

SYMPOSIUM ON THE BIDEN ADMINISTRATION AND THE INTERNATIONAL LEGAL ORDER

“TO RESTORE THE SOUL OF AMERICA”: HOW DOMESTIC ANTI-RACISM MIGHT FUEL GLOBAL ANTI-RACISM

*H. Timothy Lovelace Jr.**

On November 7, 2020, President Joe Biden proclaimed that his administration would “restore the soul of America.” He declared that U.S. voters had given him a mandate “to achieve racial justice and root out systemic racism in this country,”¹ and that he plans to use the nation’s restored moral leadership to create international consensus around U.S. values and urge foreign nations and intergovernmental institutions to adopt anti-racist agendas.² To be sure, Biden’s commitment to ending systemic racism is rooted in troubling notions of U.S. exceptionalism and invokes an unfounded anti-racist nostalgia. We should never “restore” America’s racial past. Nevertheless, Biden’s commitment is, in many ways, refreshing and raises a crucial and productive question: how might the United States recalibrate the international legal order and address systemic racism within Biden’s framework? One straightforward and pragmatic answer emerges: the Biden administration should live up to the standards of those who inspired his campaign’s mission. In other words, truly improving the racial order at home might be a viable way to advance anti-racism abroad, including through existing international institutions.

“To Redeem the Soul of America”

More than a half-century ago, the Southern Christian Leadership Conference (SCLC) adopted the motto, “To Redeem the Soul of America.” The organization’s president was Dr. Martin Luther King, Jr., and the organization blossomed through the toils of countless foot-soldiers and the unsung leadership of a black woman and a gay black man, Ella Baker and Bayard Rustin, respectively. When King was assassinated, the SCLC was in the midst of the Poor People’s Campaign, which made a moral case to end racial and economic injustice and tied U.S. ideals to a broader human rights framework. In fact, one of the campaign’s legal and philosophical anchors was an “Economic and Social Bill of Rights.” Simultaneously, King recognized the foreign policy implications of the Poor People’s Campaign—that the United States would be in a better position to support the practice of democracy abroad if it practiced racial equality at home.

When Joe Biden launched his presidential bid, he wrapped his campaign in the mantle of the SCLC. Biden declared that the racist attacks in Charlottesville, Virginia in 2017 compelled him to run for President, and he stated

* *Professor of Law and John Hope Franklin Scholar, Duke University School of Law, Durham, North Carolina, United States.*

¹ Matt Stevens, [Read Joe Biden’s President-Elect Acceptance Speech: Full Transcript](#), N.Y. TIMES (Nov. 9, 2020).

² *Id.*

that the presidential campaign was a “battle for the soul of this nation.”³ During Biden’s November 2020 victory speech, he emphasized many of the same themes. He reminded listeners of his campaign’s motto, thanked the diverse coalition that elected him, and specifically promised to back the black community who supported his campaign in its lowest moments. Biden, who served under the nation’s first black president, pledged to assemble “a cabinet that looks like America,” and his selections thus far reflect his awareness that anti-racist efforts must be inclusive of women of color. Kamala Harris, Biden’s running mate, is now the first woman, first black woman, and first South Asian American woman to serve as vice president. Women of color will likely have prominent roles throughout the administration, including Linda Thomas-Greenfield, the administration’s nominee for U.S. Ambassador to the United Nations. These personnel decisions suggest that the administration is confident that it can forge a new future of freedom globally by modeling anti-racism domestically.

The President faces no easy march. He inherits an incredibly polarized political environment. More than seventy million Americans voted for white nationalist Donald Trump. Furthermore, while many Americans have long resisted racial reforms in the United States, they have resisted even more strongly the idea of addressing racism on the world stage—from attempts to end the transatlantic slave trade, to Marcus Garvey’s petition to the League of Nations, to W.E.B. Du Bois’ appeal to the United Nations. And U.S. xenophobia is far from a bygone relic. The Trump administration balked at human rights criticisms of its racist and xenophobic immigration policies, withdrew from the UN Human Rights Council, and refused to submit periodic reports to the UN’s treaty monitoring bodies.

