

# Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison

Tanya Kateri Hernandez

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# MULTIRACIAL MATRIX: THE ROLE OF RACE IDEOLOGY IN THE ENFORCEMENT OF ANTIDISCRIMINATION LAWS, A UNITED STATES-LATIN AMERICA COMPARISON

*Tanya Kateri Hernández*†

*This Article examines the role of race ideology in the enforcement of antidiscrimination laws. Professor Hernández demonstrates the ways in which the U.S. race ideology is slowly starting to resemble the race ideology of much of Latin America. The evolving U.S. race ideology is a multiracial matrix made up of four precepts: (1) racial mixture and diverse racial demography will resolve racial problems; (2) fluid racial classification schemes are an indicator of racial progress and the colorblind abolition of racial classifications an indicator of absolute racial harmony; (3) racism is solely a phenomenon of aberrant racist individuals; and (4) focusing on race is itself racist. Because the multiracial matrix parallels much Latin American race discourse, Professor Hernández conducts a comparative analysis between U.S. and Latin American anti-discrimination law enforcement practices. Professor Hernández concludes that the new race ideology bolsters the maintenance of race hierarchy in a racially diverse population. Consequently, an uncritical embrace of the new race ideology will hinder the enforcement of antidiscrimination laws in the United States. Professor Hernández proposes that a greater focus on racism as a global issue that treats race as a political identity formation will assist in the recognition of the civil rights dangers of a multiracial matrix.*

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† Professor of Law & Justice Frederick W. Hall Scholar, Rutgers School of Law-Newark. A.B., Brown University; J.D., Yale Law School. I dedicate this Article to Alesandro Quentin Walker and Leila Isabela Walker—my daily inspiration for taking on the challenge of writing about race and racism. The following individuals and institutions were immensely helpful in my research of Latin American civil rights laws and realities: Angelo Falcon of the Puerto Rican Legal Defense and Education Fund Institute for Puerto Rican Policy, The United Nations Association of Cuba, James Ramsey of the Equal Employment and Opportunity Commission Department of Statistics, and René Pinto-Lugo of the Puerto Rico Commission on Civil Rights. In addition, the following colleagues shared many helpful insights when discussing this project: Taunya Lovell Banks, Robert J. Cottrol, Jorge Duany, Alejandro Garro, Pedro Malavet, James Pope, Miriam Jiménez Román, Charles Venator Santiago, Frank Valdes, and especially Carlos Gonzalez. I also benefited from comments and suggestions I received while presenting this Article before the Yale Law School Women of Color Reading Group Seminar of Spring 2001; the January 2002 N.Y. Writer's Group Meeting hosted by Paulette Caldwell and attended by Regina Austin, Holly Maguigan, Denise Morgan, and Twila Perry; and the 2002 Latino Studies Journal conference. Lisa Brown, Jennifer Chan, Taleali Jennings, Shreya Mandal, Mark Murphy, and Chotsani Sackey all provided excellent research assistance at different points in time. Funding for this research project was generously provided by the Dean's Research Fund of Rutgers School of Law-Newark. Any shortcomings are my own.

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### INTRODUCTION

*Si viéramos realmente el universo, tal vez lo entenderíamos.*<sup>1</sup>

—Jorge Luis Borges

The racial justice movement in the United States today has reached an important turning point. While the formal mechanisms for addressing racial inequality have long been in place, there is a growing societal belief that it is no longer necessary for the government to be proactively engaged in ensuring racial equality.<sup>2</sup> A racial hierarchy continues to exist<sup>3</sup> alongside a deteriorated social commitment to race-based programs.<sup>4</sup> The early Civil Rights movement was astonishingly successful at making the goal of racial equality a stated national norm and catalyzing government programs designed to provide concrete access to jobs and education.<sup>5</sup> However, the move-

<sup>1</sup> JORGE LUIS BORGES, *EL LIBRO DE ARENA* 44 (El Libro del Bolsillo Alianza Editorial, 3d ed. 1980) (1975) ("If we could see the universe as it really is, perhaps we could understand it." (translation mine)).

<sup>2</sup> See Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1 (describing a national survey in which White respondents "were far less likely to view black problems as being serious, or to favor government action to correct persistent social and economic disparities").

<sup>3</sup> *Id.* (noting that government statistics show that racial disparities continue to exist in employment, income, education, and access to health care).

<sup>4</sup> See, e.g., STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* 168-75 (1995) (discussing growing criticism of affirmative action programs).

<sup>5</sup> See HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* 45 (1994) (observing that the formal equality components of the Civil Rights movement found popular support for the enactment of legislation). Polls show that most U.S. residents have adopted the rhetoric of formal racial equality. See, e.g., IRWIN KATZ, *STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS* 14-16 (1981); HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 71-138 (1985).

ment's very success contributes to the notion that Blacks<sup>6</sup> and other persons of color no longer require legal assistance in accessing equal opportunity.<sup>7</sup> Furthermore, growing rates of immigration, intermarriage, and mixed-race children<sup>8</sup> are now routinely touted as both the proof and the reason why race-conscious remedial programs are no longer needed.<sup>9</sup> Indeed, the growing acceptance of race mixture and, more particularly, multiracial racial identities, is viewed as completely challenging the U.S. notion of race that was so implicitly central to the early Civil Rights movement.<sup>10</sup> Thus, the societal shift that the racial justice movement must now address is not primarily the ways in which the changes in racial demographics encompass a greater diversity of cultural backgrounds,<sup>11</sup> but more importantly how the public dis-

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<sup>6</sup> I capitalize the words "Black" and "White" when they refer to persons of those races to denote the political meaning of race and the social significance of being Black or White as something more than just skin color. *Accord* Victor F. Caldwell, Book Note, 96 COLUM. L. REV. 1363, 1369 (1996) (reviewing CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995)) (contrasting the Critical Race Theory historical view of race, which acknowledges past and continuing racial subordination, with the formal view of race, which treats race as "neutral, apolitical descriptions, reflecting merely "skin color" or region of ancestral origin" (quoting Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra*, at 257, 257)). Although capitalizing White may be interpreted as furthering the supremacy of Whiteness, capitalizing also serves the important role of piercing the veil of transparency that cloaks Whiteness and its concomitant privileges. Only when Whiteness becomes more generally perceived as a race-based privilege will racial justice efforts have a meaningful opportunity to be effective. *See generally* Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (describing Whites' lack of consciousness of Whiteness and the problem of "colorblindness").

<sup>7</sup> *Cf.* THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 109 (1984) (stating that "[t]he battle for civil rights was fought and won—at great cost—many years ago").

<sup>8</sup> *See* Eric Schmitt, *For 7 Million People in Census, One Race Category Isn't Enough*, N.Y. TIMES, Mar. 13, 2001, at A1.

<sup>9</sup> *See, e.g.*, RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 78 (1996) ("Today the majority of minorities are nonblack; many are recent immigrants. Not only have nonblack minorities diluted the benefits of affirmative action for African Americans, they have in some instances used affirmative action to exclude blacks.").

<sup>10</sup> *See* WINANT, *supra* note 5, at 157–58; *see also* Tanya Katerí Hernández, "Multiracial" Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998) (critiquing the Multiracial Category Movement (MCM) and its advocacy of a multiracial category on the 2010 U.S. Census). "Multiracial" is the term some interracial couples prefer to use as a racial classification for their mixed-race children. *Id.* at 98–99.

<sup>11</sup> Indeed, the U.S. Civil Rights movement consistently lobbied for social welfare policies that would benefit all poor people and not solely African Americans, despite its mischaracterization—then and now—as formulating social policies only for African Americans. *See* DONA COOPER HAMILTON & CHARLES V. HAMILTON, THE DUAL AGENDA: RACE AND SOCIAL WELFARE POLICIES OF CIVIL RIGHTS ORGANIZATIONS 2–3 (1997). Furthermore, contrary to the popular perception that directly links the contemporary demographic increase of non-Black minorities to a shift in the racial scheme, the global racial order was never simply a Black-White binary construct. *See* Roger Sanjek, *The Enduring Inequalities of Race, Introduction to RACE* 1, 10 (Steven Gregory & Roger Sanjek eds., 1994) ("The post-1400s global racial order has always extended beyond black and white in its

course that uncritically attributes miraculous powers to those demographic changes contributes to a distinct racial ideology that may influence the efficacy of antidiscrimination legal enforcement. I use the term "race ideology" to refer to the discursive forces that over time transform what officially and unofficially counts as race and the prescribed parameters for self-defining or being defined as of a particular race,<sup>12</sup> as well as the limitations on what is defined as racism.<sup>13</sup> As I use the term in this Article, race ideology also encompasses the rhetoric that attributes value to particular kinds of race formation.

To be specific, the race ideology that predominated during the time of the early Civil Rights movement was one which viewed racial identity as static and Blackness as rigidly determined by the existence of even one ancestor of African ancestry.<sup>14</sup> Today, there is a growing scholarly acknowledgement that race is a socially constructed concept and that African ancestry may not necessarily lead an individual either to embrace a Black racial identity or to view race as socially salient.<sup>15</sup> The U.S. Census Bureau's decision to permit people to claim multiple racial designations on the 2000 census is a striking example of the evolving changes in U.S. race ideology.<sup>16</sup>

But the current ideological evolution in the United States is not entirely unique or unprecedented. Historically, the United States has had geographic diversity with respect to the relative rigidity or fluidity of approach to racial designation. For instance, both antebellum

ranked racist ordering, but these two terms have also always defined its poles. There is no decentered mosaic." In fact, Sanjek notes, "[p]ersons of African ancestry have consistently experienced extreme subjugation within the global racist order, even if its victims have never been solely black." (citations omitted).

<sup>12</sup> For the analysis, I shall use Ian F. Haney López's definition of race as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry." Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

<sup>13</sup> The connection between ideology and racism is clear insofar as:

An ideology is a set of principles and views that embodies the basic interests of a particular social group. Typically, a broad ideology encompasses expressed attitudes and is constantly reflected in the talk and actions of everyday life. One need not know or accept the entire ideology for it to have an impact on thought or action. Thus, each person may participate only in certain fragments of an ideology. Ideologies are usually created by oppressors to cover what they do, and counterideologies are often developed by the oppressed in their struggle against domination.

JOE R. FEAGIN, *RACIST AMERICA* 69 (2000).

<sup>14</sup> See F. JAMES DAVIS, *WHO IS BLACK?* 4-6 (1991).

