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BLACK LIKE OBAMA: WHAT THE JUNIOR ILLINOIS SENATOR'S APPEARANCE ON THE NATIONAL SCENE REVEALS ABOUT RACE IN AMERICA, AND WHERE WE SHOULD GO FROM HERE

AMOS N. JONES*

Given Americans' warm bipartisan response to Senator Barack Obama's keynote address at the 2004 Democratic National Convention, the realist is constrained to applaud with them. The fact that voters of all ethnicities enthusiastically back¹ a man apparently black who, at first glance, is fairly critical of the status quo² indicates that the country is more open-minded than it used to be.³ Once the applause has subsided, however, the realist is further constrained to take a hard look at the facts as opposed to the rhetoric

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1. John Chase and David Mendell, *Obama sails to Senate win; Obama scores a record landslide*, CHI. TRIB., Nov. 3, 2004, at 1. In the general election, Obama wound up defeating opponent Alan Keyes by a margin of more than 40 percentage points. *Id.*

2. See *Obama's Speech*, JET, Aug. 16, 2004, at 12. ("If there's a child on the South Side of Chicago who can't read, that matters to me, even if it's not my child. If there's a senior citizen somewhere who can't pay for her prescription and has to choose between medicine and the rent, that makes my life poorer, even if it's not my grandmother. If there's an Arab-American family being rounded up without benefit of an attorney or due process, that threatens my civil liberties.")

3. For illustrations of the contempt with which white elites historically have viewed Harvard-trained lawyers and successful politicians presumed to be black, compare *Law: Future Cloudy*, TIME, Aug. 6, 1937, at 26 (*inter alia*, quoting a "complain[ing] chocolate-skinned Austin Thomas Walden of Atlanta," who had lambasted racism in the law in addressing the National Bar Association's annual convention at the University of Pennsylvania, and introducing the new president of the association, Howard University Law School Professor William L. Houston (father and uncle of recipients of Harvard Law School's Doctor of Juridical Science degree) as driving a Lincoln Zephyr) with the facts of *Major v. Treen*, 700 F. Supp. 1422 (E.D.La. 1988) (Ronald Reagan Assistant Attorney General for Civil Rights William Bradford Reynolds's declining to enforce the Voting Rights Act despite evidence that redistricting legislators and interested parties had made explicitly racist remarks about how New Orleans did not need any more "nigger bigshots" and "nigger mayors" to run in voting districts that gave blacks a fair chance to win) summarized in LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 36 (1998).

accompanying Obama's stardom. His globetrotting memoir and media appearances, while uplifting and entertaining, have proved unsatisfactory in delivering the obviously critical thinker's original answer to the big question that has remained unaddressed since the euphoria of 2004, when numerous journalists proclaimed Obama the new black political hope.⁴ When, how, and why did Barack Obama become black?

This essay contextualizes Obama's popular personal story within the messy legal and social framework created by centuries of slavery and Jim Crow segregation in America. It opens with a summary of Obama's identity as presented in his autobiography republished in 2004 and proceeds through a specific review of racial classifications in American legal history, raising the question whether Obama should even be counted as a black man. After explaining the history of the "one-drop rule" given legal force by a rarely considered holding of *Plessy v. Ferguson*⁵ that remains good law even today, the essay criticizes the thoughtless imposition of the black label upon Obama, suggesting possible reasons for his allowing Americans to minimize or ignore his substantially more dominant white heritage. Without suggesting specific regimes for categorization, the essay concludes by arguing that the time has come for public and private law to recognize different degrees of blackness, especially now that the country's census allows Americans to categorize themselves in more than one racial group.⁶

4. See, e.g., Clarence Page, *Obama's drama and our dreams; Getting back on track as the United States*, CHI. TRIB., Aug. 1, 2004, at 9 ("For now, [Obama] offers an inspiring glimpse of what America's next generation of black leadership could look like—a leadership that is not for blacks only."); Jonathan Tilove, *New star emerges on Democratic scene; Obama speech marks race-politics watershed*, THE (NEW ORLEANS) TIMES-PICAYUNE, July. 28, 2004, at 1 ("[I]n coming years, this week in Boston may be seen as a signal moment in the changing of the guard of the nation's black political leadership. It is the last act of the Rev. Al Sharpton's failed bid to grab the mantle long held by the Rev. Jesse Jackson, and the debut star turn of Barack Obama..."); and David Mendell, *Ryan, Obama enter new ring; Democrat carries high hopes of blacks with him to center stage*, CHI. TRIB., March 18, 2004, at 1 ("If he wins, he will instantly be catapulted into the top ranks of black leaders in the nation, setting expectations that may be difficult for a freshman senator to meet.").

5. 163 U.S. 537 (1896).

6. In a 2001 attachment to his classic book on the subject published in 1991, *infra* note 19, sociologist F. James Davis contextualized the intervening movement that drove this development:

"The OMB and the Census Bureau created an Interagency Task Force, composed of about thirty federal agencies, to recommend changes in the collection of racial data. In July 1997 this task force presented its report, recommending the 'check one or more' change but rejecting the addition of a multiracial category or any mention of the word 'multiracial' in the race question. The OMB decided in October 1997 to accept this recommendation for the 2000 census. The multiracial-

I. OBAMA'S AUTOBIOGRAPHY

Dreams from My Father: A Story of Race and Inheritance was solicited after Obama was elected president of the *Harvard Law Review* in 1990 and became publicized as the esteemed scholarly periodical's first black president.⁷ But this is not the autobiography of an American man who is black in the historical sense; this is a book by and about a biracial man who had a white Kansan mother and a black Kenyan father, the latter of whom he recalls meeting only once in his life—for a one-month period when he was 10 years old.⁸

Obama's parents met and married as undergraduates at the University of Hawaii around 1960. In 1963 when Obama was 2, his father left the family, eventually returning to Kenya with a Ph.D. from Harvard and serving as finance minister. Obama's mother, an anthropologist and distant descendant of Confederate States of America President Jefferson Davis, remarried. The family moved to Indonesia, where they spent four years while Obama's stepfather worked in the oil industry. Then Obama returned alone to Hawaii,

identity movement had not succeeded in getting its category added to the census forms, but the decision was still a victory: The federal government had officially acknowledged the reality of multiple racial ancestries. ...