Nonetheless, the hurdles that the Biden administration faces, though high, are not insurmountable. Even if Congress refuses to pass significant, anti-racist legislation, the President retains substantial executive authority to attack systemic racism in both domestic and foreign relations. Moreover, nearly a generation ago, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). As a result, the present calls to end systemic racism domestically and internationally are not asking the administration to do anything new per se; the United States has existing treaty obligations to end systemic racism. In any case, if we take the President at his word—that he sincerely seeks to restore the soul of America and that he wants to set an anti-racist example for the world—it is imperative that those interested in eradicating systemic racism hold the administration accountable. Uprooting systemic racism at home and abroad requires that the administration do more than gesture at the SCLC’s motto or even appoint a diverse cabinet. It requires that the administration engage and embrace the substance of King’s human rights vision.

Because Black Lives Matter

The term “systemic racism” came to the forefront of mainstream U.S. politics in the wake of the murders of Ahmaud Arbery, Breonna Taylor, and George Floyd. Massive protests dominated 2020, and demonstrations which started in the United States reverberated globally. Activists have persistently raised important questions about the evolution of white supremacy in policing and, more broadly, in the criminal justice system.

The protests against systemic racism have also revealed the depth and persistence of police violence, even against peaceful protesters. Police violence during modern protests in Ferguson, Louisville, and Minneapolis is eerily reminiscent of scenes from Selma, Birmingham, and Memphis in the 1960s. The Biden administration must maintain its unequivocal stance here. It must also emphasize that police practices like tear-gassing protesters are not simply civil rights abuses. They are also human rights abuses in violation of the CERD, ICCPR, and CAT. Recognizing as much, the Biden administration should prioritize thorough pattern-or-practice investigations of alleged police misconduct and urge that Congress, among other things, end the federal transfer of military-grade

³ Arlette Saenz, [Joe Biden Announces He is Running for President in 2020](#), CNN (Apr. 25, 2019).

equipment to law enforcement, incentivize more non-carceral approaches to public safety, lower the *mens rea* standard in federal prosecutions for police misconduct, and establish a national registry to monitor police misconduct.⁴

Serious concerns over U.S. police misconduct have global resonance as well. In Rio de Janeiro, for example, police in the last decade have killed nearly 9,000 people, more than three-quarters of whom were black men.⁵ In Paris, police officers claim to be colorblind, but the area's black and Arab populations are targets for police stops and violence at shocking rates.⁶ In Toronto, police stop blacks at rates that surpass the stop rates in New York City, which became notorious for its stop-and-frisk policies.⁷ For the Biden administration to restore dignified leadership in the United States and rally the world, it must support the Human Rights Council's efforts to investigate police violence against Africans, people of African descent, and protesters. The administration should also press the High Commissioner on Human Rights to engage more communities directly harmed by police violence and offer more sweeping accounts and recommendations to end racist policing.⁸

"I Can't Breathe"

It is critical to understand that systemic racism in the United States pervades much more than the criminal justice system, a reality that Biden readily acknowledges. "I Can't Breathe"—George Floyd and Eric Garner's cries as police stole their lives, and a sentence now a staple in demonstrations across the world—has multiple valences. COVID-19 has disproportionately infected and killed people of color in the United States. In fact, autopsy reports showed that George Floyd had contracted COVID-19 before his death. Sadly, the United States is not alone here. The pandemic has ravaged communities of color throughout the world. The United Kingdom, for example, has acknowledged the racial disparities in its COVID-19 infection and death rates.⁹ The Biden administration should deliver COVID-19 vaccinations, treatment, and testing in a way that recognizes that racial minorities are bearing the pandemic's brunt and denounce the anti-Asian hatred surrounding the pandemic. It should also collaborate with foreign governments and international institutions, including the WHO, to ensure health equity in and between countries. Article 5(e) of CERD—plus basic concerns over human dignity, fairness, and equal protection—requires that the United States and more than 170 other countries end persistent health disparities.