<sup>15</sup> See Sanjek, *supra* note 11, at 1; see also Howard Winant, *Racial Democracy and Racial Identity: Comparing the United States and Brazil*, in *RACIAL POLITICS IN CONTEMPORARY BRAZIL* 98, 105 (Michael Hanchard ed., 1999) ("[T]he United States is now experiencing a totally unprecedented racial situation, in which large-scale uncertainty exists as to the meaning of race or the proper orientation of state racial policies.").

<sup>16</sup> See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788-90 (Oct. 30, 1997) [hereinafter OMB Revisions].

South Carolina<sup>17</sup> and Louisiana<sup>18</sup> sometimes used the existence of African ancestry to designate individuals as Mulatto, as opposed to Black.<sup>19</sup> Similarly, in much of Latin America the process of racial designation for its sizeable population of African descent has been depicted as contextually contingent and varied.<sup>20</sup> Yet each of the aforementioned contexts shares the unfortunate trait of denigrating Blackness and esteeming Whiteness.<sup>21</sup> This commonality underscores the importance of never presuming that a distinct race ideology indicates a relinquishment of race-based privilege and hierarchy. A deeper level of inquiry is needed.

In fact, the comparison of traditional U.S. race ideology with that of Latin America can be very useful in exploring the general role of race ideology in the development and enforcement of antidiscrimination laws. Rather than blindly presuming that increased acknowledgment of race mixture and the socially constructed nature of race will automatically result in a racially tolerant society, an examination of another context such as Latin America, which shares the U.S. history of chattel slavery but has long promoted its racial mixture as evidence of a racially harmonious environment,<sup>22</sup> can provide a tangible mechanism for assessing the actual societal influence of this distinct racial ideology. More specifically, an international comparison of civil rights structures and their efficacy offers a concrete way to test the hypothesis that race mixture equals race harmony and the transcendence of race and that focusing on racial differences inculcates racism.<sup>23</sup> I have earlier referred to this colorblind-inspired hypothesis as “multiracial

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<sup>17</sup> See DAVIS, *supra* note 14, at 35–36 (describing antebellum South Carolina’s societal and judicial refusal to adopt an expansive definition of blackness that would encompass an individual with any known African ancestry in favor of a more fluid racial classification system that recognized Mulattos as racially and socially distinct).

<sup>18</sup> See VIRGINIA R. DOMÍNGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* 138–40 (1986) (detailing the separate social status of Mulattos in Louisiana).

<sup>19</sup> *But see* Miriam Jiménez Román, *Looking at That Middle Ground: Racial Mixing as Panacea* 6 (Nov. 2, 2001) (presented at “Race Mixture in the Americas” symposium, American University, Washington College of Law) (unpublished manuscript, on file with author) (“The states of the Lower South are frequently cited as anomalies to the one-drop rule but, in fact, throughout the United States, there have been communities of people of known mixed ancestry who have been rejected by Whites and have refused to be defined as Black, people who in practice have constituted a ‘third race.’”).

<sup>20</sup> See MARVIN HARRIS, *PATTERNS OF RACE IN THE AMERICAS* 54–64 (1964) (discussing the particularities of a Latin American approach to racial classification).

<sup>21</sup> See *infra* Part III.

<sup>22</sup> See CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (1971).

<sup>23</sup> See, e.g., CARLOS MOORE, *CASTRO, THE BLACKS, AND AFRICA* 258–59 (1988) (discussing a viewpoint promoted in post-revolutionary Cuba which equated Black solidarity with racism).

discourse.”<sup>24</sup> The comparison to Latin America and its multiracial discourse can thereby serve to inform the ways in which racial justice activists in the United States might begin to respond to the societal changes with greater efficacy in ameliorating racial inequality rather than becoming ensnared in a multiracial matrix.

I use the term “multiracial matrix” to refer to the ways in which the many layers of multiracial discourse can form a matrix. The matrix serves the hegemonic function of dictating what is reality and thereby convincing all those harmed by its construction of reality that their experience is natural and sometimes even desirable.<sup>25</sup> Four precepts comprise the layers of multiracial discourse that, in turn, form a multiracial matrix: (1) racial mixture and diverse racial demography will resolve racial problems by transcending race; (2) fluid racial identity is an indicator of a form of racial progress that deconstructs the stability of racial categories and thereby brings society closer to a colorblind utopia; (3) racism is solely a phenomenon of aberrant racist individuals who inappropriately express their prejudice; and (4) discussing race or focusing on race is itself racist because it disrupts the harmony of race neutrality.<sup>26</sup>

I purposely draw on the Latin American experience for this inquiry into the continuing utility of race as a legal, social, or political concept because the justification that some U.S. commentators have generated to support the valorization of race mixture and the abolition of race resonates with the idealized but misguided Latin American approach to race—namely, that referencing race causes racism.<sup>27</sup>

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<sup>24</sup> See Hernández, *supra* note 10, at 101–04 (characterizing the campaign for a “multiracial” racial category on the census as an implicit solicitation for colorblind treatment of pre-existing racial hierarchy).

<sup>25</sup> Accordingly, my study of a “multiracial matrix” incorporates Gramsci’s concept of hegemony—the means by which a system of attitudes and beliefs reinforces existing social arrangements and, through a form of ideological control, convinces both the dominated and dominant classes that the existing order is inevitable. See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 238–39 (Quintin Hoare & Geoffrey Nowell Smith trans., 1971).

<sup>26</sup> In its deployment, the multiracial matrix can be as seductive and controlling as the computer matrix depicted in the film *The Matrix*. See Larry Wachowski & Andy Wachowski, *The Matrix Shooting Script*, in *THE ART OF THE MATRIX* 271, 313 (Spencer Lamm ed., 2000) (“What is the Matrix? Control. . . . The Matrix is a[n artificially] generated dreamworld built to keep us under control. . . .”).

<sup>27</sup> See Alejandro de la Fuente, *Race, National Discourse, and Politics in Cuba: An Overview*, 25 *LAT. AM. PERSP.*, May 1998, at 43, 44 (quoting the influential Cuban leader José Martí as saying: “To insist on the divisions into race, on the difference of race . . . is to make difficult both public and individual enterprises . . . . [T]he Negro who proclaims his racial character . . . authorizes and brings forth the white racist. . . . Two racists would be equally guilty, the white racist and the Negro . . .”). While there is great diversity in Latin American particularities and racial formation, all countries in Latin America share the commonality of denying the existence of racism while simultaneously maintaining racial hierarchy and privilege. Cf. Marisol de la Cadena, *Reconstructing Race: Racism, Culture and Mestizaje in Latin America*, 34 *NACLA REP. ON AM.*, May/June 2001, at 16, 16 (“One of the most puzzling,

The Latin American racial context is often idealized because of the widely promoted depiction of Latin America as respectful of the fluidity of race and racial identity,<sup>28</sup> and because of the misperception of Latin America as tolerant of racial differences due to its race mixture and relative lack of public focus on race.<sup>29</sup> However, this comparative analysis shows why the Latin American experience with race counsels great caution in any move to discard or devalue race as a unit of critical analysis and transformative action in the United States.<sup>30</sup>

More specifically, I will focus on Cuba and Puerto Rico's civil rights structures for this Article's comparison. I chose Cuba as a case-in-point because of its self portrayal as a racially mixed "racial democracy"<sup>31</sup> and, more so, because of its official rejection of race as a formal concept.<sup>32</sup> Cuba's explicit and public rejection of the notion of race provides a wealth of experience and information with which to assess more effectively the advisability of abandoning racial categories in the ongoing development of civil rights. And because the "racial democracy" construction of contemporary Cuban race relations is a

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disconcerting phenomena that the non-native visitor confronts while traveling in Latin America is the relative ease with which pervasive and very visible discriminatory practices coexist with the denial of racism.").

<sup>28</sup> See DEGLER, *supra* note 22, at 6.

<sup>29</sup> See *id.* at 4-7. It should be noted that what I term multiracial discourse is not unique to the Spanish-speaking world, inasmuch as Lusophone and Francophone America have also utilized the concept of race mixture for ordering a racial hierarchy. Lourdes Martínez-Echazábal, *Mestizaje and the Discourse of National/Cultural Identity in Latin America, 1845-1959*, *LATIN AM. PERSP.*, May 1998, at 21, 23. But it is still useful to focus on the particularities of Latin America because of its popular idealization as a racial democracy. See, e.g., William W. Meggenney, *The Black Puerto Rican: An Analysis of Racial Attitudes*, 35 *PHYLON* 83, 85 (1974) (describing the popular notion of Latin America's more benign race relations and concluding that "[t]he first facet concerning the feelings of equality experienced by Puerto Rican Negroes may be summed up in the historical fact of racial mixture").

<sup>30</sup> Furthermore, the recent demographic changes in the United States, which reflect increasing numbers of Latino residents, Schmitt, *supra* note 8 (reporting that the Latino population in the United States increased nearly 60% in a decade), also counsel the importance of international comparisons; comparisons aid us in better understanding the distinctive ideology of a population that demographers predict will soon be the largest racial minority in the country. See *id.* Because it is beyond the scope of this Article, I will not be focusing upon the influence of Latino/a U.S. residents on U.S. race ideology. While it is certainly a topic worthy of focused inquiry, the project of this Article is to unveil the ways in which systemic forces in the United States are themselves generating a shift in race ideology. It just so happens that the shift parallels similar institutional interests and dynamics in Latin America.

<sup>31</sup> See MOORE, *supra* note 23, at 163-65, 256. "Racial democracy" is a term that originated in Brazil, but was adopted elsewhere in Latin America to describe the assertion that racial mixture has obviated all racial hostilities and as a consequence all races are treated equally. See GILBERTO FREYRE, *THE MASTERS AND THE SLAVES* 83 (Samuel Putnam trans., 2d rev. ed. 1986) (premising a theory of "racial democracy" upon the claim that racial mixing results in a racially harmonious society).

<sup>32</sup> See MOORE, *supra* note 23, at 28.



model cultivated in much of Latin America,<sup>33</sup> Cuba serves as a useful example of the broader Latin American backdrop.<sup>34</sup> I also focus on Puerto Rico because it manifests a Latin American perspective on race while having access to the full panoply of U.S. civil rights statutes as a commonwealth of the United States.<sup>35</sup> Indeed, it is Puerto Rico's unique position as a legal context with both its own local civil rights laws as well as those of the U.S. federal government that provides the most promise in considering the consequences of the U.S. shift in race ideology. To the extent that Puerto Rico's experience in the enforcement of U.S. civil rights statutes differs from that of the contiguous United States, an exploration of the effect of its Latin American race ideology on civil rights enforcement may have much to portend for the United States and its own reconsideration of its race ideology.

