

LEGAL RESPONSES TO BLACK SUBORDINATION, GLOBAL PERSPECTIVES

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[I]n order to win and bring as many people with us along the way, we must move beyond the narrow nationalism that is all too prevalent in Black communities.

— Black Lives Matter¹

INTRODUCTION

Around the world, people of African descent (“Afro-descendants”) — to use one of the broadest possible definitions of Blackness — are overrepresented among the poor and disempowered.² Any effort to understand the role that law has played in the past — and might play in the future — in either causing or mitigating these patterns of subordination should account for the fact that while those patterns exhibit enormous variety, they also transcend national boundaries and operate on a global scale. These insights are staples of postcolonial analyses of Black culture.³ Less well explored is why or how the relationship between *law* and Black experiences ought to be analyzed from a global perspective.⁴ So, for instance, it is not immediately obvious why the killing of a Black man by police in the United States should lead to protests around the world. Nor is it obvious why the members of the Congressional Black

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¹ *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about> [<https://perma.cc/BE5K-Z88N>].

² It is clear that not all people of African descent are identified, either by themselves or others, as Black. *See, e.g.*, Edward Telles & Tianna Paschel, *Who Is Black, White, or Mixed Race? How Skin Color, Status, and Nation Shape Racial Classification in Latin America*, 120 AM. J. SOCIO. 864, 865–66 (2014) (discussing determinants of racial classification in Latin America). In fact, this Essay will show that the concept of Blackness can vary from place to place and time to time.

³ *See generally* Deborah A. Thomas & Kamari Maxine Clarke, *Globalization and the Transformations of Race*, in GLOBALIZATION AND RACE: TRANSFORMATIONS IN THE CULTURAL PRODUCTION OF BLACKNESS 1 (Kamari Maxine Clarke & Deborah A. Thomas eds., 2006); PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993).

⁴ *But see* HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 441–74 (2008); Hope Lewis, *Transnational Dimensions of Race in America*, 72 ALB. L. REV. 999, 1022–23 (2009).

Caucus — or activists or scholars who support them — would ever look at the experiences of Black people outside the United States while formulating an agenda for legal reform. This Essay argues that there are several good reasons why lawmakers, activists, or scholars reckoning with legal responses to Black subordination should reject parochialism and approach their task from a global perspective; the challenge is to do that while avoiding the inherent pitfalls.

Adopting a global perspective necessarily entails rejecting any form of African American exceptionalism, meaning, the assumption that the experiences of Black people in the United States have nothing in common with experiences of Afro-descendants in other countries.⁵ It also involves abandoning similar preconceptions about the uniqueness of the Black experience in other countries. The rejection of these forms of parochialism can be a step toward providing support, learning, and recognizing interdependence across borders.

At the same time, a global perspective need not and should not presume that there is either a universal Black experience, a universal definition of Blackness, or a universally effective set of legal responses to Black subordination. Projects that involve studying foreign societies in order to identify common problems that merit common legal responses are founded on a problematic assumption of “legal universalism.”⁶ Those projects founder whenever either (a) the people in the relevant jurisdictions face different problems or (b) the relevant legal response can be expected to have different effects in different environments.⁷ Both these factors, which have been carefully examined in the literature on critical race theory and comparative law,⁸ are likely to limit the value of comparative analysis as a way of identifying legal responses to the problems that Black people face. Afro-descendants in different countries have different histories and do not necessarily have the same ideals and aspirations. Even in the Western Hemisphere, where over 150 million Afro-descendants share the historical experience of having ancestors who were subject to the transatlantic slave trade,⁹ the problems caused by the legacy of slavery intersect in varying ways with other

⁵ See GILROY, *supra* note 3, at 4 (implicitly associating African American exceptionalism with ethnic particularism and nationalism in historical studies of Black American culture and politics); HENRY LOUIS GATES, JR., *BLACK IN LATIN AMERICA 2* (2011) (rejecting this kind of African American exceptionalism).

⁶ Kevin E. Davis, *Legal Universalism: Persistent Objections*, 60 U. TORONTO L.J. 537, 539 (2010).

⁷ *Id.* at 540.

⁸ See *infra* Part II, pp. 368–73.

⁹ This figure is based on an estimate of the number of Afro-descendants in Latin America and the number of Black people in the United States whose ancestors were enslaved people. See Monica Anderson, *A Rising Share of the U.S. Black Population Is Foreign Born* (Apr. 9, 2015), <https://www.pewresearch.org/social-trends/2015/04/09/a-rising-share-of-the-u-s-black-population-is-foreign-born> [<https://perma.cc/VB9X-FYJX>] (estimating most of the approximately 40 million

potential sources of disadvantage such as skin color, nationality, and geographic dispersion. And, of course, the laws that might be used to address those problems operate in very different environments. In the face of these kinds of differences, comparative analysis still has a valuable role to play, but it is a limited one.

Although it is important to acknowledge the differences between Black communities in the Western Hemisphere, it also is important to account for their interconnections. For instance, it is important to recognize the ways in which the United States and international institutions under its control project the influence of U.S. legal norms beyond borders, including to foreign countries inhabited by many Afro-descendants. There also are enormous cross-border flows of people, goods, services, and capital that can serve to transmit the influence of laws from one country to another.¹⁰ The existence of these kinds of legal spillovers complicates the task of evaluating the impact of both U.S. and foreign laws upon Afro-descendants. At a minimum, a global approach requires abandoning the conventional presumption that the legal determinants of outcomes in any given country are located exclusively in the relevant national legal system. Instead, the Americas should be treated as a single but diverse region, which contains multiple societies that are partially distinct but also deeply interconnected. In particular, it is a region inhabited by Afro-descendants whose experiences and outlooks are both common and distinct and are, at least potentially, influenced by multiple national, subnational, and supranational bodies of law.