"When the 2000 census offered Americans the opportunity to check more than one race for the first time, 2.3 percent did so. Among blacks, 8.3 percent of those age 18 or younger checked two or more races, but only 2.3 percent of those age 50 or over. ...

"An empirical argument for recognizing multiracial identity is the marked increase in interracial marriages. From 1968 to 1989, children born to mixed marriages increased from 0.7 percent of all births to 3.4 percent, or from 22,100 to 110,500. During this same period, births for one black and one white parent increased more than fivefold. ... There have of course been a great many racially mixed children in the United States for centuries, most of the black-white ones without benefit of marriage and automatically defined as black by the one-drop rule. That rule faces a greater challenge in the black-white marriages of recent decades, the large majority of which involve a black father and a white mother. Many of these wives do not want their children to have to deny their mother's ancestry. It has been estimated that at least 30 percent of black-white couples in recent decades have wanted to identify their children as biracial or multiracial, not just black." F. James Davis, *Epilogue to the Tenth Anniversary Edition*, available at <http://www.psupress.org/Justataste/samplechapters/justatasteDavis.html> (last visited Nov. 23, 2005) (citation omitted).

7. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* vii (2004).

8. Barack Obama, Here's what it takes to be a bona fide 'full-grown' man, June 19, 2005, Father's Day address at his Trinity United Church of Christ of Chicago (*in CHI. TRIB.*, June 22, 2005, at 27).

where he was reared by his white grandparents and attended prep school at highly regarded Punahou, which once taught the Hawaiian royal family. He attended Occidental College in California for two years before transferring to Columbia University. After graduating in 1983, he worked in Chicago. He entered Harvard Law School in 1988 and graduated *magna cum laude* in 1991. After graduating he wrote the book and returned to Chicago, embarking on life as an attorney and law professor. He won his state senate seat in 1996.

Approaching the book realistically raises an important point: since Obama can easily and without challenge say that he is black,⁹ then he also should be permitted to stand before a national audience and declare without ridicule that he is white. However, it is well documented that Obama's category of biracial people cannot exercise their right to identify themselves in America; the society does this for them, often at a very early age.¹⁰ The automatic imposition of the black label was the part of the Obama story that, if publicized, would have made many Americans uncomfortable.¹¹ Perversely, it is precisely this incomplete (erroneous) racial assignment from which Obama's star power is derived.

II. THE POWER TO UNITE

In his book, Obama refers from time to time to his mixed heritage. The introduction frames his early thoughts about the people who would stare:

Privately they guess at my troubled heart, I suppose—the mixed blood, the divided soul, the ghostly image of the tragic mulatto trapped between two worlds. And if I were to explain that no, the tragedy is not mine, or at least not mine alone, it is yours, sons and daughters of Plymouth Rock and Ellis Island, it is yours, children of Africa, it is the tragedy of both my wife's six-year-old cousin and his white first grade classmates, so that you need not

9. OBAMA, *supra* note 7, at xvi. (introducing the book as “a record of a personal, interior journey—a boy’s search for his father, and through that search a workable meaning for his life as a black American”) and at 8 (recalling from his Senate primary that “without organizational backing or personal wealth, a black man with a funny name, I was considered a long shot”).

10. See *infra* Section III (defining the “one-drop rule”). But cf. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 332-33 (2003) (arguing that a well ordered multiracial society ought to allow its members free entry into and exit from racial categories).

11. See generally Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 12-16 (2000) (cataloguing factors that facilitate many white people's denial of racism).

guess at what troubles me, it's on the nightly news for all to see, and that if we could acknowledge at least that much then the tragic cycle begins to break down ... well, I suspect that I sound incurably naïve, wedded to lost hope, like those Communists who peddle their newspapers on the fringes of various college towns. Or worse, I sound like I'm trying to hide from myself.¹²

Yet, *Dreams from My Father* only leaves Obama's racial status as the kind of abstraction the author claimed to clarify.

An important example is his discussion of how he admires Malcolm X's "repeated acts of self-creation," the black Muslim leader's ability to reinvent himself. Obama contrasted himself: "I knew as well that traveling down the road to self-respect my own white blood would never recede into mere abstraction."¹³ He then embarked on an intriguing story of how his white grandmother, with whom he was then living, had evidenced to her husband that she feared a panhandler at her bus stop because he was black. Mentioning his mild distress, Obama suddenly takes us away to Waikiki, changing the subject.¹⁴ These kinds of arrested proclamations are not unusual in the book. Obama thus teases those readers aware of his identification as a black man, leaving us wishing we knew precisely when he killed off the white in his line.

With familiar avoidance in the air, the punditry are claiming that Obama might unite America in a way nobody else could, by virtue of his ethnic lineage. On the heels of his inspiring speech of July 28, 2004, such artful commentary came forth with no acknowledgment of the race dynamics responsible for defining the man's identity in the first place—not from the Democrats, not from the Republicans, not from black constituents, and not from Obama himself.¹⁵

12. OBAMA, *supra* note 7, at xv.

13. *Id.* at 86. Obama discussed the privilege of remaking oneself in a tribute to Abraham Lincoln published on July 4, 2005. "...[W]hen I, a black man with a funny name, born in Hawaii of a father from Kenya and a mother from Kansas, announced my candidacy for the U.S. Senate, it was hard to imagine a less likely scenario than that I would win—except, perhaps, for the one that allowed a child born in the backwoods of Kentucky with less than a year of formal education to end up as Illinois' greatest citizen and our nation's greatest President. In Lincoln's rise from poverty, his ultimate mastery of language and law, his capacity to overcome personal loss and remain determined in the face of repeated defeat—in all this, he reminded me not just of my own struggles. He also reminded me of a larger, fundamental element of American life—the enduring belief that we can constantly remake ourselves to fit our larger dreams." Barack Obama, *What I See in Lincoln's Eyes*, TIME, July 4, 2005, at 74.

14. OBAMA, *supra* note 7, at 88.

15. Before winning the primary, Obama "tried to downplay his role as a budding black leader, saying that he was 'of the African-American community, but not limited by it.'"