This comparative study of the Latin American and U.S. racial contexts indicates that the ostensible Latin American rejection of race as a social or formal concept sustains rather than diminishes White privilege. In Cuba's case, discarding race has not abated racism.<sup>36</sup> One lesson that may be drawn from the Cuban abolition of race is that race is likely to remain an analytically and politically useful concept as long as racial hierarchy exists in fact.<sup>37</sup> Similarly, the Puerto Rican focus on race mixture as a panacea for racial discord has failed to remedy ongoing racial disparities.<sup>38</sup> Significantly, all of the examined Latin American contexts—including Puerto Rico—show an alarming underenforcement of civil rights laws despite the existence of demonstrable and longstanding incidences of race-based discrimination. The contemporary U.S. racial justice movement may benefit from this comparison by formulating a strategy for countering the negative ef-

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<sup>33</sup> See *id.* at 21 (“Castro’s exclusive emphasis on the goal of racial integration was entirely consistent with the Latin model of race relations.”).

<sup>34</sup> For a survey of the extent of the African diaspora in Latin America, see generally LESLIE B. ROUT, JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA: 1502 TO THE PRESENT DAY* (1976).

<sup>35</sup> See Organic Act of Puerto Rico, Pub. L. No. 64-368, ch. 145, § 9, 39 Stat. 951, 954 (1917) (codified as amended at 48 U.S.C. § 734 (1994)) (“[T]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States . . .”); see also JAY KINSBRUNER, *NOT OF PURE BLOOD: THE FREE PEOPLE OF COLOR AND RACIAL PREJUDICE IN NINETEENTH-CENTURY PUERTO RICO* 32 (1996) (“Puerto Ricans share more with the Latin American conception of race than with the North American.” (quoting CLARA E. RODRÍGUEZ, *PUERTO RICANS: BORN IN THE U.S.A.* 52-53 (1989))); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000) (analyzing how Puerto Rico’s popular island culture remains independent of the Anglo culture dominant in the continental United States).

<sup>36</sup> See *infra* Part IV.B.

<sup>37</sup> See Tanya K. Hernández, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135, 1142-51 (2000).

<sup>38</sup> See *infra* Part IV.C.

fects of a shifting race ideology on the enforcement of antidiscrimination laws.<sup>39</sup>

This Article begins by contrasting the Latin American race ideology with that of the United States. Part II presents the particular ways in which the United States is slowly moving towards a Latin American race ideology in its public discourse and in some legal scholarship. Part III then assesses the critical differences between Latin American and U.S. approaches to race. Part IV analyzes the manner in which the Latin American race ideology, as exemplified by the Cuban and Puerto Rican examples, has hindered the development and enforcement of antidiscrimination laws. The Article then concludes with an exploration of how U.S. antidiscrimination law might respond in order to achieve continued efficacy at addressing racial inequality in the likely event that the United States should formulate the same troubled approach to civil rights enforcement as the one currently existing in Latin America.

## I

### CONTRASTED MODELS OF RACE: A CRITICAL OVERVIEW

*It is an open question whether a society that sees every addition of white blood as a step toward purification is more, or less, prejudiced than a society that sees any appreciable trace of Negro blood as a mark of degradation.<sup>40</sup>*

Cuba and Puerto Rico, like much of Latin America, have been historically credited with a seeming respect for social fluidity<sup>41</sup> in racial labeling. But a critical examination of Latin American racial labeling demonstrates that racial identity and identification are neither completely fluid nor neutral. Instead, this claimed or imputed fluidity operates as a vehicle for the perpetuation of White supremacy. In fact, an interrogation of the Latin American race model reveals the manner in which its operation and effects do not differ greatly from the facially distinct U.S. model—racial hierarchy is a substantive and structural reality in both contexts.

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<sup>39</sup> One civil rights attorney suggests that the "Civil Rights Movement presently lacks direction and strategic vision." William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 *ASIAN L.J.* 1, 8 (1995).

<sup>40</sup> DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 275 n.24 (1966).

<sup>41</sup> I use the term "fluidity" to encapsulate the way in which the Latin American race model is characterized as malleable in its designation of racial classifications in response to skin color, facial features, and social status, instead of being rigidly confined to racial ancestry.

### A. Race in Latin America: Prejudice of Mark

The perception of racial fluidity throughout Latin America generally is based upon the premise that racial classifications are determined more by how closely one phenotypically appears to belong to one race than by one's blood or ancestors.<sup>42</sup> For instance, before a racial designation of Black is deemed appropriate, custom dictates an informal visual assessment of an individual's hair texture, nose width, thickness of lips, and degree of dark pigmentation for consistency with what is stereotypically viewed as a Black person.<sup>43</sup> Accordingly, individuals with identical racial heritage can be identified socially or informally by distinct racial designations based on their phenotype. For this reason, Latin American racial classification practices have been termed a "prejudice of mark."<sup>44</sup>

For example, formal racial classifications contained in the Cuban census are listed in terms of skin color.<sup>45</sup> These categories include White (a person primarily of European ancestry), Black (a person primarily of African ancestry), Mulatto (a person of mixed European and African ancestry), and Yellow (a person of Asian ancestry).<sup>46</sup> Because the Cuban census historically has been conducted by appointed enu-

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<sup>42</sup> See HARRIS, *supra* note 20, at 57 (discussing the occurrence of this phenomenon in Brazil). The Latin American exceptions to the use of racially fluid racial classifications are countries such as Argentina and Chile—countries that view themselves as White as a result of earlier campaigns conducted to diminish the demographic presence of Blacks and indigenous persons. See, e.g., GEORGE REID ANDREWS, *THE AFRO-ARGENTINES OF BUENOS AIRES, 1800–1900*, at 199 (1980) (describing the disappearance of fluid racial distinctions after 1850, which were "replaced by a tendency to lump 'morenos,' 'negros,' 'mulatos,' and 'pardos' together under the general denomination of 'people of color'").

<sup>43</sup> See HARRIS, *supra* note 20, at 57–58; see also *id.* at 38–39 (observing a similar phenomenon with regard to the Native American phenotype); cf. HOETINK, *CARIBBEAN RACE RELATIONS* 120, 170–72 (Eva M. Hooykaas trans., Oxford Univ. Press 1971) (1967) (referring to a societal preference for certain physical features and coloring as a "somatic norm image").

<sup>44</sup> See Oracy Nogueira, *Skin Color and Social Class*, in *PLANTATION SYSTEMS OF THE NEW WORLD* 164, 169 (1959).

<sup>45</sup> Although socialist Cuba presumably abolished racial categories, see MOORE, *supra* note 23, app. 2, at 359, the government has continued to include racial classifications on the census and on government-issued identification cards. The government pursues its race-lessness project by withholding or delaying the distribution of census racial data to the public. Cf. DOREEN S. GOYER & ELIANE DOMSCHKE, *THE HANDBOOK OF NATIONAL POPULATION CENSUSES: LATIN AMERICA AND THE CARIBBEAN, NORTH AMERICA, AND OCEANIA* 144–47 (1983) (noting that the Cuban census has contained a race/color question in the census years of 1953, 1970, and 1981); MOORE, *supra* note 23, app. 2, at 357–62 (describing the unreliability of the Cuban census data); Lourdes Casal, *Race Relations in Contemporary Cuba*, in ANANI DZIDZIENYO & LOURDES CASAL, *THE POSITION OF BLACKS IN BRAZILIAN AND CUBAN SOCIETY* 11, 22 (Minority Rights Group, Report No. 7, new ed. 1979) (observing that publications of the 1970 Cuban census have not included any breakdowns of the population by race).

<sup>46</sup> See GOYER & DOMSCHKE, *supra* note 45, at 144–46 (delineating the Cuban census format); see also Nadine Therese Fernandez, *Race, Romance, and Revolution: The Cultural Politics of Interracial Encounters in Cuba* 24–25 (1996) (unpublished Ph.D. dissertation,

merators, the actual determination of which Cuban racial label applies to an individual has turned on who is viewing the person to be designated.<sup>47</sup> In this way, the *informal* method of racial classification by visual assessment effectively conflates with the *formal* method of racial classification each time a census enumerator uses an “eyeball” test to determine the race of an individual respondent by his or her skin color. Within certain parameters, race in Cuba and throughout Latin America is in the eye of the beholder. In those countries where the population of persons of African descent is smaller, such as Mexico, Guatemala, or Bolivia, the indigenous population is the more populous racial minority. In turn, a corresponding fluidity in ethnic designation is evident in the use of the “Mestizo” category to reflect those individuals of mixed White and Indigenous ancestry.<sup>48</sup>

The Puerto Rican experience with racial classifications is also particularly demonstrative of the distinctive Latin American race ideology. Census enumerators have traditionally conducted a visual survey of the respondent’s physical appearance in order to determine racial designation. It was not until the recent 2000 census that a self-identification method was employed.<sup>49</sup> While census forms issued during the period of Spanish rule used the color categories of Black, Mulatto, and White,<sup>50</sup> sixteen informal racial categories embodied a racial spectrum that referenced race mixture of Europeans, Blacks, and indigenous populations.<sup>51</sup> When Puerto Rico was ceded to the United States in 1898, the United States continued to incorporate a color question on the decennial census.<sup>52</sup>

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University of California, Berkeley) (on file with author) (listing racial categories used in Cuba).

<sup>47</sup> See GOYER & DOMSCHKE, *supra* note 45, at 10–11, 142–46 (describing the canvasser method and the use of this method for census-taking in Cuba); see also MOORE, *supra* note 23, app. 2, at 358 (suggesting that when enumerators for the 1943 census permitted each person to select a racial category, the reported results gave an unreliably low figure for the Black category).

<sup>48</sup> See Madeline Barbara Léons, *Stratification and Pluralism in the Bolivian Yungas*, in 1 BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN 335, 337 (Norman E. Whitten, Jr. & Arlene Torres eds., 1998) (describing the tripartite Bolivian racial classification system of White, Mestizo, and Indian).