The COVID-19 crisis has exposed and exacerbated a much deeper U.S. healthcare crisis that cannot be vaccinated away. There is no fundamental right to healthcare under the U.S. Constitution, there are presently more than thirty million uninsured Americans, and people of color, and women of color in particular, suffer from a wide range of health disparities. In the "Economic and Social Bill of Rights," King called America's stark health disparities an "abiding scandal," and he demanded "the right to the full benefits of modern science in health care."¹⁰ The Biden administration must put forth legislation that guides the country to true universal healthcare in the absence of a federal constitutional right to healthcare, possibly in conjunction with promoting healthcare as a human right, including through reference to treaty bodies, such as the Committee on Economic, Social and

⁴ See [George Floyd Justice in Policing Act of 2020](#), H.R. 7120, 116th Cong. (2020).

⁵ César Muñoz, [Brazil Suffers Its Own Scourge of Police Brutality](#), HUM. RTS. WATCH (June 3, 2020).

⁶ Eleanor Beardsley, ['No Justice in France, Either': French Protest Police Killings in U.S. and at Home](#), NPR (June 4, 2020).

⁷ Dan Levin, [Not Just a U.S. Problem: Black Lives Matter Here, Too, Canadians Say](#), N.Y. TIMES (June 15, 2016).

⁸ ACLU, [Joint Oral Statement Submitted by the ACLU to the 45th Session of the Human Rights Council on Resolution 43/1](#) (Oct. 1, 2020).

⁹ Adé Olaiya, [The Impact of COVID-19 on African Diaspora Communities: Addendum to the Report on Key Achievements Realizing Thematic Objectives of IDPAD](#), UNESCO INCLUSIVE POLY LAB (Apr. 2020).

¹⁰ *To the President, Congress, and Supreme Court of the United States (Feb. 6, 1968)*, in Records of the SCLC, Part 2, Box 39:22.

Cultural Rights (although the United States has signed but not ratified this treaty). There is no excuse for such injustice in any country, much less the wealthiest country in human history.

The COVID-19 crisis has also exacerbated many other inequalities involving basic economic, social, and cultural rights. In 1968, King lamented that the black unemployment rate was twice the white unemployment rate. In September 2020, the black unemployment rate was still nearly twice the rate of white unemployment. During the pandemic, people of color, especially women of color, have been more likely to work as frontline employees, more vulnerable to contracting COVID-19 and less likely to receive hazard pay. The pandemic has similarly exposed existing inequalities in education, food security, housing, and environmental protections. The Biden administration must immediately shepherd stimulus legislation that provides meaningful relief for the poor and working classes, who, again, are disproportionately people of color. At the same time, the administration must shame those who shame the poor and working classes for receiving federal COVID relief and say nothing about the disparate relief given to corporations. As King stated, too often, “This country has socialism for the rich [and] rugged individualism for the poor.”¹¹

“Give Us the Ballot”

The 2020 U.S. presidential election illustrated the need for stronger voting protections and full respect for U.S. obligations under the ICCPR and CERD. For nearly two decades, jurisdictions have increasingly adopted voter suppression tools. In the wake of *Shelby County v. Holder*, the pace of disenfranchisement has quickened. Moreover, during and after the 2020 election, the architects and enablers of actual voter disenfranchisement spread baseless claims that they were the victims of disenfranchisement. These claims, coupled with an emaciated Voting Rights Act, threaten to fuel voter disenfranchisement under the guise of voter protection.

More optimistically, the Biden administration has endorsed the John Lewis Voting Rights Advancement Act, legislation that accords with ICCPR and CERD and honors the legacy of activists in Selma and beyond. The administration could and should go even further. It should also press Congress to grant statehood to the federal territories to bestow their U.S. citizenship with full voting rights. These proposed reforms would help restore faith in democratic institutions and would help model to the world how democratic governments can confront their own legacies of colonialism as part of their commitments to protecting international human rights.

No Person is Illegal

One prominent area where the administration might push past King’s vision is immigration reform. Although King corresponded with Cesar Chavez and praised the struggles of the United Farm Workers, King never imagined the immigration crisis the United States faces today. Trump found widespread support among xenophobes by spewing hatred towards immigrants, championing the construction of a larger wall on the U.S.-Mexican border, and using his executive authority to institute a discriminatory Muslim ban. President Biden should use his executive authority to reverse America’s draconian course on immigration, denounce xenophobia and Islamophobia globally, and adhere to the Refugee Convention.¹²

¹¹ Jose Yglesias, *It May be a Long, Hot Spring in the Capital*, N.Y. TIMES (Mar. 31, 1968).