Asked by the *New York Times* how he defined his own racial identity in July 2004, Obama said he considered himself African-American:

African-Americans are a hybrid people. We're mingled with African culture and Native American culture and European culture. ... If I was arrested for armed robbery and my mug shot was on the television screen, people wouldn't be debating if I was African-American or not. I'd be a black man going to jail. Now if that's true when bad things are happening, there's no reason why I shouldn't be proud of being a black man when good things are happening, too.¹⁶

His memoir could have furnished more detailed answers but instead fell short. Perhaps the glossing was purposeful, as going deeper into what his white lineage has done for his opportunities and successes in America probably would have presented facts inconvenient to an otherwise simple-looking racial identification decision. Moreover, harping on white racism as the factor that forces biracial Americans to identify at some point as black would turn off white voters who are the currency of national politicians' long-term viability. Minding this gap, Obama campaigned well in Illinois, electrified the nation as the keynote speaker at the Democratic National Convention in Boston, trounced black conservative Alan Keyes,¹⁷ and vowed in his victory address to continue bringing people together across partisan lines for the benefit of Illinois.¹⁸

The talk of Obama as a presidential contender centers on this power to unite. But if Obama's capacity for racial unification is to be credibly assessed, then the white heritage with which he is intimately familiar must be acknowledged as prominently as his black identity is. His black identity has been imposed without incident and paraded in public with fanfare. Yet, while Obama is known as the first black president of the *Harvard Law Review*, he in fact is more probably the periodical's first biracial president. He is celebrated as only the fifth African-American ever elected to the United States Senate, although he is more accurately among a tiny group of Americans of equal black and white heritage who have been elected to the United States Senate.¹⁹ It is as if the well researched and now-officially-recognized racial

Mendell, *supra* note 4. At a May 2004 fund-raiser attended by young black professionals in Chicago, Obama was introduced by the host as "the best and brightest we have to offer the world." *Id.*

16. Monica Davey, *A Surprise Senate Contender Reaches His Biggest Stage Yet*, N.Y. TIMES, July 26, 2004, at A1.

17. Chase and Mendell, *supra* note 1.

18. *Id.*

19. See F. JAMES DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION 6 (1991).

category for mixed Americans does not exist—or, if it does, never should be taken seriously as a category of its own, lest history be subject to significant revision informed by an enlightened embrace of ethnic distinctions that matter to every American's identity.

Dreams from My Father was initially published before the Bureau of the Census began deliberating on whether Americans should be permitted to identify themselves as multiracial, but Obama has had ample opportunity since then to think about this question and how he would identify. The federal decision to allow multiple box-checking on Census forms was a momentous matter, once it was raised in the late 1990s,²⁰ but Obama failed to acknowledge it in the Preface to the 2004 Edition he added.²¹

While Obama told the *New York Times* that he had no choice to identify otherwise, raising the specter of black men's often negative exposure in the media, he was evasive on the real issue inasmuch as he focused on the appearance factor rather than on the racism factor in forming his identity, or what Professor Lani Guinier would call the "organizing story" of his life.²² In fact, it is racism that causes so many Americans who have two black parents to wind up under arrest in the first place, racism similar to the kind that marks half-white men as irredeemably tainted because one parent is black. In his memoir Obama should have analyzed pointedly the historical process by which America disallows him and Americans like him from claiming that they are white. In glossing over this injustice, the Constitutional Law teacher's memoir cheated the reader.

III. DEFINING RACE IN AMERICAN LAW: GENES, CULTURE, AND THE ONE-DROP RULE

In his seminal socio-legal survey of the development of American racial classifications, sociologist F. James Davis differentiates racial and cultural

20. *Supra* note 6. *But see* Maurice R. Dyson, *Multiracial Identity, Monoracial Authenticity & Racial Privacy: Towards an Adequate Theory of Multiracial Resistance*, 9 MICH. J. RACE & L. 387 (2004), at 402-03 (noting that the history of the one-drop rule in America raises doubts about the political consequences of the U.S. Bureau of the Census's new racial allowances).

21. So did his chief proponent in her quotation on the cover: Children's Defense Fund Founder Marian Wright Edelman thereupon wrote, "Perceptive and wise, this book will tell you something about yourself whether you are black or white." Edelman, a black, Yale-educated lawyer who advocates powerfully for children—and herself the mother of three highly accomplished biracial sons who came of age around the same time as Obama—ought to know better than to appear so exclusionary.

22. *See infra* note 95.

processes, “although they have taken place together in the same social situations:”

Races are groupings of human beings based on average differences in biological characteristics, while cultures are group patterns of behavior and beliefs. Racial traits are transmitted from generation to generation by the genes, while culture is transmitted in the process of socialization, by social communication. Blacks in the United States are a group with visibly distinctive racial traits, but they also are an ethnic group with a sense of identity and a shared lifestyle.²³

Until the 1980s, the nation’s undisputed answer to the racial question “Who is black?” was that a black person is any person with any known African black ancestry.²⁴ This definition, known widely as the “one-drop rule,” was grounded in the American experience of slavery and Jim Crow segregation.²⁵ Some courts called it the “traceable amount rule,” meaning that a single drop of “black blood” makes a person black.²⁶ As Professor Davis explains, blacks had no choice but to accept the white-imposed definition: “[T]his American cultural definition of blacks is taken for granted as readily by judges, affirmative action officers, and black protesters as it is by Ku Klux Klansmen.”²⁷

An important legacy of the *Plessy* decision is its rarely considered²⁸ holding that the one-drop rule remains legally allowable. Homer Plessy’s contention was that, since he was only one-eighth black and appeared to be as white as most people who were no-eighths black, he was entitled to sit in the

23. DAVIS, *supra* note 19, at 29.

24. BREWTON BERRY AND HENRY L. TISCHLER, RACE AND ETHNIC RELATIONS 4TH ED. 97-98 (1978); GUNNAR MYRDAL, AN AMERICAN DILEMMA 113-118 (1944); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 1-2 (1980).

25. *See generally* DAVIS, *supra* note 19, at 831-80 (describing the emergence of the rule from the antebellum period, as miscegenation proliferated, and tracing its development into the firm rule of the Twentieth Century). *See also* VIRGINIA R. DOMINGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA 23-55 (1986) (discussing the history of racial classifications); CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 1-17 (1940) (surveying contemporary state laws defining who is a Negro); and GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 12-25 (1910) (analyzing the question “What is a Negro?”).

26. MELVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 56 (1964).

27. DAVIS, *supra* note 19, at 8.

28. Constitutional law casebooks routinely edit this opinion to exclude its dismissive treatment of the fundament of the plaintiff’s argument, that he was not black (the adoption of which by the Court would have been dispositive of the entire case). *See, e.g.*, GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, AND MARK V. TUSHNET, CONSTITUTIONAL LAW, 4TH ED. 437-446 (2001).

white sections of trains engaged in interstate commerce through Louisiana.²⁹ The Court refused to decide directly on the definition of Negro, instead upholding briefly at the end of the Opinion state legislatures' authority to define a Negro as any person with black ancestry.³⁰ Although the Supreme Court overturned that case's acceptance of separate-but-equal doctrine 58 years later in *Brown v. Board of Education*,³¹ the Court since *Plessy* has refused to hear challenges of racial classifications of persons who thought they were white but who were classified in official records as black. This consistently has been the practice in the lower courts, and often when the black ancestry was even less than one-eighth.³²

Perhaps the most vivid legal endorsement of the one-drop rule is the decision of another Louisiana case, this one presented to the Supreme Court in 1986 by a woman who had assumed that she was white but found out later in life that her birth certificate listed her as black. In *Jane Doe v. State of Louisiana*,³³ a woman sued in Louisiana courts to change the classification on her deceased parents' birth certificates to "white" so that she and her brothers and sisters—all of whom looked white and some of whom had both blonde hair and blue eyes—could be designated as white. The plaintiff, Mrs. Susie Phipps, had been denied a passport because she had checked "white" on the application but her birth certificate said "black." Phipps claimed to have been shocked by the discovery of the "black" mark; she always had believed she was white, had married twice as white, and had always lived as white. A 1970 Louisiana statute had refined the definition of black from anyone "with a trace of black ancestry" to anyone whose ancestry is more than one thirty-second black.³⁴ During the Phipps litigation, adverse publicity caused the state to change the law again in 1983, this time permitting a designation of white—and even allowing birth-certificate classifications to be changed—when it was proved that a child is white by a "preponderance of the evidence."³⁵

In the 1983 trial, decided a month prior to the enactment of the new law, the state offered evidence alleging that Phipps was three-thirty-seconds black, including affidavits from some relatives who said that they considered

29. *Plessy*, 163 U.S. at 549 (1896).

30. *Id.* at 552.

31. *Brown v. Board of Education*, 348 U.S. 886 (1954).

32. DAVIS, *supra* note 19, at 8.

33. 485 So. 2d 369 (1985).

34. DAVIS, *supra* note 19, at 10 (quoting La. R.S. 42:267).

35. *Id.*

themselves to be colored.³⁶ Yet, after the revised statute took effect, the district and appellate courts of Louisiana effectively reinstated the traceable-amount rule, citing as controlling the race marked on the birth certificates of Phipps's parents: "That appellants might today describe themselves as white does not prove error in a document which designates their parents as colored."³⁷ The majority opinion noted expert testimony that the race of an individual cannot be determined with scientific accuracy, holding that "individual race designations are purely social and cultural perceptions and the evidence conclusively proves those subjective perspectives were correctly recorded at the time the appellants' birth certificates were recorded."³⁸ Phipps's own subjective perspective, based on significant physical evidence, was ignored. The black in Phipps's lineage, to be sure, was but one great-great-great-great-grandmother, a slave who had conceived the child of a white master.³⁹

At the rehearing in December 1985 the appellate court also affirmed the necessity of designating race on birth certificates for public health, affirmative action, and other governmental purposes and held that equal protection of the laws is not denied as long as the information is treated as confidential.⁴⁰ Like the Supreme Court of Louisiana in 1986, the U.S. Supreme Court in December of that year declined to review the decision, stating: "The appeal is dismissed for want of a substantial federal question."⁴¹ Thus, the state court's opinion was sufficient for the Supreme Court of the United States to leave intact a state's effectively perpetuating the application of the one-drop rule.

It is instructive at this point to recall what it meant to be black on the mainland in 1961, the year of Obama's birth. The focus here shall remain on the continuous condition of victimhood formative of the black American experience, a process to which neither Obama nor any of his relatives were subject.

36. Calvin Trillin, *American Chronicles: Black or White*, NEW YORKER, Apr. 14, 1986, at 62-63 and 71-74.

37. *Doe*, 485 So. 2d at 371 (1985).

38. *Id.* at 372.

39. DAVIS, *supra* note 19, at 10.

40. *Id.* at 11.

41. 107 Sup. Ct. Rep., interim ed. 638 (1986) (*quoted in* DAVIS, *supra* note 19, at 11).

IV. THE MAKING OF A BLACK AMERICAN

Since America's colonial days, blacks generally have lived under all-encompassing *de jure* subjugation applicable to everybody viewed as black.⁴² While moves to counter attitudes biased against persons on the basis of their ethnicity, race, and national origin materialized during the twentieth century, the primary mechanisms for banning discrimination were the Constitutional amendments added after the Civil War. The Thirteenth Amendment prohibits slavery and involuntary servitude.⁴³ The Fourteenth Amendment contains the Due Process and Equal Protection clauses that limit state action, as well as a clause empowering Congress to enforce the provisions of the amendment.⁴⁴ The Fifteenth Amendment forbids denying any individual the right to vote on the basis of race or color.⁴⁵ State constitutions include a variety of provisions dealing with equal rights, some of them essentially rewording the federal due process or equal protection clauses.⁴⁶

Still, until the 1960s, black Americans were barred generally from associations, educational institutions, houses of worship, neighborhoods, occupations, and legal defenses and recourse.⁴⁷ Routine police terrorism,⁴⁸ church bombings,⁴⁹ child killings,⁵⁰ and other systematic and random assaults⁵¹ imposed a burden that denied all black families full access to the American

42. PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 222-232 and 395-408 (1999).

43. U.S. CONST. amend. XIII.

44. U.S. CONST. amend. XIV, §§ 1, 5. While the equal protection clause of the Fourteenth Amendment does not on its face apply to the federal government, the notion of equal treatment has become part of the concept of due process under the Fifth Amendment. *See Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).

45. U.S. CONST. amend. XV.

46. ROBERT N. COVINGTON AND KURT H. DECKER, *EMPLOYMENT LAW IN A NUTSHELL* 203 (2002).

47. John Payton, *The Meaning and Challenges of the Michigan Cases*, address at the Harvard Law School Saturday School Program (Nov. 6, 2003), available at http://www.law.harvard.edu/news/webcast_archive/2003 (last visited Nov. 23, 2005). *See generally* John H. Mansfield, *Harvard and the Pink Hat Café: Some Recollections of the Civil Rights Movement and a Few Observations on Its Surprising Consequences* (Apr. 12, 1995), at 8-11 (discussing, in Leverett House's Kenneth B. Murdock Lecture, legal challenges to violent intransigence of Mississippi whites after passage of the Civil Rights Act of 1964) (on file with author).