<sup>49</sup> See Jorge Duany, *Neither White Nor Black: The Representation of Racial Identity Among Puerto Ricans on the Island and in the U.S. Mainland*, in THE MEANING OF RACE AND BLACKNESS IN THE AMERICAS: CONTEMPORARY PERSPECTIVES (Anani Dzidzienyo & Suzanne Oboler, forthcoming 2003) (manuscript at 15, on file with author).

<sup>50</sup> See Kelvin Santiago-Valles, *Policing the Crisis in the Whitest of All the Antilles*, 8 CENTRO 43, 44 (1996).

<sup>51</sup> *Id.* at 43; see also Eduardo Seda Bonilla, *Two Patterns of Race Relations* 5 (1969) (U.S. Dep’t of Health, Educ. & Welfare, Office of Educ., No. ED 058 368) (unpublished manuscript, on file with author) (listing sixteen racial terms used by the Puerto Rican colonial society).

<sup>52</sup> See GOYER & DOMSCHKE, *supra* note 45, at 298–99.

The decision to omit altogether a race/color question on the census came only after Puerto Rico acquired commonwealth status in 1952, and the census became a joint project of the local Puerto Rico Planning Board and the U.S. Bureau of the Census.<sup>53</sup> A Puerto Rico Planning Board official justified the removal of a race question as obligatory under the commonwealth's constitutional prohibition against race and color discrimination.<sup>54</sup> Like Cuba, Puerto Rican government officials viewed the public focus on race as divisive and counter-productive to the goal of unification under a common ethnicity.<sup>55</sup> Yet even after the abolition of the race/color question on the census, Puerto Rico continued to use racial categories in other official venues, like the courts, social services agencies, and the police.<sup>56</sup> The racial categories that are officially used are white, black and "Trigueño,"<sup>57</sup> while at least nineteen different categories are used informally by the populace.<sup>58</sup>

Commentators speculate that the 1952 decision to abolish the use of racial classifications on the Puerto Rico census was motivated in large part by the unreliability of the 1950 census.<sup>59</sup> The race/color question on the 1950 census listed two racial categories—White and non-White (to include Blacks and Mulattos together).<sup>60</sup> With the use of only those two categories, the Puerto Rico census reported 79.7% of the population as White.<sup>61</sup> The race data was viewed as inherently suspect because a visual inspection of the population would inevitably lead one to conclude that "[w]hatever else it may be, Puerto Rico is not a society that is preponderantly 'white' under conventional North American definitions of race."<sup>62</sup> More importantly, the progressive decrease in those identified as Black on the island since the 1820 census by the Spaniards has occurred at a pace inexplicable by emigration, immigration, and birth and death patterns.<sup>63</sup> Indeed, when the Puerto Rico 2000 census reinstated a race question identical to that used in the continental United States and allowed respondents to choose multiple racial classifications for the first time, the census yielded 80.5% of the population self-identifying as White, 8.0% as

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<sup>53</sup> See *id.* at 301–02.

<sup>54</sup> Duany, *supra* note 49, at 17.

<sup>55</sup> See *id.* at 22.

<sup>56</sup> Santiago-Valles, *supra* note 50, at 50.

<sup>57</sup> See *id.* "Trigueño" literally translates as "wheat color," but is used to amorphously describe anyone who seems to fall between White and Black. See *id.* at 44.

<sup>58</sup> See Duany, *supra* note 49, at 1.

<sup>59</sup> See JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 97 n.475 (1979).

<sup>60</sup> GOYER & DOMSCHKE, *supra* note 45, at 299.

<sup>61</sup> CABRANES, *supra* note 59 (citing U.S. Census Bureau statistics).

<sup>62</sup> *Id.*

<sup>63</sup> See HOETINK, *supra* note 43, at 184–86.

Black, 4.2% as of multiple races, and 7.3% as other races such as Asian/Pacific Islander and Native American.<sup>64</sup>

These recent census results not only fail to comport with Puerto Rico's national image as a mixed-race population, they do not comport with a visual inspection of the population. For instance, even in the municipality of Loíza, founded as a community of escaped slaves and culturally respected as the center for African folklore with a density of Black people,<sup>65</sup> 29.7% of the population self-identified as White on the 2000 census.<sup>66</sup> The consistent, apparent disconnect between the appearance of the population and the selection of racial categories has been prevalent in Puerto Rico as it has fluctuated between the use of fluid categories as a Spanish colony, the more circumscribed census choices of a U.S. territory, and once again more fluid categories with the 2000 census option to select multiple racial categories. It is therefore incorrect to interpret the unreliable race data as being the direct result of the superimposition of U.S. racial categories upon a jurisdiction like Puerto Rico that maintains a more Latin American approach to racial definition.<sup>67</sup> In fact, comprehensive studies of other Latin American contexts have revealed the same disconnect between physical appearance and self-identification absent the use of U.S.-influenced racial categories.<sup>68</sup> In addition, the public preference for Whiteness on the census is consistent whether it is the census enumerator who selected the category based on a visual survey, as in pre-1960 census years, or if the respondent is allowed to self-identify, as was permitted on the 2000 census.<sup>69</sup>

Another feature that distinguishes Latin American race ideology from the historically prevalent race ideology in the United States is its

<sup>64</sup> See *Puerto Rico 2000 Population and Racial Breakdown*, IPR DATANOTE ON PUERTO RICAN COMMUNITY (Puerto Rican Legal Def. & Educ. Fund Inst. for Puerto Rican Policy, New York, N.Y.), May 2001, at 1, 1 fig. [hereinafter IPR DATANOTE].

<sup>65</sup> See, e.g., MARCOS A. RIVERA ORTIZ, *JUSTICIA NEGRA* [BLACK JUSTICE] 53 (2001) (asserting the popular conception of Loíza as characterized by a 90% Black population and consequently as the region that suffers the most race discrimination).

<sup>66</sup> IPR DATANOTE, *supra* note 64, at 2.

<sup>67</sup> *But cf.* CABRANES, *supra* note 59, at 98 n.475 ("The statistics on race collected by the . . . United States Census Bureau, based as they were upon North American notions of race, were invariably meaningless.").

<sup>68</sup> See, e.g., MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* 85–128 (2000) (describing Brazil's struggle to have its population self-identify as of African descent, although Brazil is home to the largest population of persons of African descent outside of Nigeria); see also DAVID HOWARD, *COLORING THE NATION: RACE AND ETHNICITY IN THE DOMINICAN REPUBLIC* 41–49 (2001) (describing how persons of African descent in the Dominican Republic identify themselves with the ambiguous term of "Indio" (Indian) in order to avoid associations with Blackness).

<sup>69</sup> See Duany, *supra* note 49, at 17. One possible explanation for the similarity in census enumerators' racial selection and individual self-identification can be found in the Latin American concern with insulting someone by publicly referring to them as non-White and the way in which socioeconomic status informs racial classification.

focus on the individual rather than on familial and ancestral connections when selecting a racial classification. In theory, both formal and informal Latin American practices associated with the visually based prejudice of mark permit siblings with the same ancestors to be racially designated as distinct based on the variance of their racial appearance.<sup>70</sup> To a certain extent, prejudice-of-mark practices also permit economic and social status to mediate a formal racial designation.<sup>71</sup> In Latin American settings, social status informs formal racial classification, as illustrated by the common belief that persons of prominence *should not* be “insulted” by referencing their visible African ancestry. Additionally, it is generally presumed that because no person of prominence could be Black, these persons should be designated distinctly.

For example, when Cuba’s pre-Revolution dictator, Fulgencio Batista, was a humble sergeant in the Cuban military, he was formally identified as a Mulatto.<sup>72</sup> But when Batista installed himself as dictator in 1952, his African ancestry was no longer publicly or formally acknowledged.<sup>73</sup> Social and political position served to whiten him.<sup>74</sup> Batista’s ascension into the White racial classification, based upon his improved social status and his quasi-European phenotype, thus illustrates the fluidity associated with formal Cuban/Latin American identity practices and the “*blanqueamiento*” (whitening) ideal which is central to the Latin American race ideology.<sup>75</sup> *Blanqueamiento* refers to both the aspiration and possibility of transforming one’s social status by approaching Whiteness.<sup>76</sup> An individual can become socially lighter by marrying a lighter-skinned partner, or by becoming wealthy or famous. For instance, it is consistently alleged that the dark-skinned soccer icon from Brazil, Pelé, successfully deployed the *blanqueamiento* ideology when he had his birth certificate amended to re-

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<sup>70</sup> See, e.g., PIRI THOMAS, *DOWN THESE MEAN STREETS* 142–48 (1967) (relaying an insightful exchange between two Puerto Rican brothers—one who identifies as White, and one who identifies as Black).

<sup>71</sup> See Arlene Torres & Norman E. Whitten, Jr., *To Forge the Future in the Fires of the Past: An Interpretive Essay on Racism, Domination, Resistance, and Liberation, General Introduction to 2 BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN* 3, 23 (1998).

<sup>72</sup> See MOORE, *supra* note 23, at 5.

<sup>73</sup> See Gayle McGarrity & Osvaldo Cárdenas, *Cuba, in NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY* 77, 92 (Minority Rights Group ed., 1995).

<sup>74</sup> Yet the ability of an individual with any known African ancestry to become a national leader is quite astounding when one compares the Cuban context to that of the United States, in which no individual with publicly acknowledged African ancestry has ever ascended to the presidency.

<sup>75</sup> See Torres & Whitten, *supra* note 71, at 8–9 (“*Blanqueamiento* refers to the processes of becoming increasingly acceptable to those classified and self-identified as ‘white.’ This is an ethnic movement—coterminous with socioeconomic advancement governed by the ideology of ‘development’ . . .”).

<sup>76</sup> See *id.*

flect a White racial classification after achieving world fame.<sup>77</sup> Pelé's racial revision of his birth certificate already had great historical precedence in Iberian America: in the eighteenth century, Iberian colonial authorities officially instituted laws that permitted upper-class Mulattos in the Americas to purchase the privileges of Whiteness.<sup>78</sup>

In concert with the prejudice-of-mark and *blanqueamiento* approaches to racial identification, the Latin American race model advances the cultural perspective known as "*mestizaje*," which asserts that race mixture has made racial identification a very indeterminate and unnecessary practice.<sup>79</sup> In other words, *mestizaje* advances the notion that the existence of extensive racial mixture in the population has created a new people that can only be identified in a nationalistic fashion as, for example, "Cuban," "Puerto Rican," "Mexican," and so forth.<sup>80</sup> In turn, racial mixture is rhetorically idealized and promoted as the national norm.<sup>81</sup> But the new people envisioned by *mestizaje* are purposefully more White than Black or indigenous.<sup>82</sup> For instance, in a contemporary and implicit invocation of *mestizaje* and *blanqueamiento*, a Puerto Rican newspaper observed that "Puerto Ricans will 'bleach away' many of the physical traces of its African past by the year 2200, with the other Spanish-speaking Caribbean [islands] following a few centuries later."<sup>83</sup> The Latin American race model also maintains a distinctive approach to racial group identity formation.