¹² For a comprehensive treatment here, see Jaya Ramji-Nogales, *Cultivating Normative Authority: The Biden Administration, Migration, and the International Legal Order*, 115 AJIL UNBOUND 46 (2021).

To Make the Wounded Whole

Finally, President Biden has pledged to study the continuing effects of slavery and the possibility of reparations. This is wonderful news. His administration should also consider other forms of state-sanctioned discrimination, including Jim Crow and the U.S. government's violations of treaty obligations to tribal nations. Plans to end systemic racism, by definition, must be far-reaching and ambitious. Furthermore, enduring problems like the racial wealth gap may never close without reparations. In the United States, the median white family has nearly eight times more net wealth than the median black family.¹³ Since much of the racial wealth gap stems from discriminatory federal policy, the federal government has a moral duty to reduce the gap. Universal programs like forgiving education loan debt and medical debt would shrink the racial wealth gap; reparations would propel this worthwhile project even further.

Here, critics of reparations often overlook an inconvenient truth. King called for reparations in the United States. In 1961, King insisted that the United States adopt efforts like those in India where "millions of rupees [were] set aside each year to provide scholarships, financial grants and special employment opportunities for the untouchables."¹⁴ And King was clear to his critics: reparations were not reverse discrimination. "To the argument that this is a new form of discrimination inflicted upon the majority population," he asserted, "the Indian people respond by saying that this is their way of atoning for injustices and indignities heaped in the past upon their seventy million untouchable brothers."¹⁵ King's vision for U.S. reparations accords with not only many past and present appeals for reparations around the world, but also Articles 1(4) and 2(2) of CERD.

Conclusion: Why We Can't Wait

If the Biden administration seeks to end systemic racism and restore U.S. standing, it must move *immediately*. Historically, the policy windows for racial reform have been short-lived in the United States. If anything, this nation's history demonstrates that racist backlash often follows moments of racial progress. Shortly after the emancipation of enslaved persons, Southern states enacted Black Codes. After the powerful but all-too-brief experiment of Reconstruction came Redemption and Jim Crow. After *Brown v. Board of Education*, Massive Resistance followed. And after the election of Barack Obama, Trumpism flourished. In other words, while Biden believes that he now has a mandate to end systemic racism, America's lack of anti-racist resolve will likely put a soon end to his administration's opportunity to make meaningful structural change.

Sadly, Biden must also consider how electoral polarization might undermine his anti-racist mandate. Midterm elections will come soon, and Biden would do well to remember the backlash and congressional obstructionism that emerged just after he and Obama took office. Morally, placing another person or group's freedom on a timetable is condemnable. King authored a book entitled *Why We Can't Wait*, decrying the calls for continued black patience with racism. Legally, the United States has treaty obligations mandating the eradication of systemic racism now. For example, Article 2 of CERD, which the United States ratified in 1994, requires that states parties to the treaty end racial discrimination "without delay."¹⁶

¹³ Neil Bhutta et al., [Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances](#), FEDS NOTES (Sept. 28, 2020).

¹⁴ Martin Luther King, Jr., *Equality Now: The President has the Power (Feb. 4, 1961)*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 152, 158 (James Washington ed., 1986).

¹⁵ *Id.*

¹⁶ [International Convention on the Elimination of All Forms of Racial Discrimination](#) art. 2, Dec. 21, 1965, 660 UNTS 195.

In the “Letter from the Birmingham Jail,” King argued that humans are “caught in an inescapable network of mutuality, tied in a single garment of destiny.”¹⁷ If this administration takes King’s vision seriously, it must seek to eradicate systemic racism inside and outside of U.S. borders. Racism in the United States is part of a much older and global phenomenon that unfortunately thrives today in hearts, minds, and institutions. Recognition of this foreign-domestic tapestry in the Biden administration’s anti-racist policies has the power to advance the idea of a beloved community domestically and internationally. King’s vision was and remains a call to arms to act now and to work globally. “Injustice anywhere,” King declared, “is a threat to justice everywhere.”¹⁸

¹⁷ Martin Luther King, Jr., *A Letter from the Birmingham Jail (Apr. 16, 1963)*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, *supra* note 14, at 290.

¹⁸ *Id.*