48. HOWELL RAINES, *MY SOUL IS RESTED: THE STORY OF THE CIVIL RIGHTS MOVEMENT IN THE DEEP SOUTH* 208-209 (1977).

49. *Id.* at 56.

50. *Id.*

51. JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965* 122 (2002).

Dream.⁵² Black Americans had only token political representation in a country whose creed exalted equality.⁵³ Indignity upon indignity finally compelled blacks, along with sympathetic whites, to organize and gradually force the issue of racial liberation.⁵⁴ Starting around the time of the founding of the National Association for the Advancement of Colored People (NAACP) and continuing through the era of the 1941 March on Washington, the Montgomery Bus Boycott, the Greensboro sit-ins, and the passages of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, civil rights activists across the country challenged successfully the injustices of their land.⁵⁵

Motivating that transition, black litigators were challenging the unjustness of America's racial distinctions in bold, new ways. NAACP counsel Charles Hamilton Houston—the first black editor of the *Harvard Law Review*, dean of Howard University's law school, and the mind behind much of the theory adopted to attack segregation—purposefully dramatized the senselessness in such classifications. Until Houston became involved, pre-*Shelley v. Kraemer*⁵⁶ racially-restrictive-covenant litigation was simple and straightforward: the plaintiff alleged that the covenant existed, that the defendant resided in the covenanted property, that the defendant was a Negro, and that the plaintiff was white (and therefore not personally in violation of the covenant).⁵⁷ As soon as these allegations were proved, a court would order that the defendant be ejected from the property.⁵⁸ Occasionally, defendants raised constitutional arguments, which were summarily rejected.⁵⁹ For the most part, these cases were as routine as run-of-the-mill landlord-tenant litigation⁶⁰—but Houston began denying, and requiring plaintiffs to

52. See John F. Kennedy, Radio and Television Report to the American People on Civil Rights, June 11, 1963 (noting that “[t]he Negro baby born in America today, regardless of the section of the nation in which he is born, has about one-half as much chance of completing a high school as a white baby born in the same place on the same day, one-third as much chance of completing college, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life expectancy which is 7 years shorter, and the prospects of earning only half as much”), available at <http://www.jfklibrary.org/j061163.htm> (last visited Nov. 23, 2005).

53. IRVING L. GORDON, AMERICAN HISTORY, 2ND ED. (REVISED) 390 (1993).

54. *Id.* at 391.

55. *Id.* at 395.

56. 68 S.Ct. 215 (1947).

57. Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 308 NOTE 20 (1990).

58. *Id.*

59. *Id.*

60. *Id.*

prove, that they were white and that the defendants were black.⁶¹ This produced cross-examinations that searched into plaintiffs' ancestries for several generations, stunning plaintiffs and the communities they represented.⁶² Houston's purpose was not to be procedurally obstructive; it was instead part of a much larger effort to persuade the courts, the public, and the parties themselves that distinctions based on race are meaningless.⁶³ "Every time you drag these plaintiffs in and deny that they are white," Houston explained, "you begin to make them think about it. That is the beginning of education on the subject. In denying that your defendants are Negroes, you go to the question of the standards of race. There are many people who cannot give any reason why they are white."⁶⁴ Buoyed in 1954 by the unexpected, unanimous *Brown* decision effected through similar litigation techniques, the Civil Rights Movement took hold, embracing the deliberately moralized political approach that would secure blacks' rights and reflexively establish the black community as the conscience of the nation.

This is where Martin Luther King, an elite black Baptist preacher from the South, became instrumental. A powerful speaker with profound eloquence⁶⁵ and sophisticated charisma,⁶⁶ King took the cause directly to the people. He appealed to the white masses by applying the lessons of the Bible, which the overwhelming majority of Americans accepted as the most reliable moral guidepost.⁶⁷ In Montgomery, he oversaw a protracted transportation boycott that got blacks seats and jobs, enduring manifold bombings and cash-draining litigation.⁶⁸ In Selma, he exposed state-sanctioned hostility to blacks' voting, enduring the beating of his followers over a bridge they had paid for by police officers paid to protect them—followers including the Rev. James Reeb, a young, white Unitarian who was beaten to death by a group of whites

61. *Id.* (citing CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 60-61 (1959)).

62. Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 308 note 20 (1990).

63. *Id.*

64. *Id.* (citing VOSE, *supra* note 61, at 61).

65. GORDON, *supra* note 53, at 390.

66. *Id.* At the age of 26, King accepted his first professional job—as the Senior Pastor of the elite Dexter Avenue Baptist Church in Montgomery, Ala., organized during Reconstruction by First Baptist Church laity including black faculty of Alabama State University and erected on the city's most desirable commercial thoroughfare. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-68 203 (1988).

67. See SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 343 (2004) (explaining contemporary conservatives' bringing back of religion into the public square).

68. BRANCH, *supra* note 66, at 203.

angered by the march.⁶⁹ In Chicago King dramatized the ill treatment confronting the city's black residents, planning a dangerous march into racist Cicero.⁷⁰ In Washington he preached to the world the "I Have a Dream" sermon that convicted a nation to live up to its moral possibilities.⁷¹ In death, he haunted the nation through the prophetic words of his "I've Been to the Mountaintop" sermon, delivered the night before his assassination in Memphis, Tennessee.⁷² Through it all, the cameras rolled, and he was never alone. In every major city, similar black leaders and followers of many colors copied King's moral arguments, confronting the establishment, engaging authority, and working with the people to transform society at great personal cost.⁷³ The resultant institutions of American democracy are a reminder of the forces that turned black Americans into a unique people on American soil.