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<sup>77</sup> See Telephone Interview with Anani Dzidzienyo, Professor of Afro-Brazilian Studies, Brown University, African Studies Department and Portuguese & Brazilian Studies Department (Feb. 20, 2002) (explaining that Brazilians so frequently set forth Pelé as the proof that "money whitens" that it is also thought that Pelé altered his official racial classification on his identity documents); see also Femi Ojo-Ade, *Black Brazil: African Notes on a New Negritude*, in *BLACK BRAZIL: CULTURE, IDENTITY, AND SOCIAL MOBILIZATION* 175, 182–83 (Larry Crook & Randal Johnson eds., 1999) ("[Pelé] is Brazil's ambassador of 'whitening,' always by the side of blond, blue-eyed bombshells (e.g., Xuxa), forever denying any sign of racism in his beloved nation.").

<sup>78</sup> See James F. King, *The Case of José Ponciano de Ayarza: A Document on Gracias al Sacar*, 32 *HISP. AM. HIST. REV.* 640, 641–43 (1951).

<sup>79</sup> See Torres & Whitten, *supra* note 71, at 7–8.

<sup>80</sup> Cf. *id.* (discussing the relatedness of race, nationalism, and ethnic blocs).

<sup>81</sup> An illuminating example of the Latin American use of *mestizaje* as a rhetorical device is the case of Venezuela. While Venezuela has long boasted about being a "café con leche" (coffee with milk) society in which its citizens are proud of their Black and White origins, "the thrust of official policy since the nineteenth century, expressed primarily in immigration policies, has been to dilute the café [coffee] as much as possible." Winthrop R. Wright, *Elitist Attitudes Toward Race in Twentieth-Century Venezuela*, in *SLAVERY AND RACE RELATIONS IN LATIN AMERICA* 325 (Robert Brent Toplin ed., 1974).

<sup>82</sup> See Arlene Torres, *La Gran Familia Puertorriqueña "Ej Prieta de Beldá"* (*The Great Puerto Rican Family Is Really Really Black*), in 2 *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN* 285, 286 (1998) ("Upon first glance, it appears that a national emphasis on *mestizaje* in Puerto Rico promotes processes of social integration; however, there is still a hyper-privileging of individuals of European descent with phenotypic features associated with 'whiteness.'").

<sup>83</sup> Peggy Ann Bliss, *Black, White, Puerto Rican All Over*, *SAN JUAN STAR*, Mar. 22, 1995, at 30.



Individuals are overtly discouraged from identifying along racial lines.<sup>84</sup> The rationale underlying such a societal approach is the cultural conviction that a focus on race and distinctive racial identification is socially divisive and without a redeeming value.<sup>85</sup>

The origins of *mestizaje* and *blanqueamiento* are rooted in nineteenth-century Latin America's search for a positive identity in the face of encroaching European and Anglo-American eugenic judgments and values that associated the prevalence of non-Whites in Latin America with the backwardness of mongrel nations.<sup>86</sup> Between 1880 and 1930, intellectuals in Latin America were strongly influenced by European racial theories like eugenics that asserted the innate inferiority of non-Whites and thus provided the justifications for European colonialism and U.S. imperialism.<sup>87</sup> *Blanqueamiento*, and its gradual approach to the Whiteness ideal across generations, provided a means both for removing some of the taint of backwardness and for philosophically opposing colonialism and imperialism.<sup>88</sup> In turn, *mestizaje* countered the mongrel nation descriptor with a well-constructed illusion of moral superiority for having solved racial problems by minimizing racial differences and facilitating a racial democracy.<sup>89</sup> A Mexican philosopher with great influence in Latin America promoted *mestizaje* as a means for creating a new race—a "cosmic race" so that "[t]he lower types of the species will be absorbed by the superior type. In this manner, for example, the Black could be redeemed, and step by step, by voluntary extinction, the uglier stocks will give way to the more handsome."<sup>90</sup> Not only was "pure" Blackness undesirable, but

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<sup>84</sup> See Torres & Whitten, *supra* note 71, at 7 (contrasting the *mestizaje* and *blanqueamiento* approaches with *negritude*, a concept that promotes Black self-identification by calling attention to the positive power inherent in "blackness").

<sup>85</sup> See Pedro Pérez Sarduy & Jean Stubbs, *Preface to AFRO-CUBAN VOICES*, at xi, xii (Pedro Pérez Sarduy & Jean Stubbs eds., 2000).

<sup>86</sup> Martínez-Echazábal, *supra* note 29, at 23–24.

<sup>87</sup> See Aline Helg, *Race in Argentina and Cuba, 1880–1930: Theory, Policies, and Popular Reaction*, in *THE IDEA OF RACE IN LATIN AMERICA, 1870–1940*, at 37, 37–38 (Richard Graham ed., 1990).

<sup>88</sup> Accordingly, *blanqueamiento* ideology pervaded Latin American countries in which the indigenous population outnumbered the Black population, just as it did in those countries in which the Black presence predominated. See, e.g., Moisés González Navarro, *Mestizaje in Mexico During the National Period*, in *RACE AND CLASS IN LATIN AMERICA* 145, 154 (Magnus Mörner ed., 1970) (describing the application of whitening ideology to Indians in Mexico). Furthermore, it was particularly salient in those Latin American nations that are now perceived to be predominantly White such as Argentina, Chile, and Uruguay, because the *blanqueamiento* ideology was overtly deployed in the immigration context to whiten those countries. See MARGARITA SÁNCHEZ & MICHAEL FRANKLIN, *COMUNIDADES DE ANCESTRÍA AFRICANA EN COSTA RICA, HONDURAS, NICARAGUA, ARGENTINA, COLOMBIA, ECUADOR, PERÚ, URUGUAY Y VENEZUELA* 223 (Inter-Am. Dev. Bank 1996) (publication prepared for conference on poverty relief for minority communities in Latin America).

<sup>89</sup> See Martínez-Echazábal, *supra* note 29, at 33–35.

<sup>90</sup> JOSÉ VASCONCELOS, *THE COSMIC RACE/LA RAZA CÓSMICA* 30 (Didien T. Jaén ed. & trans., Pace Publ'ns 1979) (1925).

asserting a Black identity was also perceived as a threat to the nationalism of Latin American countries. “[D]uring the period of national consolidation and modernization . . . mestizaje underscored the affirmation of cultural identity as constituted by ‘national character’ . . . .”<sup>91</sup> For example, while at different times Cuba has had an ethnically diverse population of persons of Spanish, Chinese, Jewish, and African ancestry, the nation-building process has consistently devalued racial and ethnic group formation in the creation of racially and ethnically affiliated organizations.<sup>92</sup> Similarly, in Puerto Rico, Blackness is a contested site of identification for the state.<sup>93</sup> Accordingly, “[t]his retreat from blackness is evident not only in nationalist[ ] discourses, but also in everyday social interactions, and it surfaces primarily in family narratives.”<sup>94</sup> Furthermore, any discussions of a race-related topic are viewed as the equivalent of racism. In short, the pervasive denial of the existence of racism is viewed as synonymous with the treatment of race and racial identity as taboo subjects.

Hence, the prejudice-of-mark racial classification system of Latin America shies away from overt considerations of racial categories and instead focuses on color gradations. Latin American racial distinctions, which are visually based on phenotype, have been described as a “prejudice of mark” because they seem to focus on physical appearances rather than origins. This descriptor stands in supposed contrast to the U.S. model, known as a “prejudice of origin,” which makes racial distinctions based chiefly on heritage or ancestry.<sup>95</sup> Yet, in operation, the prejudice-of-mark’s use of phenotype effectively incorporates ancestry into the process or act of racialization, both formally and informally.<sup>96</sup> Similarly, and as the following section will demonstrate,

<sup>91</sup> Martínez-Echazábal, *supra* note 29, at 21.

<sup>92</sup> Cuba’s recent economic interest in promoting Afro-Cuban music and dance for foreign tourists is viewed as an acknowledgement of Cuba’s cultural origins and not as a validation of Afro-Cuban racial identity. Cf. Hernández, *supra* note 37, at 1145 (arguing that highly valued, well-paying jobs in the tourist industry “are reserved for persons ‘de buena apariencia’ (good looking but commonly understood as white Cubans)”).

<sup>93</sup> See Isar P. Godreau, *La semántica fugitiva: “raza,” color y vida cotidiana en Puerto Rico*, 9 REVISTA DE CIENCIAS SOCIALES (n.s.) 52, 52–55 (2000) [hereinafter Godreau, *La Semántica*]; see also Isar P. Godreau, *Confronting the Panic: Troublesome Hispanics 2* (Mar. 16–19, 2000) (presented at Latin American Studies Association Conference, Univ. of Pittsburgh) (unpublished manuscript, on file with author) [hereinafter Godreau, *Confronting the Panic*] (“Notions of whitening go hand-in-hand with nationalist representations of Puerto Rico as a Hispanic culture.”).

<sup>94</sup> Godreau, *Confronting the Panic*, *supra* note 93, at 3.

<sup>95</sup> See Nogueira, *supra* note 44, at 169.

<sup>96</sup> One can quickly surmise this incorporation of ancestry from the correlation between skin color and ancestry on the Cuban census. See GOYER & DOMSCHKE, *supra* note 45, at 145 (citing the Cuban census definition of “race” as “color of skin”); see also HOETINK, *supra* note 43, at 169 & n.3 (stating that prejudice of origin also permeates Latin American relations in that the African ancestors of a designated White person become relevant when disputes arise).

the deployment of a prejudice-of-origin approach to racial distinctions pragmatically incorporates observations of phenotype into considerations of ancestry.

