ 5.

¹⁰⁴ U.S. HUMAN RIGHTS NETWORK, ICERD SHADOW REPORT 2008 (2008), http://www.ushrnetwork.org/cerd_shadow_2008; Posting of Hope Lewis to IntLawwGrrls, <http://intlwgrrls.blogspot.com/2008/03/concluding-observations-just-beginning.html> (Mar. 10, 2008, 09:19 EST) (“Concluding Observations?: Just Beginning,” discussing U.N. comments in response to the 2007 periodic report of the United States on its compliance with ICERD and discussing the USHRN shadow report).

¹⁰⁵ U.S. Department of State, Periodic Report of the United States to the U.N. Committee on the Elimination of Racial Discrimination 1 (2007), available at http://www.state.gov/g/drl/rls/cerd_report/.

¹⁰⁶ *See* U.S. HUMAN RIGHTS NETWORK, *supra* note 104, at 1; Posting of Hope Lewis, *supra* note 104.

received serious consideration by CERD and were well-publicized. Significant diplomatic follow-up included a visit to the U.S. by the U.N. Special Rapporteur on Racism.¹⁰⁷

*E. Committee on Economic, Social, and Cultural Rights:
General Comment No. 20¹⁰⁸*

Finally, the UN Committee on Economic, Social, and Cultural Rights (CESCR) issued General Comment No. 20, a strong interpretive statement on discrimination with regard to the obligation to respect, protect, and fulfill economic, social, and cultural rights. The Comment clarifies that the ICESCR's non-discrimination provisions apply to a wide range of marginalized groups. The document addresses the problem of definition by noting that membership in a protected group can occur through self-identification, association, or even the perception that an individual belongs to the group. It also explicitly recognizes the concept of multiple discrimination and the cumulative impact of complex discrimination.

Remarkably, General Comment No. 20 gives specific interpretive weight to the implied category of protected groups. It had long been clear that expressly protected categories such as race and sex are protected from discrimination by the international human rights treaties and by the UDHR, but it had been less clear which groups might be covered implicitly under the "or other status" category. This groundbreaking document clarifies and interprets various applications in the context of disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and/or economic and social status.

The fact that this broad reading of non-discrimination occurred in the context of interpreting economic, social, and cultural rights (sometimes referred to as the "step-children" of the human rights movement) is even more promising.¹⁰⁹

Such efforts leave me hopeful that "defining race" will be a multilayered and progressive enterprise in the support of social change. We are at the beginning of what I hope will be a trend

¹⁰⁷ U.S. Human Rights Network, Special Rapporteur on Racism U.S. Mission 2008, http://www.ushrnetwork.org/special_rep (last visited May 20, 2009) (providing information on U.N. Special Rapporteur Doudou Diene's visit to the United States).

¹⁰⁸ Committee on Economic, Social, and Cultural Rights, Non-discrimination in Economic, Social, and Cultural Rights (25 May 2009) E/C.12/GC/20 25 May 2009, available at <http://www.hlrn.org/img/documents/GC%2020.doc>.

¹⁰⁹ See generally, Woods & Lewis, *supra* note 16.

1026

Albany Law Review

[Vol. 72

toward a more positive and effective approach to becoming post-racist without becoming post-racial.