Obama shares in none of this heritage, though he is assumed to be black like this. Ironically, his mass appeal is embodied in this paradox. He can be called a great unifier because he presents a fresh black face free of the baggage of historical bigotry—systemic and enduring racism that has left black Americans scarred and white Americans blushing. After all, none of his relatives endured American slavery or fell victim to Jim Crow segregation. He was born into the era of affirmative action, having grown up in ethnically diverse and unusually tolerant Hawaii.⁷⁴ He is as much immigrant as he is black, and as white as he is both. To many white people, who form roughly 70 percent of the presidential electorate, he is the preferred black alternative to the other electrifying Democratic National Convention speaker of the week, the Rev. Al Sharpton,⁷⁵ who reminded his primetime audience of the necessity of human sacrifice and an act of Congress to empower many black Americans simply to vote.⁷⁶ But why would Obama even be compared to Sharpton,⁷⁷

69. *Id.* at 87.

70. CHARLES PATTERSON, *THE CIVIL RIGHTS MOVEMENT* 113 (1995).

71. *Id.* at 72.

72. *Id.* at 115-116.

73. GORDON, *supra* note 53, at 395-96.

74. *See* Davis, *supra* note 6 (noting that "the implicit Hawaiian rule for determining the status of racially mixed persons stands in sharper contrast to the one-drop rule than any of the world's other status rules. . . . The Hawaiian rule confers on racially mixed persons a status equal to that of all parent groups, enabling one to acknowledge and be proud of all of one's ancestries.").

75. *See* Tilove, *supra* note 4.

76. FDCH Political Transcripts, *The Reverend Al Sharpton Delivers Remarks at The Democratic National Convention*, July 28, 2004. Sharpton declared: "Mr. President, the reason we are fighting so hard, the reason we took Florida so seriously, is our right to vote wasn't gained because of our age. Our vote was soaked in the blood of martyrs, soaked in the blood of Goodman, Chaney and Schwerner, soaked in the blood of four little girls in Birmingham.

when Sharpton is constitutionally blacker than Obama (and was the kind of activist subject to a brutal assassination attempt at a New York City demonstration in the 1990s)? Because of the whites-imposed one-drop rule, which makes both men equally black no matter how white Obama's heritage is. *Dreams from My Father* hardly explains this dynamic's effect on the author. Obama appears determined to avoid issuing the inevitable indictment of white racism, perhaps because he has no historical claim based on the racial injustice that Americans his age with two black parents share.

V. WHAT THE BLACK EXPERIENCE MEANS: PICKING BLACK LEADERS

If Obama were a black in America in the traditional sense, with two black American parents and several black American grandparents, would Americans across the board so enthusiastically embrace him? This question spurs speculation, but recent political history can provide clues toward an answer.

The case of former Secretary of State Colin Powell could suggest an affirmative reply. Like Obama, Powell had foreign parentage; his were Caribbean. Unlike Obama, both of Powell's parents were black. Nevertheless, Powell has long been considered to be a formidable prospect for the presidency. Of course, Powell became universally popular in America only after having risen to chair the Joint Chiefs of Staff as a hero of the first Gulf War. Americans adore war heroes and political moderates. Powell is obviously both. Obama is clearly neither.

A political milestone more comparable to Obama's was the victory in 1989 of the first and only elected black governor in American history, Governor L. Douglas Wilder. The developments subsequent to this episode suggests that traditional blacks cannot be popular like Obama. Wilder, who served Virginia from 1990 to 1994, appeared in the national imagination as the grandson of slaves, a decorated Korean War veteran and self-made millionaire lawyer from Richmond who became the top elected official in a conservative Southern state where the Confederate States of America had established its capital only a few generations earlier.⁷⁸ In a nation that has allowed slavery longer than it has forbidden it, Wilder's election represented an enormous transformation. A veritable first, it exhibited willingness among

This vote is sacred to us. This vote can't be bargained away. This vote can't be given away. Mr. President, in all due respect, Mr. President, read my lips: Our vote is not for sale." *Id.*

77. See, e.g., Tilove, *supra* note 4.

78. B. Drummond Ayres, Jr., *Wilder's Flier*, N.Y. TIMES MAG., Jan. 12, 1992, at 31.

white Southerners to support a black man that was unimaginable only one generation earlier, when the state of Virginia defended its antimiscegenation laws before the Supreme Court of the United States.⁷⁹ Unlike Obama, Wilder beat a white man in the general election. His election thereby signified a transition of which the entire nation could have been proud. Moreover, he delivered while in office, balancing his fiscally strapped state's budget without raising taxes.⁸⁰ Wilder wound up a serious contender⁸¹ in the Democratic primary for president in 1992 but was virtually dismissed by the media.⁸² What could have been more encouraging than Wilder's story of American redemption? What could have served as a more uplifting symbol of the country's promise than his lifetime achievement, which originated prior to and helped to usher in the era of affirmative action? Why wasn't Wilder's victory blown up before America the way Obama's was even before Obama had won the big race?

Perhaps America could not so smoothly appropriate Wilder's story because drawing attention to his accomplishments would have forced a discussion of 244 years of slavery plus 72 more years of racist segregation, which together constitute America's most outcome-determinative disgrace. Any praise of Wilder would have had to be predicated upon his having overcome the terrors of segregated Virginia, the employment discrimination that prevented hundreds of Howard-educated lawyers (of whom he was one) from practicing anywhere, and the hostile environment of white entrenchment

79. See *Loving v. Virginia*, 87 S.Ct. 1817 (1967). Accord OBAMA, *supra* note 7, at 12 (noting that in 1960, the year in which his parents were married, the term miscegenation still described a felony in more than half of the states).

80. Wilder did not seek re-election because Virginia's governors were under a one-term limit. He later sought a U.S. Senate seat and lost, but in 2004 he was elected mayor of Richmond.

81. Wilder's basic presidential campaign theme was that the Democrats will never recapture the presidency until they stop nominating liberal tax-and-spend candidates; his party, he argued, would have to put a new kind of politician on the national stage, a realist who blends social compassion with balanced budgets, not by raising taxes, but by eliminating 'niceties' in favor of 'necessities'—the way, Wilder noted, he had run and won in Virginia. Ayres, *supra* note 78.

82. See generally Ayres, *supra* note 78.

known to permeate Virginia politics for most of Wilder's adult life.⁸³ All of a sudden the story, however uplifting, is no longer comforting.⁸⁴

VI. PASSING IN REVERSE

Watching Obama, nobody has to think concretely about slavery and Jim Crow. His background conjures no moral confrontation. He does not inherently present the black American experience the way most black politicians do, for his mother is white, his father, Kenyan. A suspicious reader might infer further. The latest dynamics in his life, including his conduct on the campaign trail, could evidence that Obama has adopted a bizarre practice that might be most accurately described as *passing in reverse*.