### B. Race in the United States: Prejudice-of-Origin

The designation of the Latin American model of racial classifications as fluid principally stems from its comparison to the U.S. model, which is thought to be overly restrictive.<sup>97</sup> Traditionally in the United States, an individual with even one ancestor of African descent has been viewed as Black regardless of phenotype.<sup>98</sup> This approach to racial designation has been known alternatively as the “one-drop rule” or the rule of “hypo-descent.”<sup>99</sup> While the U.S. Census Bureau has just recently abandoned the rule of hypo-descent by permitting multiple racial designations,<sup>100</sup> this Article shall delineate the specifics of this rule in order to trace the influence of this ideology on the enforcement of antidiscrimination laws.

A contemporary ruling in the United States enforcing the rule of hypo-descent is instructive. Susy Phipps, a Louisiana resident, always considered herself White, but unlike Pelé in Brazil<sup>101</sup> was unable to have her birth certificate formally altered to reflect a White racial designation.<sup>102</sup> Her desire to make this alteration was incited by the discovery that the State of Louisiana had classified her as Black because of the existence of a Black ancestor five generations removed from her.<sup>103</sup> The Louisiana court refused to order Ms. Phipps’s requested modification, a decision supported by—but not formally based on—Louisiana’s statutory one-drop definition of Black.<sup>104</sup> Thus, the U.S. method of racial classification is criticized for its seeming rigidity be-

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<sup>97</sup> While the U.S. system of Jim Crow racial segregation certainly contributed to the formation of a distinct Black racial identity, *see* DAVIS, *supra* note 14, at 5, it cannot provide the central explanation for the distinctions in the U.S. and Latin American race models. While *de jure* segregation was unknown in the Latin American context, virulent *de facto* segregation was and is quite common in Latin America, including Cuba. *See* NANCY LEYS STEPAN, “THE HOUR OF EUGENICS”: RACE, GENDER, AND NATION IN LATIN AMERICA 174 (1991).

<sup>98</sup> *See* DAVIS, *supra* note 14, at 5.

<sup>99</sup> *Id.*

<sup>100</sup> *See supra* note 16 and accompanying text.

<sup>101</sup> *See supra* text accompanying note 77.

<sup>102</sup> *See Doe v. State*, 479 So. 2d 369 (La. Ct. App. 1985). For a more in-depth discussion of Phipps’s case, *see* Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL’Y REV. 297, 317–22 (2000).

<sup>103</sup> *See Westley, supra* note 102, at 319; *see also id.* at 322 (noting the relevance of documentary uncertainty regarding whether Phipps’s ancestor was a “slave” or “free Negress”).

<sup>104</sup> *See Doe*, 479 So. 2d at 372 (concluding “that the now infamous ‘one-thirty second’ statute, which was repealed in 1983, is not relevant to this case. All evidence indicates that the disputed racial designations were not made by a public official but by the attending midwife or by the parents themselves” (citation omitted)).

cause it confines those who do not wish to socially or formally claim a Black identity to a "trap" of formal, official Blackness.

The U.S. race model also differs from that of Latin America in that the contemporary census uses a system of self-identification with respect to racial classification.<sup>105</sup> Self-identification officially removes third-party visual assessment from the formal method of racial classification in the United States. Thus, it is the individual's own knowledge or belief of familial ancestry that formally determines one's race on the U.S. census. Although third parties inevitably influence racial construction and self-classification,<sup>106</sup> U.S. census practices are considered comparatively rigid because the self-identification system remains typically and formally based on blood, origin, or ancestry, as dictated by the rule of hypo-descent. Furthermore, unlike the census, state collection of vital statistics, employer reports on the racial composition of their labor force, and crime statistics do not always employ a self-identification method of racial classification, as demonstrated by the Susy Phipps case in Louisiana.<sup>107</sup> Yet, in conjunction with the seemingly rigid approach to racial classification, the U.S. race model historically has tolerated the formation of distinct racial identities. Even while cultural assimilation to a North American ideal has been favored, the United States has simultaneously permitted an individual's psychic affiliation with a discrete ethnic or racial group.<sup>108</sup> Hence, while Blacks in the United States have been subjected to the national pressure to assimilate to White cultural norms, they have not previously been discouraged from identifying as Black in the way in which persons of African descent have in Latin America. In contrast, the recent public discourse in the United States has begun to take on a Latin-American approach to race that discourages the assertion of racial identity.

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<sup>105</sup> Self-identification is a twentieth-century feature of the U.S. census inasmuch as earlier census taking employed the visual survey method for racial classification. See Ella P. Lacey & Bikash Nandy, *Race, Color, and Ethnicity: Diverse, Unequal and Uneven Categories of the U.S. Census*, 14 W. J. BLACK STUD. 24, 25 (1990) ("Until 1960, determination of a person's race was left to the census taker and based on that person's observation."). Self-identification is also more suited to the use of mail-in census forms in highly literate societies. See GOYER & DOMSCHKE, *supra* note 45, at 10–11; Lacey & Nandy, *supra*, at 25 (observing that the 1960 census enabled those respondents who completed their own census forms to use the self-classification method).

<sup>106</sup> For two authors' struggles with race identity and their encounters with racism, see KEVIN R. JOHNSON, *HOW DID YOU GET TO BE A MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* (1999) and GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995).

<sup>107</sup> See Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1250, 1256–59 (1994) (discussing the use of the visual survey method rather than the self-identification method).

<sup>108</sup> See generally 39 NOMOS: ETHNICITY AND GROUP RIGHTS (Ian Shapiro & Will Kymlicka eds., 1997) (containing various essays discussing assimilation, toleration, and group affiliation).

## II

## THE U.S. RECONSIDERATION OF RACE

*The mere existence of a multiracial democracy does not spell the end of racism or important dimensions of its Black-White frame.*<sup>109</sup>

What makes the comparison to the Latin American context in this Article particularly relevant is the seeming shift that the United States is slowly making from a prejudice-of-origin race model to a prejudice-of-mark race model. Most recently, for example, the federal government responded to the demand for a separate multiracial racial category on the census by permitting census respondents to select multiple racial designations.<sup>110</sup> Multiple box-checking fundamentally deviates from the single-box-checking norm of the rule of hypo-descent, a shift that indicates a growing convergence between U.S. and Latin American approaches to racial classification. Indeed, the decision to authorize multiple box-checking for the first time since the institution of the U.S. census in 1790<sup>111</sup> arose in response to the growing numbers of mixed-race children and their parents who wanted greater flexibility in designating a racial affiliation.<sup>112</sup> Yet, an even greater demonstration of the U.S. reconsideration of race is the manner of interpretation with which the public has received and fixated on the Census 2000 population results. Although few people actually chose to select more than one racial category,<sup>113</sup> the public clamor regarding the potential to do so is a striking indicator of how the Census Bureau and the rhetoric about the census is essentially a racial

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<sup>109</sup> Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 90 (1999).

<sup>110</sup> See *supra* note 16 and accompanying text.

<sup>111</sup> ELIZABETH M. GRIECO & RACHEL C. CASSIDY, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF, at 2 (U.S. Census Bureau, U.S. Dep't of Commerce, Publication No. C2KBR/01-1, Mar. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

<sup>112</sup> See Hernández, *supra* note 10, at 98–99. The census change was also a bureaucratic response to the vast numbers of Latin American immigrants and Latino residents who consistently refused to designate a single racial category and would often select the “other race” option to reflect their own cultural perspectives on racial classification, which was distinct from those of the Census Bureau. See CLARA E. RODRÍGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES 129–52 (2000). Given the growth in the United States’ Latino population and its emerging position as the most populous racial minority, see Schmitt, *supra* note 8, at A14, it is logical to expect their continuing indirect and direct influence on the U.S. race model. See Rachel F. Moran, *Neither Black nor White*, 2 HARV. LATINO L. REV. 61, 61–69 (1997); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 595–603 (1995); Deborah Ramirez, *Multicultural Empowerment: It’s Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 959–60 (1995).

<sup>113</sup> NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. DEP’T OF COMMERCE, ECONOMICS AND STATISTICS ADMIN., U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2000, CENSUS 2000 BRIEF 1 (Nov. 2001) (reporting that 2.4% of the population reported more than one race on the 2000 census).

formation project.<sup>114</sup> For instance, in observing the increasing racial diversity of many cities that was reported by the Census Bureau, news entities have typically noted that the demographic shift “will not only transform the city but will also alter how Americans think about race, helping them move beyond simple concepts of whiteness and blackness.”<sup>115</sup> Kenneth Prewitt, the former director of the Census Bureau, has concluded that the availability of multiple racial categories to an increasingly mixed-race demographic is “a very healthy sign that barriers are breaking down. . . . It’s an indication of not only the complexity but the fluidness of our population makeup.”<sup>116</sup> In addition, Prewitt’s predecessor, Martha Farnsworth Riche, has commented that the Census 2000 results mark “the beginning of the end of the overwhelming role of race in our public life.”<sup>117</sup>

Nor have some civil rights activists been immune from jumping to the conclusion that the demographic changes immediately mean “we’re moving beyond a black-white paradigm of race,”<sup>118</sup> and that “[t]he more mixed we are, the more likely it is that we will be sensitive to each other.”<sup>119</sup> Similarly, some demographers and sociologists have concluded that “the more nuanced” racial identification permitted by checking multiple racial designations “may help break down racial barriers.”<sup>120</sup> In short, in a national poll conducted after the public release of the Census 2000 data,<sup>121</sup> sixty-four percent of respon-

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114 See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960’S TO THE 1990’S* 55 (2d ed. 1994) (defining racial formation as “the socio-historical process by which racial categories are created, inhabited, transformed, and destroyed”). Racial formation projects are simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. Racial formation projects connect what race means in a particular discursive practice and, based upon that meaning, the ways in which both social structures and everyday experiences are racially organized. See *id.* at 66–68. Racial formation theory identifies the state as the preeminent site for the controversy over the meaning of race. See *id.* at 66. Scholars such as Joe Feagin identify the mass media as playing a key role in racial formation as well. See FEAGIN, *supra* note 13, at 88–89 (revealing how the concentration of media control in just a few corporations provides white elites with the “capability to mobilize mass consensus on elite-generated ideas and views”).

115 Andrew Friedman, *Behind the Big Numbers, a Million Little Stories*, N.Y. TIMES, Mar. 18, 2001, § 14, at 6.

116 Mae M. Cheng, *‘The Face of America’: New Census Acknowledges City’s Multiracial Residents*, NEWSDAY (Melville, N.Y.), Mar. 16, 2001, at E6 (quoting Prewitt), available at 2001 WL 9221852.