The remaining Parts of this Essay take up each of these points in turn. Part I discusses the case against parochialism. Part II considers the dangers of legal universalism. Part III demonstrates the importance of recognizing transnational interconnections. To keep the analysis tractable, this Essay will focus on the Western Hemisphere.

I. REJECTING PAROCHIALISM

As noted above, many Afro-descendants in the Western Hemisphere are linked by the legacy of the transatlantic slave trade.

Black Americans trace their ancestry back to the slave trade); Gustavo López & Ana Gonzalez-Barrera, *Afro-Latino: A Deeply Rooted Identity Among U.S. Hispanics*, PEW RSCH. CTR.: FACT TANK (Mar. 1, 2016), <https://www.pewresearch.org/fact-tank/2016/03/01/afro-latino-a-deeply-rooted-identity-among-u-s-hispanics> [<https://perma.cc/5H3N-8QZD>] (130 million Afro-descendants in Latin America).

¹⁰ Kevin E. Davis, What Should Comparative Law Compare? Insights from the Caribbean 9–10 (Nov. 2020) (unpublished manuscript) (on file with the Harvard Law School Library).

Slavery was abolished throughout the hemisphere by the end of the nineteenth century.¹¹ Nonetheless, in many countries in the region, the economic, social, and, in some cases, physical, subordination has survived both emancipation and subsequent waves of voluntary migration.

The collective economic subordination of Afro-descendants actually is greater in some parts of Latin America than in the United States. In several countries, including Brazil, Ecuador, El Salvador, and Nicaragua, people who self-identify as Black have the lowest incomes of any racial group.¹² In Brazil, Black and brown workers earned on average 58% of the amount that white workers earned in 2018.¹³ By contrast, in the United States, incomes of people who identify as Black are higher than those of some groups, though they remain significantly lower than the incomes of whites or Asians. In 2018, Black workers in the United States earned on average 75% as much as white workers (or 63% of what Asian workers earned) but slightly more than Hispanic workers.¹⁴ And other data suggest that Black Americans have higher incomes than Native Americans.¹⁵

In many countries, the disadvantages of Afro-descendants in the economic sphere are accompanied by stigma and discrimination in social settings. Those social disadvantages are manifest in preferences for lighter skin color, opposition to interracial marriage, and widespread use of language that embodies negative stereotypes.¹⁶ The prevalence of these attitudes and practices in the region has led Professor Tanya Katerí Hernández to conclude that “across Latin America there is a common anti-Black reality.”¹⁷

Like in the United States, anti-Black reality in other parts of the Western Hemisphere includes tragic levels of police violence. In fact, this is another field in which the situation outside the United States might be worse than inside. In 2017, only a few years after the high-profile police shootings that prompted the formation of Black Lives

¹¹ LESLIE BETHELL, *BRAZIL: ESSAYS ON HISTORY AND POLITICS* 113–14 (2018).

¹² Stanley R. Bailey et al., *Race, Color, and Income Inequality Across the Americas*, 31 *DEMOGRAPHIC RSCH.* 735, 738–40 (2014).

¹³ INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, *DESIGUALDADES SOCIAIS POR COR OU RAÇA NO BRASIL* 3 (2019), <https://biblioteca.ibge.gov.br/index.php/biblioteca-catalogo?view=detalhes&id=2101681> [<https://perma.cc/3HAS-GPN9>]. For historical data, see Comm. on the Elimination of Racial Discrimination, Eighteenth to Twentieth Periodic Reports Submitted by Brazil Under Article 9 of the Convention, due in 2008, U.N. Doc. CERD/C/BRA/18-20, at 33 (2020).

¹⁴ U.S. BUREAU OF LAB. STAT., *REPORT NO. 1082, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY*, 2018, <https://www.bls.gov/opub/reports/race-and-ethnicity/2018/pdf/home.pdf> [<https://perma.cc/59QY-UBT4>].

¹⁵ Bailey et al., *supra* note 12, at 743.

¹⁶ TANYA KATERÍ HERNÁNDEZ, *RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE* 2–9 (2013).

¹⁷ *Id.* at 9.

Matter, Professor Juliet Hooker pointed out that police in Brazil had killed “nearly as many people (most of them Black and poor) in the past five years as U.S. police have killed during the past 30 years.”¹⁸

The perception that anti-Blackness is a global phenomenon has periodically prompted scholars and activists to study or resist it by traveling, communicating, comparing, and collaborating across borders.¹⁹ United States–based participants in these transnational ventures include historical figures as diverse as Frederick Douglass, W.E.B. Dubois, Marcus Garvey, Langston Hughes, and Booker T. Washington.²⁰ Contemporary figures who have travelled this path include Tanya Hernández, Juliet Hooker, Professor Tianna Paschel, and prominent figures in the Black Lives Matter movement.²¹

There are at least three distinct reasons for adopting a global perspective on Black subordination. The first reflects an altruistic — or at least cosmopolitan — motivation, an impulse to understand and respond to human suffering and deprivation without regard to national borders. Scholars and practitioners of human rights and law and development traditionally have been motivated by these sorts of ideals, but they have not typically put racial or ethnic inequalities at the center of attention. The facts on the ground may warrant reconsideration of those professional self-conceptions. In much of the Western Hemisphere, law and development and human rights law could be usefully reconceived as fields of study or practice that focus on the legal dimensions of Black and Indigenous subordination.²²

A second justification for trying to understand and act against Black subordination across borders is the possibility of learning. Sharing and comparing experiences across countries can help identify both common problems and effective (or ineffective) legal responses.²³ Comparativists

¹⁸ Juliet Hooker, *What Black Lives Matter Can Learn from Black Movements in Latin America*, 49 *NACLA REP. ON AMS.* 34, 35 (2017).