When extremely light-skinned, sharp-featured, and straight-haired black people would "pass" in the 1800s and 1900s, they would break from their black heritage, fool white people, and live their lives among the white community without incident, either temporarily or in perpetuity.⁸⁵ These blacks identified and pursued the obvious privileges of being white in a society ordered on white privilege.

As noted above, Obama was born into the modern era, in which racial preferences redistribute to blacks some key privileges to which whites have had exclusive access. Obama finds himself operating in a period in which being black finally brings some benefits (although blacks generally agree that benefits attached to blackness do not come close to overpowering the harmful and residual consequences of discrimination). Consider his adaptation into

83. See, e.g., *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989) (finding that the at-large system of electing members of Norfolk's city council unlawfully diluted black voting strength and that the decades-old system had been maintained for a racially discriminatory purpose). See also Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, 33 *SOC'Y* 27, at 27-28 (1996) ("[P]ublic school integration; 10296; 10296 and the associated demolition of the black school has had a devastating impact on African-American children - their self-esteem, motivation to succeed, conceptions of heroes or role models, respect for adults, and academic performance.").

84. The *New York Times* amplified some of the history about which the country would have been reminded, reporting in 1992: "It might come as a surprise to Wilder-watchers today that in his political youth, he positioned himself as a liberal, and a confrontational one at that. After entering the State Senate, he began to sport a bushy Afro and to press demands for fair-housing legislation, more minority hiring in business and making the death penalty unconstitutional. In his maiden speech, he charged that the state of Virginia, including its Legislature, was racist to the core, and called heretically for dropping the official state song, 'Carry Me Back to Old Virginia,' which contained the words 'massah' and 'darkie.'" Ayres, *supra* note 78.

85. See generally BEN LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS* 376-395 (1998).

blackness in an exchange with former “NBC Nightly News” anchorman Tom Brokaw:

BROKAW: You’ve got a black father from Kenya and a white mother from Kansas. You were raised by the white family, effectively. You’re plainly a black man.

Mr. OBAMA: Right.

BROKAW: In which culture are you most comfortable? Or does it make any difference to you?

Mr. OBAMA: Well, I think both. That’s part of what my speech was about, was we’re joined at the hip. You know, when I see two aging white people walking down the street, they could be my grandparents, and it’s that union of different cultures and different voices that make this country fabulous.⁸⁶

So Obama implies that he belongs in both cultures and indicates that he is “most comfortable” in “both cultures”—even though he is “plainly” a black man. In not addressing the affront⁸⁷ of his whiteness’s being simultaneously noticed and dismissed, and accepting without hesitation the black label, Obama certainly minimized controversy. But, in perpetuating a half-wrong (erroneous) racial assignment that happens to be synonymous with victimhood and its attendant entitlement, and deriving star power from the misleading racial assignment,⁸⁸ is Obama passing in reverse? Reasonable readers of *Dreams from My Father* and recent history will draw different conclusions.

Nineteenth Century events in American politics occasioned similar reflections. During Reconstruction, the period of unusual black empowerment following the South’s defeat in the Civil War, all but three of the twenty black congressmen and two black senators serving in Washington, D.C., were what today would be called biracial.⁸⁹ The black-white identity probe was asked of and answered head-on by one such elected official, a little-known politician who appeared in circumstances strangely similar to Obama’s.

86. Tom Brokaw, *Barack Obama, rising star in the Democratic Party*, NBC Nightly News Transcript, July 28, 2004.

87. Forcing individuals to deny part of their ancestry violates the right to free association, as defined by the Charter of the United Nations in the Universal Declaration of Human Rights. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd. Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948).

88. If Obama were 100 percent white, he would not matter to America as he now does; if he were 100 percent black, he would be historically indistinguishable from Carole Moseley-Braun, another Illinoisan, who in 1992 became the first-ever black woman U.S. Senator (but still was not promoted nationally to the degree that Obama has been).

89. DAVIS, *supra* note 19, at 6.

America's first black governor, Pinckney Benton Stewart Pinchback took office as acting governor of Louisiana in 1872.⁹⁰ He had been born in May of 1837 in Macon, Georgia, to a slave and her former master who were living as husband and wife.⁹¹ Pinchback grew up affluent, being sent North to attend high school in Cincinnati.⁹² He eventually settled in New Orleans and, as an active Republican, served for six weeks amid the impeachment of Governor Henry C. Warmouth, going on to serve Louisiana in the U.S. House of Representatives.⁹³ When asked of which heritage he drew upon as a source of pride, Pinchback replied: "I don't think the question is a legitimate one, as I have no control over the matter. A man's pride I regard as born of his associations, and mine is, perhaps, no exception to the rule."⁹⁴

Pinchback dealt with what Obama leaves out: the personal and painful confrontation of pernicious racism alive still today, especially as presented in the emerging debate over who should be counted as black. And yet, this hole's presence, which seems to remain unfilled on purpose, might manifest the greatest value of *Dreams from My Father*. Last year's republication can occasion a focused re-examination of what racial classifications mean and should signify in American law and society today.

VII. CONCLUSION

The confusion surrounding affirmative action in university admissions could be the starting point of this conversation. Harvard Law Professor Lani Guinier—herself the daughter of a white mother and a Jamaican-immigrant father, the latter of whom experienced overt racial exclusion as a Harvard admit in 1929⁹⁵—raised the question of who should be counted as black at the

90. BOOKRAGS, BIOGRAPHY OF PINCKNEY BENTON STEWART PINCHBACK 3 (2005), available at <http://www.bookrags.com/biography/pinckney-benton-stewart-pinchback> (last visited Nov. 23, 2005).

91. *Id.*

92. *Id.*

93. *Id.* at 6.

94. BOOKRAGS, *supra* note 90, at 3.

95. Lani Guinier, *Saving Affirmative Action*, THE VILLAGE VOICE, July 8, 2003, at 46. Guinier opened: "In 1929, my father was admitted to Harvard College. Proud but poor, he showed up to apply for financial aid. He was told he was ineligible because he had failed to submit a photograph with his original application. After all, the school had already admitted one black student. Harvard College had a quota for blacks, a quota of one. Many schools had similar quotas to keep out Jews as well."