117 Martin Kasindorf & Haya El Nasser, *Impact of Census’ Race Data Debated*, USA TODAY, Mar. 13, 2001, at 1A (quoting Riche).

118 Schmitt, *supra* note 8 (quoting Sonia M. Perez, a deputy vice president at the National Council of La Raza, a Hispanic advocacy organization).

119 Kasindorf & El Nasser, *supra* note 117 (quoting Beatriz Lopez-Flores, vice president of the Mexican-American Legal Defense and Educational Fund).

120 Schmitt, *supra* note 8.

121 The USA Today/CNN/Gallup Poll surveyed 1,015 adults on March 9–10, 2001. See Kasindorf & El Nasser, *supra* note 117.

dents stated that it “would be ‘good for the country’ to have more Americans ‘think of themselves as multiracial rather than as belonging to a single race.’”<sup>122</sup> Reporting on the poll, *USA Today* observed: “Racial lines may blur until the ‘melting pot’ idealized by playwright Israel Zangwill in 1908 becomes a harmonious, ‘we-are-the-world’ reality.”<sup>123</sup> That observation was then followed by the reaction: “‘Who’ll be left to hate?’”<sup>124</sup>

In short, popular reaction to the Census 2000 results demonstrated the intersection of two related notions in the U.S. reconsideration of race. The first is that the idea that racial mixture and increasing racial diversity require fluid racial classification schemes represents a step towards racial progress because they do not incite the same racial divisiveness that a rigid classification scheme does. Fluidity is favored because it is thought to be a deflection from an inappropriate focus on race. In turn, the instability of fluid racial categories calls into question the utility of any racial classification scheme. This is how fluidity converges with colorblindness—the second idea about race idealized in the U.S. reconsideration of race. As fluidity underscores a classification’s inability to fully reflect an individual’s complex racial identities, it simultaneously questions the ongoing need to racially classify at all. And indeed, the public excitement about fluidity rests in part on its trajectory towards the eradication of all racial classification schemes. In this manner the preference for fluid racial categories can be understood as another incantation of the preference for colorblindness. Thus, the U.S. reconsideration of race is reflected in a growing transformation from the belief that racial categories are static and hence that racial identification is self-evident and straightforward, to a belief that race mixture will dissolve the rigidity of those categories and, in and of itself, instill societal racial harmony and even eradicate the need to refer to one another by race.<sup>125</sup> In short, the general public’s response to the census change was overwhelmingly positive as a result of a multiracial discourse<sup>126</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (quoting Oscar Garibay, a Mexican-American police officer).

<sup>125</sup> *But see* Hernández, *supra* note 10, at 114 n.81 (describing the ways in which even stated beliefs in social construction of race can be expressed in terms that reinscribe biological notions of race).

<sup>126</sup> *See supra* notes 24–25 and accompanying text (explaining the term “multiracial discourse”); *see also* EUGENE ROBINSON, *COAL TO CREAM: A BLACK MAN’S JOURNEY BEYOND COLOR TO AN AFFIRMATION OF RACE* (1999) (relating the seductiveness of multiracial discourse to an African American indoctrinated in the rule of hypo-descent and temporarily living in Brazil).

supporting the belief that the fluidity of multiple box-checking was a definitive sign that racial hierarchy was no longer an issue.<sup>127</sup>

The emergence of a Latin American-style multiracial discourse in the United States is also suggested both by the growing numbers of individuals who no longer think that racism is a problem,<sup>128</sup> and by the judiciary's own deflection from race in the pursuit of "colorblindness" because race is a taboo subject whose mere referencing is an act of racism.<sup>129</sup> Indeed, even attacks on race-conscious attempts to facilitate electoral political participation in redistricting have been articulated as being concerned with how they "stimulate[ ] public awareness of race" and thus "fan[ ] the flames of racial division."<sup>130</sup> Furthermore, as with Latin America's various nation-building campaigns, U.S. citizens are being encouraged to view themselves as "simply American" rather than identifying along racial or ethnic lines, which practice is considered inherently divisive.<sup>131</sup> Such views are succinctly articulated by Justice Scalia's statement: "In the eyes of government, we are just one race here. It is American."<sup>132</sup> The danger of nationalism submerging all public considerations of race and racism may only

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<sup>127</sup> Multiracial discourse is even starting to manifest itself in popular culture with references to "multiracial" individuals as being a race physically distinctive from all others. For instance, best-selling author Nora Roberts has written a number of books under the name J.D. Robb in which police officers in the year 2058 immediately identify people as White, Black or Multiracial upon visual survey. See, e.g., J.D. ROBB, *GLORY IN DEATH* 39 (1995) ("The manufacturer [of the droid-robot] had given him the titled eye, golden-skinned appearance of a mixed race."); J.D. ROBB, *NAKED IN DEATH* 64 (1995) ("Eve saw he had the pale gold complexion of a multiracial heritage"). The idealization of the notion of an identifiable multiracial appearance has also begun to be put forth as the model of beauty for the future in fashion magazines. See, e.g., Eve Epstein, *Heaven Can Wait*, *ALLURE*, Apr. 2002, at 166 (describing a "new paradigm" of mixed-race beauty that "publicists and news magazines like to refer to as the future of female beauty").

<sup>128</sup> See FEAGIN, *supra* note 13, at 96 ("Today, many whites deny the seriousness of anti-black racism in the past and present history of the United States . . . . In recent interviews with members of the white elite, Rhonda Levine and I have found that many see racism as having declined significantly in importance.")

<sup>129</sup> See Hernández, *supra* note 10, at 139-56.

<sup>130</sup> Melissa L. Saunders, *Of Minority Representation, Multiple-Race Responses, and Melting Pots: Redistricting in the New America*, 79 N.C. L. REV. 1367, 1367-68 (2001) (describing the concerns of Robinson Everett, an opponent of the "racial gerrymander," which are also shared by many other Americans).

<sup>131</sup> See Lourdes Martínez-Echazábal, 'A Pluribus Unum': The Discourse of National/Cultural Identity in Latin America (Nov. 2, 2001) (presented at "Race Mixture in the Americas" symposium, American University, Washington College of Law) (unpublished manuscript, on file with author).

<sup>132</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment). *Adarand* held that federal affirmative action programs instituted to assist subordinated groups, are subject to the same strict scrutiny standard as acts of discrimination against subordinated group members. See *id.* at 227.



intensify with the resurgence of nationalist American pride in the wake of the September 11, 2001 attacks.<sup>133</sup>

The Latin American multiracial discourse has also begun to express itself within the works of some Critical Race theorists. Critical Race Theory (CRT) is a strain of legal scholarship that challenges the ways in which race and racial power are constructed and represented in legal culture and, more generally, in society as a whole.<sup>134</sup> Despite the centrality of race as a unit of analysis to CRT, a number of theorists have begun to question the continuing value of focusing on race.<sup>135</sup> These theorists suggest that the continuing reference to race reaffirms the use of phenotype and ancestry as a locus of oppression and difference.<sup>136</sup> I shall refer to these theorists as the new "race-less CRT theorists."

Three common attributes loosely unite and most usefully describe these race-less CRT theorists: (1) published work as CRT scholars; (2) documented commitment to antistatutory efforts for racial minorities; and (3) recent interest in abandoning racial labels as a mechanism for achieving racial justice. For instance, legal scholar Reginald Robinson is a self-professed Critical Race theorist who has begun to widely promote the idea that racial categories are counterproductive to racial justice.<sup>137</sup> Robinson demonstrates his commitment to eradicating the use of racial categories through recurrent delivery of his paper, "The Death of the Critical Race Theorist and the End of Race Consciousness."<sup>138</sup> Robinson's premise is that the CRT

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<sup>133</sup> See Martínez-Echazábal, *supra* note 131, at 1 (describing the post-September 11, 2001 American Council television advertising campaign that features racially diverse participants repeating the refrain "I am an American").

<sup>134</sup> For surveys of CRT scholarship, see *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) and *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 6.

<sup>135</sup> Scholars outside of legal academia have also begun to advocate the abolition of race-consciousness. See PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* (2000) (contending that race-thinking, whether imposed or as an insurgent identity, has distorted the finest promises of modern democracy).

<sup>136</sup> See Alex M. Johnson Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887 (1996); Reginald Leamon Robinson, *Race Consciousness: A Mere Means of Preventing Escapes from the Control of Her White Masters?*, 15 *TOURO L. REV.* 401 (1999); Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 *B.C. THIRD WORLD L.J.* 231 (2000) [hereinafter Robinson, *Critical Reply*]; Jonathan K. Stubbs, *The Implications of Uniracial Theory: Towards a Jurisprudence of Race and Rights for the Next Millennium* (Nov. 13-15, 1997) (presented at "Critical Race Theory Conference," Yale Law School) (unpublished manuscript, on file with author).

<sup>137</sup> See Robinson, *Critical Reply*, *supra* note 136. *But see* Hernández, *supra* note 10, at 115-21 (asserting that the movement for a "multiracial" racial classification reinforces societal value for Whiteness).

<sup>138</sup> Reginald Leamon Robinson, *The Death of the Race Crit: Deconstructing Critical Race Theory and the End of Race Consciousness* (unpublished manuscript, on file with author). Professor Robinson has presented his paper at the following conferences: 1997

scholar's commitment to race-consciousness is misplaced and undermines the CRT project to expose and eliminate racism. Because CRT scholars rely upon the paradigm of racial categories in their legal analysis, Robinson believes that they "unwittingly give energy to racism and white supremacy."<sup>139</sup> Accordingly, a move away from the use of racial categories would assist CRT scholars and others to "relate to each other as Spirit beings."<sup>140</sup>

What Robinson's analysis leaves unclear is the way in which a focus on "Spirit beings" would concretely uproot racial subordination. Instead, Robinson argues that both the adoption of a "multiracial" racial category for mixed-race persons and a shift towards viewing persons of African ancestry as an ethnic group could assist in abolishing the use of racial categories.<sup>141</sup> Robinson's preference for ethnic labels over racial labels grows out of philosopher Kwame Anthony Appiah's scholarly project to recognize racial classification as a culturally-based practice rather than biologically-based reality.<sup>142</sup>

Similarly, legal scholar Alex M. Johnson Jr. refers to Appiah in asserting that people of African descent will benefit from a paradigm shift that abandons racial categories in favor of ethnic labels.<sup>143</sup> Although Johnson ultimately rejects Appiah's wholesale approach to supplanting the term "race" with "culture,"<sup>144</sup> he does favor the aspects of Appiah's work that support a view of persons of African descent as an ethnic group rather than a racial group.<sup>145</sup> Johnson's premise is that an ethnicity model of identification will be able to generate the formation of a positive community, unfettered by color bias, because it is free of the stigma that presumably accompanies a race-based model of identification.<sup>146</sup> Furthermore, an ethnicity model has the supposed benefit of permitting individuals to reject the cate-

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Critical Race Theory Conference at Yale Law School; 1999 Critical Legal Theory Conference at the University of London; and the 2000 Mid-Atlantic People of Color Scholarship Conference.