¹⁹ See Tianna Paschel, *From Colombia to the U.S., Black Lives Have Always Mattered*, 49 *NACLA REP. ON AMS.* 27, 27–28 (2017).

²⁰ GATES, *supra* note 5, at 6–10; JULIET HOOKER, *THEORIZING RACE IN THE AMERICAS: DOUGLASS, SARMIENTO, DU BOIS, AND VASCONCELOS* 25–66, 113–54 (2017) (discussing the engagement of Douglass and Dubois with Latin America).

²¹ See HERNÁNDEZ, *supra* note 16, at 172; HOOKER, *supra* note 20; TIANNA S. PASCHEL, *BECOMING BLACK POLITICAL SUBJECTS: MOVEMENTS AND ETHNO-RACIAL RIGHTS IN COLOMBIA AND BRAZIL* 124–28 (2016); *About*, *supra* note 1; *Global Actions*, BLACK LIVES MATTER, <https://blacklivesmatter.com/global-actions> [<https://perma.cc/DTJ5-FVME>].

²² See, e.g., Enrique R. Carrasco, *Critical Race Theory and Post-colonial Development: Radically Monitoring the World Bank and the IMF*, in *CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY* 366, 366–67 (Francisco Valdes et al. eds., 2002).

²³ See generally Larnies A. Bowen & Ayanna Legros, *A Hemispheric Approach to Contemporary Black Activism*, 49 *NACLA REP. ON AMS.* 26, 26–27 (2017). This justification echoes Professor Tommie Shelby’s call for a “pragmatic” approach to Black solidarity. TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* 153 (2005); see *id.* at 150–54.

frequently espouse the potential benefits of studying foreign law.²⁴ And there is a long tradition of advocates for the advancement of Black people in the Americas learning from and being inspired by their counterparts in other parts of the world. Abolitionists throughout the world regularly cited the Haitian revolution as a lesson in rebellion as a path to emancipation.²⁵ And U.S. civil rights leaders in the 1960s cited independence movements from around the world as inspiration for their own efforts.²⁶

A third factor that militates against parochialism is recognition of mutual interdependence, captured in Martin Luther King Jr.'s unforgettable precept: "Injustice anywhere is a threat to justice everywhere."²⁷ One dimension of interdependence is on the plane of ideas — conceptions of anti-Blackness or ways of combatting it might be either transmitted or refuted across borders, whether through advocacy or demonstration effects. Black people around the world have a stake in combating anti-Black ideology in the United States before it can be exported to their countries. But interdependence can also be the product of cross-border political or military influence. For instance, in the years leading up to the U.S. Civil War, Frederick Douglass believed that the fate of racial hierarchy in the United States was linked to the success of Black-governed societies like Haiti.²⁸ He later came to believe that annexation of predominantly Black societies in the Caribbean by the United States would provide political and ideological impetus for the United States to transition to a more racially egalitarian society.²⁹ At the turn of the century, the Pan-African movement was founded largely on the assumption that people in Africa and the African diaspora had a common interest in combatting subordination of Black people in both the United States and Europe's colonies.³⁰ Against this intellectual backdrop it should not be surprising that Black Lives Matter describes itself as "a global organization" and rejects "narrow nationalism."³¹

²⁴ See generally MATHIAS SIEMS, *COMPARATIVE LAW* 2–4 (2d ed. 2018).

²⁵ See, e.g., HOOKER, *supra* note 20, at 41–42.

²⁶ See, e.g., Letter from Martin Luther King Jr. to Bishop C.C.J. Carpenter et al. 12 (Apr. 16, 1963), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf [<https://perma.cc/W2ML-SQTF>] [hereinafter Letter from a Birmingham Jail] ("Consciously and unconsciously, [the American Negro] has been swept in by what the Germans call the *Zeitgeist*, and with his black brother of Africa, and his brown and yellow brothers of Asia, South America and the Caribbean, he is moving with a sense of cosmic urgency toward the promise land of racial justice.").

²⁷ *Id.* at 2.

²⁸ HOOKER, *supra* note 20, at 41.

²⁹ *Id.* at 48–57.

³⁰ *Pan-Africanism*, in 4 *AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE* 325, 325 (Kwame Anthony Appiah & Henry Louis Gates, Jr., eds., 2d ed. 2005).

³¹ *About*, *supra* note 1.

To be clear, the case for looking across borders does not depend on the claim that there is a common anti-Black reality in the Western Hemisphere.³² The extent to which Afro-descendants in the Americas have common experiences is certainly contestable. For instance, although economic subordination is a feature of many countries in the hemisphere, it is not universal. In Panama, people who self-identify as Black or who have dark skin color have higher average incomes than members of any other racial group or people with skin of other colors.³³ But the cosmopolitan case for paying attention to foreign suffering does not necessarily depend on the magnitude of that suffering. As for the learning rationale, cross-country variation in the nature or extent of Black subordination actually bolsters the case for trying to learn from cross-country comparisons. If variations in experiences are correlated with variations in laws, then it may be possible to draw inferences about the efficacy of alternative legal responses. Finally, arguments about interconnectedness clearly contemplate the possibility that progress away from subordination might be either delayed or accelerated by foreign influences.

As an illustration of the value of abandoning parochialism, consider the issue of whether racial quotas in higher education ought to be legally permissible. In the United States, the Supreme Court's opposition to such quotas appears to be based in large part on a claim about the consequences of permitting them, namely, that this kind of "affirmative action," which necessarily involves classifying individuals by race, will exacerbate social divisions.³⁴ In principle, the empirical claim that underlies this type of argument can be tested by comparing the experiences of jurisdictions like Brazil, which have taken a different approach from the United States.