Unlike Obama, Guinier was born during the 1950s on the mainland and grew up in

same time as Obama's star was rising. At a gathering of Harvard University's black alumni that summer, Guinier joined Harvard Chairman of African and African-American Studies Henry Louis Gates, Jr., in questioning whether affirmative action's intended beneficiaries were being displaced by other kinds of blacks.⁹⁶ The two pointed out that while about 8 percent, or about 530, of Harvard's undergraduates were black, the majority of them, perhaps as many as two-thirds, were West Indian and African immigrants or their children, or to a lesser extent, children of biracial couples.⁹⁷ According to the *New York Times*, Guinier and Gates estimated that only about a third of the students were from families in which all four grandparents were born in this country, descendants of slaves; many argue that it was students like these—disadvantaged by the legacy of Jim Crow laws, segregation, and decades of racism, poverty, and inferior schools—who were intended as principal beneficiaries of affirmative action in university admissions.⁹⁸ The

a household with her black father as well as her white mother, routinely witnessing costly racial slights from the establishment. Victimized by but confronting white racism throughout much of her life, Guinier explained her identity quite clearly in her 1998 memoir: "I may have been taught by my parents that I was interracial, but in junior high school, I became black. The interracial hedge no longer sufficed. ... We all ate lunch together, blacks and whites, Italians and Jews, Japanese and Chinese. But when we left school we walked our separate ways to go to our different buses; that was the end of the socializing. ... That was the way it was. Nothing special was happening to me. It felt natural." Guinier went on: "When asked, as I frequently am, 'Why do you call yourself black?' I say, I am a black woman whose Jewish mother taught me about the Holocaust and about slavery. I am a black woman who grew up 'black' because that is how others saw me and because it was black people who embraced my mother when she married my father in 1945. I am a black woman who grew up celebrating both Passover and Easter, and who still occasionally sprinkles Yiddish words in my speech.

"I am a black woman whose parents—both parents—introduced me to my heroes, people who resisted injustice, people like Sojourner Truth and Harriet Tubman, Frederick Douglass and W.E.B. DuBois. Both my parents educated me and helped expose me to different cultures and perspectives, but it was my black father's experiences with discrimination that provided the organizing story of my life." GUINIER, *supra* note 3, at 66-67.

96. Sara Rimer and Karen W. Arenson, *Top Colleges Admit More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004, at A1.

97. *Id.* The study that provided the data on which the professors commented also revealed that a substantial proportion of the immigrant blacks declined to identify as black Americans when presented a choice of ethnic identities and invited to check all that applied. Its author concluded, *inter alia*, that her study's results "indicate that Harvard College enrolls a disproportionately large number of biracial/biethnic students, and first- and second-generation immigrant students from the Caribbean and Africa." Aisha Cecilia Haynie, *Not 'Just Black' Policy Considerations: The Influence of Pathways to Academic Success Amongst Black Undergraduates at Harvard University*, 13 J. PUB. & INT'L AFF. 40 (2002).

98. *Id.* In an article responding to the Supreme Court's affirmative action decisions of 2003, Guinier already had critiqued the box-checking exercise of the college admissions process, arguing: "Some selective institutions ... fail to probe beyond the 'checked boxes' to

Guinier-Gates dialogue wound up on the newspaper's agenda-setting front page.⁹⁹

This year, Professor Charles J. Ogletree, Jr., also of Harvard Law School, renewed the debate as the *New York Times* published an analysis revealing that, for the first time, more blacks are coming to the United States from Africa than during the transatlantic slave trade.¹⁰⁰ Ogletree, who has warned colleges and universities that admitting mostly foreign-born blacks to meet the goals of affirmative action is insufficient, stated: "Whether you are from Brazil or from Cuba, you are still products of slavery. But the threshold is that people of African descent who were born and raised and suffered in America have to be the first among equals."¹⁰¹

Barack Obama's presence in the United States Senate and the republication of his memoir should encourage all multiracial Americans grouped in the

determine who really identifies with the underrepresented groups the institution seeks to enroll: they often overlook talented, American-born, African Americans and Latinos in favor of higher-scoring recent immigrants from Africa, the West Indies, and South America. ;B166;B166 The higher test scores of well-educated voluntary immigrants apparently correlate with their lesser vulnerability to the 'stereotype threat' that depresses the performance of American-born blacks and Latinos;;B167;B167 their higher test scores may also reflect their parents' professional or educational status in their countries of origin.;B168;B168" Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113 (2003), at 155-56 (notes and citations omitted).

99. Rimer and Arenson, *supra* note 96.

100. See Sam Roberts, *More Africans Enter U.S. Than in Days of Slavery*, N.Y. TIMES, Feb. 21, 2005, at A1 ("Since 1990, according to immigration figures, more have arrived voluntarily than the total who disembarked in chains before the United States outlawed international slave trafficking in 1807. More have been coming here annually—about 50,000 legal immigrants—than in any of the peak years of the middle passage across the Atlantic, and more have migrated here from Africa since 1990 than in nearly the entire preceding two centuries.").

101. *Id.* While recent analyses have reported a dramatic rise in the number of blacks earning terminal degrees since the 1960s, for instance, a pivotal question remains: To what extent are these data based upon black Americans' progressing despite a legacy of slavery and segregation (are these data primarily the product of black immigrants and their offspring, whose upward mobility would not immediately support the proposition that black Americans are rebounding from the perfidy of the past)? See, e.g., Lamont A. Flowers and Lee Jones, *Exploring the status of Black male faculty utilizing data from the National Study of Postsecondary Faculty*, J. OF MEN'S STUD., Vol. 12, No. 1 (Sept. 22, 2003).

The inclusion of black immigrants and their children in official racial statistics, without disaggregation, is bound to contaminate measurements of racial progress—especially those considering black males, who always have been grossly underrepresented in American colleges and universities. See, e.g., *Census Bureau Attributes Large Wage Gap Among Blacks to Educational Differences*, Daily Lab. Rep. (BNA) No. 178, at d12 (Sept. 16, 1993) (extrapolating from U.S. Census data that "regardless of educational attainment, white men [have] higher median earnings than African-American men across most occupational categories").

black category to contemplate their own stories of race and inheritance. Simultaneously, with a fast-growing number of Americans of multiple racial backgrounds participating increasingly at every level of national life, the time also has come for the country's political and legal systems to initiate an official process to decide once and for all who is entitled to count legally as black in twenty-first century America.