In 2012, Brazil's Supreme Federal Tribunal (STF), the country's apex constitutional court, held that the Brazilian Constitution permitted the University of Brasília to adopt an admissions policy that reserved 20% of its places for self-identified Black or brown students.³⁵ The STF explicitly considered U.S. jurisprudence suggesting that such schemes

³² The three basic reasons to adopt a global perspective on Black subordination almost certainly apply, at least to some extent, to other forms of subordination, but further exploration of that topic is beyond the scope of this Essay.

³³ Bailey et al., *supra* note 12, at 739–40, 755–56. The racial categories compared in Panama were, in order of income: negro, white, mestizo, mulatto, and indigenous Indian. *Id.* at 751.

³⁴ Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 228, 234–36 (Deborah Hellman & Sophia Moreau eds., 2013).

³⁵ S.T.F., No. ADPF 186/DF, Relator: Min. Ricardo Lewandowski, 26.4.2012, Supremo Tribunal Federal Jurisprudência [S.T.F.J.], 20.10.2014 (Braz.), 91–92, <http://portal.stf.jus.br/processos/downloadPeca.asp?id=269432069&ext=.pdf> [<https://perma.cc/T2YH-NT9A>] [hereinafter No. ADPF 186/DF].

tend to cause racial divisions but decided that, in the Brazilian context at least, they were likely to promote racial integration.³⁶ A few months after the decision was handed down, Brazil's National Congress passed a law that required federal postsecondary institutions to create quotas for Black, brown, and Indigenous students who had completed their secondary education in Brazil's famously inadequate state schools.³⁷ The law also set aside seats for students from families with incomes of less than 1.5 times the minimum wage, all in an attempt to ensure that class, race, and income were taken into account in awarding preferential access to higher education.³⁸

Scholars and activists outside of Brazil might take an interest in these developments simply because they care about the well-being of Afro-Brazilians. The Brazilian experience also might provide an opportunity for learning and, if the lessons are learned by sufficiently powerful actors, a source of influence. There are at least three distinct forms that learning might take. First, the Brazilian experience might demonstrate previously unimagined legal strategies. Scholars, activists, or policy-makers who never thought of basing quotas on a combination of race, class, and income might be prompted to consider such a scheme for their own jurisdiction. Second, to the extent that the Brazilian judges and legislators arrived at a considered judgment that quotas were more likely to lead to integration than division, that opinion might warrant respect and count as a reason to arrive at a similar conclusion about the likely consequences of adopting quotas in other contexts.³⁹ Third, the effects of the Brazilian experiment — as opposed to just the possibility of it or the fact that it was undertaken — might be informative and serve as a benchmark for progress in other countries. Obtaining information about effects would, of course, require monitoring the trajectory of race relations in Brazil over time and determining whether any observed trends were attributable to quotas as opposed to other factors.

Any efforts to learn from Brazil's quota jurisprudence or practices will require careful attention to the specificities of the Brazilian context. First, the STF's reasons for its decision relied heavily on data about the specific problems faced by Afro-Brazilians, including high rates of illiteracy and significant disparities in educational achievement and employment outcomes.⁴⁰ Brazil has an unusually large and disadvantaged population of Afro-descendants, whose combination of latent political

³⁶ *Id.* at 78–82.

³⁷ Lei No. 12.711, de 29 de Agosto de 2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30 de Agosto de 2012 (Braz.).

³⁸ *Id.*

³⁹ Professor Julie C. Suk appears to cite the Brazil jurisprudence for this purpose. *See* Suk, *supra* note 34, at 240–44.

⁴⁰ No. ADPF 186/DF, *supra* note 35, at 68–71 (citing data collected by the Instituto Brasileiro de Geografia e Estatística).

power and subordination may not be comparable to those of Black people in many other countries.⁴¹ Second, the STF made much of the fact that its decision had to be based on the specificities of not just Brazilian society but also the Brazilian Constitution, which in their view obliged the state to take positive measures to combat inequality and did not have to be interpreted in the same way as the Constitution of the United States.⁴² Third, in the aftermath of the STF's decision and the adoption of the quota law, quotas have been widely employed by postsecondary institutions in Brazil, and there have been substantial increases in enrollment of Black students.⁴³ But the reviews have not been altogether positive. Black students do not necessarily participate in the most prestigious programs, and concerns about fraud have led some institutions to expel students whose appearance was deemed not to match their racial identification.⁴⁴

Despite these reasons for caution, people beyond Brazil's borders — including, for example, members of the U.S. Congressional Black Caucus — might still learn from its experience. A generation of U.S. lawyers who have known nothing but the U.S. Supreme Court's fundamentally conservative interpretation of the Constitution's equality provisions can only benefit from being inspired to imagine alternative approaches. More concretely, U.S. lawyers struggling with how to define the beneficiaries of affirmative action in a society in which an increasing number of people identify as multiracial might find it instructive to examine approaches to racial classification in Brazil, where the vast majority of Afro-descendants consider themselves multiracial.⁴⁵

⁴¹ See generally Edward Telles, *Demography of Race in Brazil*, in 4 INTERNATIONAL HANDBOOKS OF POPULATION: THE INTERNATIONAL HANDBOOK OF THE DEMOGRAPHY OF RACE AND ETHNICITY 151 (Rogelio Sáenz et al. eds., 2015).

⁴² No. ADPF 186/DF, *supra* note 35, at 86.

⁴³ See Alice Dias Lopes, *Affirmative Action in Brazil: How Students' Field of Study Choice Reproduces Social Inequalities*, 42 STUD. HIGHER EDUC. 2343, 2344 (2017); Andrew M. Francis & Maria Tannuri-Pianto, *Using Brazil's Racial Continuum to Examine the Short-Term Effects of Affirmative Action in Higher Education*, 47 J. HUM. RES. 754, 755 (2012) (finding that quotas have increased brown and Black enrollment, have not decreased preuniversity effort, are associated with small disparity in performance in selective programs, and induced some fraud in self-identification).

⁴⁴ See Dias Lopes, *supra* note 43, at 2356; Francis & Tannuri-Pianto, *supra* note 43, at 755; Cleuci De Oliveira, *Brazil's New Problem with Blackness*, FOREIGN POL'Y (Apr. 5, 2017), <https://foreignpolicy.com/2017/04/05/brazils-new-problem-with-blackness-affirmative-action> [<https://perma.cc/5JS9-HEQR>].

⁴⁵ See Kim Parker et al., *Multiracial in America: Proud, Diverse and Growing in Numbers*, PEW RSCH. CTR. (June 11, 2015), <https://www.pewresearch.org/social-trends/2015/06/11/multiracial-in-america> [<https://perma.cc/58HR-X8B5>] (documenting increase in number of Americans identifying as multiracial on U.S. Census); HERNÁNDEZ, *supra* note 16, at 172–74 (asserting the value of studying the Latin American experience to evaluate changes in U.S. racial categories); INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, *supra* note 13, at 2.

II. AVOIDING LEGAL UNIVERSALISM

As the Brazilian illustration suggests, it is important to ensure that rejection of parochialism does not degenerate into a crude form of legal universalism, implying that any given legal intervention consistently delivers the same (presumably positive) results.⁴⁶ The standard objection to legal universalism is that “context matters.” The implication is that there is little point in seeking either opportunities to provide assistance, insight, inspiration, or solidarity in places where Black people face different problems that might be poorly understood by outsiders and whose legal systems provide different avenues for response. This argument resonates with a key insight from critical race theory: intersectionality.⁴⁷ Factoring in the ways in which the experience of any given individual can be shaped by the intersection of multiple sources of disadvantage, classic critical race theory examples show how the experiences of women of color in the United States can be shaped by the combined effects of race, gender, and immigration status (among other factors).⁴⁸ The point that context matters has also long been a staple of comparative law scholarship, starting with Montesquieu’s claim that, “[The political and civil laws of each nation] should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.”⁴⁹

Intersectionality presents a direct challenge to the proposition that Afro-descendants embedded in different social circumstances face a common reality. Even if they all are subordinated in some sense, they may be subordinated by different combinations of factors — including factors that operate across borders — and to different degrees. Some may not self-identify as Black or sympathize with the aims of legal reforms aimed at changing the situation of Black people. Moreover, not all those who identify as Black will face the same kinds of disadvantage. Or to put it more provocatively, even if they think they are Black, they may not warrant being treated as Black for the purposes of laws aimed at confronting Black subordination. In these situations, intersectionality demands contextualism.

To appreciate the force of these objections, consider the story behind a set of legal reforms in Colombia at the turn of the twenty-first century.

⁴⁶ See Davis, *supra* note 6.

⁴⁷ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

⁴⁸ *Id.* at 1246.

⁴⁹ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). For discussion of subsequent literature in this vein, see generally Davis, *supra* note 6.

A large portion of Afro-descendants in Colombia lived along the country's Pacific and northwest Caribbean coasts.⁵⁰ Along the Pacific Coast, where Afro-descendants represented the majority of the population, many of the people lived in rural areas, and the main political grievances related to land.⁵¹ Beginning in the mid-1980s, peasants in the region mobilized, with the assistance of the Catholic Church, to resist being displaced from their land by corporations backed by the Colombian state.⁵² Initially, these movements were organized along regional and class lines rather than race or ethnicity.⁵³ And even when they began to articulate their claims in terms of Blackness, they operated separately from and sometimes in conflict with organizations representing the interests of urban Afro-Colombians.⁵⁴ At the same time, the mobilization of rural Afro-Colombians in the 1980s cannot be understood without reference to the grassroots mobilization effort that the Catholic Church was conducting throughout Latin America, among both Afro-descendants and Indigenous peoples.⁵⁵

The distinctive concerns of the rural Afro-Colombians translated into a distinctive set of political objectives. Their main demands were for collective title to land, recognition of and protection of their distinct culture, and political autonomy.⁵⁶ These demands were consciously modeled upon the demands being advanced by Indigenous peoples in Colombia and elsewhere.⁵⁷ Urban Afro-Colombian organizations put forward a very different set of demands focused on equality and integration into broader Colombian society.⁵⁸ The differences between these approaches are fundamental: collective as opposed to individual rights; recognition of difference versus formal equality; separation versus integration. Both philosophies have found some traction in the United States over the years, but, recently at least, the integrationist approach has dominated.⁵⁹ The collectivist/separatist approach manifested itself in the back-to-Africa movement and the Black towns of the late-nineteenth and early-twentieth centuries and has been defended by intellectuals such as Booker T. Washington and Roy Brooks.⁶⁰ However, the strategy seems to have little appeal for contemporary Afro-

⁵⁰ PASCHEL, *supra* note 21, at 42.

⁵¹ *Id.* at 69–71.

⁵² *Id.*

⁵³ *Id.* at 70.

⁵⁴ *Id.* at 71.

⁵⁵ *Id.* at 69–70.

⁵⁶ *Id.* at 68.

⁵⁷ *Id.* at 68–71, 100, 103–04.

⁵⁸ *Id.* at 68, 71.

⁵⁹ See ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 1 (1996).

⁶⁰ See *id.* at 117–23.

descendants in the United States, who are more urbanized and geographically dispersed than the inhabitants of Colombia's Pacific Coast.

The Colombian case also illustrates how the opportunities for legal reform can be highly context-specific. Afro-Colombians won formal legal recognition of their demands for recognition and autonomy in 1993 with the passage of Law 70.⁶¹ The law, which is limited in scope to rural communities, primarily in the Pacific Coastal region, provides for grants of collective titles to Black communities, recognition of cultural difference and political representation.⁶²

Law 70's passage was secured under a unique set of political conditions. The opening was provided by a constitutional reform process.⁶³ The 1991 Constitution laid the groundwork for future reform by requiring the government to create a special commission to develop a law for Black communities within two years.⁶⁴ The constitutional reform process was prompted by the collapse in legitimacy of the Colombian state in the 1980s, a period during which the country was wracked by violence and the political system had been captured by elites.⁶⁵ The process empowered groups that had been previously excluded from the political system, and the sheer volume of proposed changes enabled sweeping reforms while attracting little debate.⁶⁶ The rural Afro-Colombians also benefited from a desire among the drafters of Colombia's new constitution to conform to international norms that favored Indigenous peoples and formed strategic alliances with Indigenous organizations participating in the reform process.⁶⁷ Later, Afro-Colombian activists worked closely with anthropologists to win intellectual support for the idea that they should be treated as a distinct ethnic group.⁶⁸

The subsequent implementation of Law 70 also demonstrates the ways in which the impact of laws depends on the surrounding legal system together with the broader social, economic, and political environment. Black communities have struggled to capture the full benefits of the collective titles promised by the Law.⁶⁹ To begin, titling was often delayed by the combination of bureaucratic requirements imposed by the state and the relevant communities' limited capacity to navigate

⁶¹ L. 70, agosto 27, 1993, DIARIO OFICIAL [D.O.] (Colom.).

⁶² *Id.*

⁶³ See PASCHEL, *supra* note 21, at 102-06.

⁶⁴ L. 70, art. 57, agosto 27, 1993, DIARIO OFICIAL [D.O.].

⁶⁵ See PASCHEL, *supra* note 21, at 102-03.

⁶⁶ See *id.* at 106 ("[W]hile issues of ethnic pluralism were significant, they were far from the center of the constitutional reform process.")

⁶⁷ See *id.* at 104-06.

⁶⁸ See *id.* at 108-12.

⁶⁹ See *id.* at 190-200.

them.⁷⁰ And once collective titles were obtained, unrelated violent conflict in the region, involving both paramilitary groups and the Colombian armed forces, prevented many communities from enjoying the land.⁷¹

Meanwhile, organizations led by Afro-Colombians living in urban areas often pursued different objectives, at least in part because their population was distributed in such a way that they were less likely to benefit from political autonomy defined in conventional territorial terms. According to Paschel, they tended to seek rights for individual “Afro-Colombians” rather than collective “black communities.”⁷² They prioritized integration into the broader Colombian society, through interventions such as affirmative action in the labor market and higher education, as opposed to seeking land rights and local autonomy.⁷³ And they tended to favor interventions that defined Blackness in terms of ancestry, physical traits, or shared identity based on experience, rather than cultural or territorial distinction from other groups.⁷⁴ Overall, therefore, the history of Black movements in Colombia is a classic illustration of intersectionality. Factors such as a group’s size and territorial distribution, as well as international factors such as exposure to transnational social movements, can have profound effects on its perceived interests and aspirations, including its views on issues as fundamental as integration/equality versus separation/empowerment.

Even where the experiences, aspirations, and legal situations of Afro-descendants within countries like Colombia diverge, they may converge with those of Afro-descendants in other countries. For instance, territorially some maroon communities in Suriname have interests that are broadly similar to those of rural, as opposed to urban, Afro-Colombians and benefit from being classified as Indigenous groups under international human rights law.⁷⁵ Or to pick another well-researched example, in many Latin American countries, skin color is a better predictor of relative income than racial identification, while in others, like in the United States, the combination of skin color and race is most informative.⁷⁶ In the former set of countries there is an open question as to whether Afro-descendants with lighter skin should benefit from the same protections against discrimination as other Afro-descendants. As a final example, in countries like the Dominican Republic and the

⁷⁰ See *id.* at 190–92.

⁷¹ See *id.* at 195–99.

⁷² *Id.* at 142; see *id.* at 141–44.

⁷³ *Id.* at 65–68, 137–51.

⁷⁴ *Id.* at 136–40.

⁷⁵ See *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 86 (Nov. 28, 2007) (treating maroon community as Indigenous people for the purposes of the right to land).

⁷⁶ See Bailey et al., *supra* note 12, at 740–44.

Bahamas, widespread mistreatment of people of Haitian descent suggests that subordination sometimes ought to be understood as a function of the interaction of national origin and race.⁷⁷

The fact that the subordination of Afro-descendants in different countries can be simultaneously both similar and different suggests that legal responses often should try to find a middle ground between parochialism and universalism. To illustrate that possibility, consider the case of reparations. Ever since Emancipation, Afro-descendants in the United States have called for reparations — transfers of resources designed to compensate for the harm inflicted during slavery.⁷⁸ Proponents have pointed not only to slavery but also to decades of state-sponsored subordination associated with Jim Crow and other forms of discrimination against Black people in the United States.⁷⁹ Resistance to these claims obviously is founded in part in self-interested considerations on the part of those who would bear the burden of funding the reparations. There are also, however, important philosophical and pragmatic objections, generally revolving around the following questions: Who should fund reparations? How much should be paid? And to whom? These objections have particular force when set up against calls for reparations in the form of cash payments to individual Black people in the United States.

Black people in other jurisdictions also have called for reparations, and some of those initiatives repay attention in the United States. One of the most notable initiatives is the CARICOM call for reparations.⁸⁰ CARICOM is an international organization whose member states include fourteen former British colonies in the Caribbean, together with Haiti and five British territories in the region.⁸¹ CARICOM has called for reparations from European governments.⁸² It has demanded financial compensation, specifically, cancellation of states' public debt.⁸³ But that is only one of ten demands. The other demands include a full apology, support for resettlement in Africa, educational initiatives, public

⁷⁷ INTER-AM. COMM'N ON HUM. RTS., REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE DOMINICAN REPUBLIC 21–23 (2015); Charmane M. Perry, "It's Better in the Bahamas": The Stigma of Being Haitian, Citizenship, and Identity Choices Among Second-Generation Haitians in the Bahamas 22–23 (May 2017) (Ph.D. dissertation, University of Wisconsin-Milwaukee) (UWM Digital Commons).

⁷⁸ WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 2 (2020); BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 3 (1973).

⁷⁹ DARITY & MULLEN, *supra* note 78, at 207, 243.

⁸⁰ *10-Point Reparation Plan*, CARICOM REPARATIONS COMM'N, <https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan> [<https://perma.cc/HKX7-UEJQ>].

⁸¹ *Member States and Associate Members*, CARICOM, <https://caricom.org/member-states-and-associate-members> [<https://perma.cc/6V9B-ZTLS>].

⁸² *10-Point Reparation Plan*, *supra* note 80.

⁸³ *Id.*

health, technology transfer, and psychological rehabilitation from the trauma of slavery.⁸⁴

The CARICOM plan provides little assistance in resolving the question of *who* should fund reparations in the United States (or *why*), mainly because it calls for reparations to be paid by foreign governments as opposed to U.S. federal or state governments. The CARICOM approach may, however, shed light on *how* reparations should be paid, specifically, by illuminating ways in which seeking collective forms of relief can sidestep the problems associated with more individualized relief. In other words, it may be possible for Black people outside the Caribbean to learn what they can from the CARICOM example and leave the rest. This sort of selective approach to engaging with foreign experiences seems like the only realistic way to resolve the tension between parochialism and universalism.

III. RECOGNIZING INTERCONNECTIONS

Even if it does not bear direct lessons for the United States, the CARICOM initiative might still merit attention and support from lawmakers or activists in the United States, either because they are concerned with the welfare of Black people in the Caribbean or because they believe that the resulting intellectual momentum will spill across borders and propel their own claims. The prospect of this kind of cross-border spillover, and the resulting interdependence among geographically, culturally, and linguistically distinct communities of Afro-descendants, represents both a justification for adopting a global perspective on legal responses to the Black experience and a methodological complication.

Legally relevant cross-border spillovers may be either direct or indirect. The experiences of people physically located in one country might be affected directly by international law and laws that formally apply only to people in other territories. Alternatively, the laws in any given territory may have to respond to situations shaped in part by cross-border flows of ideas, capital, goods, and, perhaps most importantly, people — flows driven by factors such as the legacy of colonial ties, economic growth, attitudes and policies toward trade and immigration, the advance of media and communications technology, and the spread of popular culture.⁸⁵ This interconnectedness is inconsistent with the typically parochial approach to legal analysis of issues relating to anti-Black racism in the United States.

Cross-border spillovers are especially visible to Afro-descendants in the Caribbean, the territorial heart of the United States' zone of influence. There is a well-established line of scholarship tracing a range of

⁸⁴ *Id.*

⁸⁵ Davis, *supra* note 10.

social and economic outcomes in Latin America and the Caribbean, including inequality, to the transnational effects of policies implemented through the U.S. legal system. Prominent examples are the war on drugs, lax gun laws that sustain a steady cross-border flow of weapons, and immigration laws and practices that allow large numbers of people to be deported from the United States, the United Kingdom, and Canada to Caribbean countries, where they have few social or economic resources and so are at immediate risk of becoming members of an underclass.⁸⁶

Jamaica, the vast majority of whose inhabitants are Black, is a prime example of a country that has been deeply affected by these kinds of cross-border spillovers. For instance, a substantial amount of violent crime on the island is motivated by conflict over the proceeds of international narcotics trafficking and telemarketing fraud, activities whose profitability depends in part on the laws and enforcement practices of foreign countries like the United States.⁸⁷ In addition, the vast majority of homicides in Jamaica are committed with guns.⁸⁸ In 2009, U.S. authorities stated that most guns seized in Jamaica could be traced back to three Florida counties with large populations of Jamaican immigrants and lax gun laws.⁸⁹ More controversially, there is some evidence of a link between deportations and levels of crime in Jamaica and other countries in the region.⁹⁰ Between 2000 and 2013, 41,061 people were deported to Jamaica, a country with a population of less than three million people, and in 2016 it was estimated that approximately 2% of the island's population consisted of criminal deportees.⁹¹

Economically and socially significant cross-border spillovers certainly are not limited to Jamaica, nor are they limited to the effects of transnational crime. In Cuba, economic disparities between Afro-descendants and other members of the population have been exacerbated by the fact that Afro-descendants are less likely to have relatives in the United States who can send them remittances.⁹² In Cuba and elsewhere in the region there have been reports of businesses in the tour-

⁸⁶ *Id.* at 31–35.

⁸⁷ *See id.* at 32–33, 39–41, 43.

⁸⁸ *See id.* at 31.

⁸⁹ *Id.*

⁹⁰ *See id.* at 33–35.

⁹¹ GEOFF BURT ET AL., DEPORTATION, CIRCULAR MIGRATION AND ORGANIZED CRIME: JAMAICA CASE STUDY 5–7 (2016), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2016-007/2016-007-en.pdf> [<https://perma.cc/JR9G-XY58>]; *Population, Total - Jamaica*, WORLD BANK, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=JM> [<https://perma.cc/9LW7-M6S9>].

⁹² *See* Sarah A. Blue, *The Erosion of Racial Equality in the Context of Cuba's Dual Economy*, 49 *LATIN AM. POL. & SOC'Y* 35, 64 (2007); Tanya K. Hernandez, *Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 *U.C. DAVIS L. REV.* 1135, 1145 (2000).

ist sector discriminating against Black employees and visitors in an effort to cater to the racist preferences of foreign tourists.⁹³ In Colombia, President Uribe appointed an Afro-Colombian to a cabinet-level position on Afro-Colombian issues after a leader of the Congressional Black Caucus suggested that this would help win support in the U.S. Congress for a free trade agreement.⁹⁴ More generally, U.S. legal norms in areas ranging from civil rights to corporate law have exerted an enormous influence on the development of legal systems in many countries in Latin America (and Africa), both through direct contacts and through the mediating influences of international institutions.⁹⁵

The United States is a relatively large, wealthy country, and so is less susceptible to certain transnational influences than, say, a small and relatively poor island nation like Jamaica. It would be a mistake to assume, however, that the United States is immune to cross-border influences. At the ideological level, there has been speculation that Latin American conceptions of post-racialism might spread to the United States as the country's mixed-race population increases in size.⁹⁶ This concern in turn implies that factors — including legal developments like Brazil's endorsement of racial quotas — that drive changes in attitudes in Latin America might also influence attitudes in the United States.

Patterns of racial subordination in the United States also are susceptible to the influence of cross-border flows of people. As Afro-descendants have immigrated to the United States, traditions and patterns of inequality from Africa, Latin America, and the Caribbean have been transplanted to the United States and, to some extent, disrupted pre-existing racial hierarchies. As of 2016, approximately 9% of the Black population in the United States were foreign born, and another 8% were the children of at least one foreign-born parent.⁹⁷ Almost half (49%) of foreign-born Black people living in the United States were born in the Caribbean, and the most common places of birth among the larger

⁹³ See Hernandez, *supra* note 92.

⁹⁴ 151 CONG. REC. 21718 (2005) (statement of Sen. Obama); *Congressman Meeks Meets with President Uribe, Vice*, WIKILEAKS (Aug. 11, 2005, 6:26 PM), https://wikileaks.jcvignoli.com/cable_05BOGOTA7621 [<https://perma.cc/J8N7-CDLQ>].

⁹⁵ See, e.g., YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 32–58 (2002) (tracing influence of the United States upon the elites of selected Latin American countries in the areas of human rights, economic policy, and business law); H. Timothy Lovelace, Jr., *Civil Rights as Human Rights*, 70 DUKE L.J. (forthcoming 2021) (manuscript at 3–5) (on file with the Harvard Law School Library) (describing role of U.S. lawyers in drafting the International Convention on the Elimination of All Forms of Racial Discrimination).

⁹⁶ See HERNÁNDEZ, *supra* note 16, at 171–81.

⁹⁷ Monica Anderson & Gustavo López, *Key Facts About Black Immigrants in the U.S.*, PEW RSCH. CTR.: FACT TANK (Jan. 24, 2018), <https://www.pewresearch.org/fact-tank/2018/01/24/key-facts-about-black-immigrants-in-the-u-s/> [<https://perma.cc/6YUS-N7F5>].

group were Jamaica, Haiti, and Nigeria, in that order.⁹⁸ There is evidence that some of these Black immigrants and their descendants, and in particular those from the West Indies and Africa, systematically have higher incomes and levels of educational attainment than other Black people living in the United States.⁹⁹ (Casual observation suggests they are over-represented among Black U.S. law professors.) In other words, there is credible evidence that certain Black immigrants and their descendants in the United States are less subordinated along various economic dimensions than other Black Americans. This raises the question of whether relatively privileged Black immigrants and their descendants ought to benefit from legal responses crafted to respond to the distinctive forms of subordination associated with the historical legacies of Southern slavery and Jim Crow. This issue is percolating in debates around who should benefit from affirmative action and reparations.¹⁰⁰

These transnational vignettes, together with the mini-case studies of Brazil and Colombia in the first two Parts of this Essay, provide glimpses of why activists, legislators, and scholars interested in combating Black subordination almost anywhere in the world have a stake in understanding both the experiences of Afro-descendants in other places and the associated legal responses. This includes our hypothetical member of the Congressional Black Caucus. As we have already discussed, she might expect to learn from, or be benchmarked against, or benefit from supporting foreign legal initiatives such as Brazilian affirmative action programs or the CARICOM reparations plan. Now we see that she also might be concerned about how her decisions affect Black people from other countries, whether for simple humanitarian reasons or because those people — and their ways of life — have moved, or might move, to the United States.

CONCLUSION

Adopting a global approach to Black subordination involves a careful blend of comparative and transnational legal analysis. Cross-country comparisons can illuminate new dimensions of the problem and help to identify and assess alternative legal responses. Meanwhile, attention to the transnational dimensions of the phenomenon can identify ways in which both legal causes and responses operate across borders. All of this is possible even as we acknowledge significant diversity

⁹⁸ *Id.*

⁹⁹ See Eleanor Marie Lawrence Brown, *An Alternative View of Immigrant Exceptionalism, Particularly as it Relates to Blacks: A Response to Chua and Rubinfeld*, 103 CAL. L. REV. 989, 1003, 1006–10 (2015) (summarizing evidence of superior achievement of Nigerians and West Indians); cf. Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (arguing that racism is unavoidable for Black people in the United States, including recent immigrants).

¹⁰⁰ Farah Stockman, “*We’re Self-Interested*”: *The Growing Identity Debate in Black America*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/08/us/slavery-black-immigrants-ados.html> [<https://perma.cc/3Q59-MNK9>]; Lewis, *supra* note 4, at 1017.

among the experiences of Afro-descendants and available legal responses. In short, studying legal responses to Black subordination requires a perspective that moves beyond parochialism while avoiding the pitfalls associated with legal universalism and accounting for complex transnational interconnections.