<sup>139</sup> Robinson, *Critical Reply*, *supra* note 136, at 254-55.

<sup>140</sup> *Id.* at 238. Similarly, the work of Jonathan K. Stubbs promotes a shift from race-consciousness to humanness, but fails to address how this shift will dismantle the material benefits within the current racial hierarchy. *See* Stubbs, *supra* note 136, at 2-6.

<sup>141</sup> *See* Robinson, *Critical Reply*, *supra* note 136, at 238, 263, 272-73.

<sup>142</sup> *See* KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 37-42, 73-83, 174-78 (1992). Appiah is a Professor of African-American Studies and Philosophy at Princeton University who has written extensively on African and African-American literary criticism.

<sup>143</sup> *See* Johnson, *supra* note 136, at 894-95, 917.

<sup>144</sup> *Id.* at 911-12.

<sup>145</sup> *See id.* at 910-12, 917.

<sup>146</sup> *See id.* at 938.

gory at will in much the same way that some Latin Americans of African descent are able to reject the "Black" racial category.<sup>147</sup>

In fact, much of Johnson's analysis rests upon a depiction of the Latin American race model as comparatively more effective at destroying "the allegedly superior mark of whiteness,"<sup>148</sup> because its focus upon phenotype rather than ancestry is fluid enough to create "shade confusion"<sup>149</sup> so as to undermine the power of the Whiteness "trademark."<sup>150</sup> Yet, in their well-intentioned proposals for the destabilization of racial categories, Johnson, Robinson, and other emerging raceless CRT scholars<sup>151</sup> fail to observe that an investigation of the Latin American context reveals the fallacy of presuming that more fluid approaches to racial labeling and a colorblind deflection from race actually work to destroy racial hierarchy rather than reinforce it.

### III

#### THE CRITIQUE: "MARK" AND "ORIGIN"—CORRESPONDENCES OF PREJUDICE

*When we strip away the historical variations in social and political constructions of race in the Americas, one glaring commonality remains: general social discrimination based on skin color.*<sup>152</sup>

While the U.S. and Latin American race models may appear different on the surface, upon closer inspection the two models evince a disturbing commonality. Both models esteem Whiteness and maintain racial hierarchy. Despite its distinct model of race, Latin America continues to suffer from the same racial disparities in socioeconomic opportunities as the United States.<sup>153</sup> Indeed, some Latin American

<sup>147</sup> See *id.* at 933–36. But see Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1188–1202 (1997) (favoring rigid racial categories because they have maintained the cohesion of the African-American community).

<sup>148</sup> Johnson, *supra* note 136, at 920.

<sup>149</sup> *Id.* at 891.

<sup>150</sup> See *id.* at 898–99, 920–21.

<sup>151</sup> See, e.g., e. christi cunningham, *The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 727 (1999) (advocating the "death of race as a facet of identity"); Stubbs, *supra* note 136 (advocating a shift from "race-consciousness" to a focus on "human-ness"). Nor is the racelessness shift limited to race critics who are legal scholars. Jorge Klor de Alva is a prominent Professor of Comparative Ethnic Studies and Anthropology who also strongly advocates for the abolition of all racial classifications. See *Our Next Race Question: The Uneasiness Between Blacks and Latinos*, HARPER'S, Apr. 1996, at 55, 59–61 (presenting Klor de Alva's opposition to the use of any racial categories). "[R]ace is a lamentable category for any kind of progressive organization, and we need an alternative to affirmative action. I would remove the government from participation in the naming game and its divisive racializing of identities." *Id.* at 61.

<sup>152</sup> James Early, *Reflections on Cuba, Race, and Politics*, SOULS, Spring 1999, at 46, 52.

<sup>153</sup> See SÁNCHEZ & FRANKLIN, *supra* note 88, at 221 (describing the similarities across Latin America in the poor socioeconomic status of persons of African descent as compared to Whites).

historians suggest that the relative population sizes of people of African ancestry vis-à-vis Whites are more central to the fluidity of racial classifications than any national identity as a racial democracy.<sup>154</sup> To be specific, unlike the United States, Cuba and Puerto Rico's population of persons of African ancestry have historically numerically approximated (and some commentators think surpassed)<sup>155</sup> the population of its White elite.<sup>156</sup> In fact, "[o]ver 90 percent of the approximately 10 million enslaved Africans brought to the Americas . . . were taken to Latin America and the Caribbean,"<sup>157</sup> whereas only 4.6% were brought to the United States.<sup>158</sup> The distinct racial demography of Latin America—where there generally is a smaller proportion of Whites in comparison to its African-descended and indigenous populations—has in turn motivated Whites in Latin America to permit the social ascendancy of some Afro-Latinos,<sup>159</sup> and usually its Mulattos and Mestizos, to buffer the elite against the discontent of the subordinated majority of color.<sup>160</sup> Hence, even the economic and social mobility of some Afro-Latinos within the fluid racial classification scheme is rooted in the reality of a racial hierarchy. Thus, the Latin American public pride regarding the fluidity of its formal racial classification practices is particularly misplaced. Indeed, the informal racial classification practices that Latin Americans rarely discuss more starkly manifest the connection to White supremacy.

At the same time, informal racial designations are more impervious to the influence of social status. An Afro-Latino can sometimes achieve a comfortable socioeconomic standing, but will still be disparaged as a Black person in social discussions outside his or her presence; the only distinction that will be made is to describe that individual as "the Black person with money."<sup>161</sup> Even Cuban dictator

<sup>154</sup> See DEGLER, *supra* note 22, at 239–45.

<sup>155</sup> See Santiago-Valles, *supra* note 50, at 44 (noting one Puerto Rican scholar's argument that "in 1942 only about 40 percent of the Island's population could be considered predominantly white," and another scholar's 1965 estimate that seventy percent of the population was mixed).

<sup>156</sup> See, e.g., KINSBRUNER, *supra* note 35, at 28–30 (charting the percentage of Blacks and Whites in Puerto Rico from 1779 to 1830); David Booth, *Cuba, Color and the Revolution*, 40 *Sci. & Soc'y.* 129, 140–41 (1976).

<sup>157</sup> Miriam Jimenez Román, *Un hombre (negro) del pueblo: José Celso Barbosa and the Puerto Rican "Race" Toward Whiteness*, 8 *CENTRO* 8, 12 (1996).

<sup>158</sup> *Id.*

<sup>159</sup> I use the academic terms "Afro-Latinos" and "Afro-Cubans" to collectively describe all Latino and Cuban persons of African descent, whether racially categorized as Mulatto or Black, and to focus upon the centrality of bias against African ancestry and phenotype in Cuba and Latin America.

<sup>160</sup> See DEGLER, *supra* note 22, at 239–44 (discussing the role of demography in the recognition of mixed-race identities).

<sup>161</sup> See, e.g., HOETINK, *supra* note 43, at 169 & n.3 (stating that prejudice of origin also permeates Latin American race relations in that the African ancestors of a designated White person become relevant in disputes).

Fulgencio Batista was reportedly denied admission to some of Havana's "exclusive clubs" because of informal knowledge of his African ancestry.<sup>162</sup> Thus, while the formal method of racial classification is seemingly more fluid than the United States' more restrictive rule of hypo-descent, Latin Americans have particular moments when they informally deploy a binary model of racial classification more characteristic of the U.S. approach. The binary race model surfaces when Latin Americans engage in acts of discrimination and when victims describe an experience of discrimination.<sup>163</sup> Sociologist Isar Godreau explains the Latin American shifting between fluid and binary models of race as a manifestation of individuals' expressions of when "the other doesn't belong."<sup>164</sup> In contrast, the seeming fluidity of the Latin American approach to racial designation centers on assisting individuals to avoid the negative *formal* racial classification of Black, while at all times maintaining an informal recognition of African ancestry.

In this scheme, the parameters that cabin the fluidity of racial classification are the degree of one's pigmentation, African features, and socioeconomic status. For instance, Batista would have been less able to alter his formal racial classification upon improving his social standing if his African ancestry had been a more prominent aspect of his coloring and features. Thus, the power of socioeconomic status to lend flexibility to formal racial classification can be limited by the visibility of one's African ancestry in physical appearance.<sup>165</sup>

Ultimately, the Cuban and Puerto Rican fluidity in racial identification is premised on a racist ideology of whitening, in which individuals are esteemed by how closely they approximate and effectively claim Whiteness.<sup>166</sup> More specifically, the value these nations place on European (Spanish) ancestry dictates the fluidity of racial designation: the more White one appears, the more "freedom" one has to

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<sup>162</sup> See MOORE, *supra* note 23, at 5; Casal, *supra* note 45, at 18.

<sup>163</sup> See Godreau, *Confronting the Panic*, *supra* note 93, at 9.

<sup>164</sup> *Id.* (describing how Puerto Ricans interviewed in an empirical study of race on the island constantly shifted between binary models of race talk and more fluid, euphemistic models, but observing that the binary use of linguistic categories "speaks to the real effects of racist[ ] forms of exclusion that fix and essentialize identities").

<sup>165</sup> The ability of soccer player Pelé (a dark-skinned Afro-Brazilian) to alter his identification documents to reflect a White racial designation, *see supra* note 77 and accompanying text, does not diminish the significance of phenotype as a limitation on fluid racial identity practices. The absolute rarity of dark-skinned persons altering their formal racial designation and the singularity of Pelé's international stardom lends even greater credence to this conclusion. See Anani Dzidzienyo, *Africana and the United States (of America)—Latin America Comparison: Myths and Realities* 18 (Nov. 2, 2001) (presented at "Race Mixture in the Americas" symposium, American University, Washington College of Law) (unpublished manuscript, on file with author) (observing that the rarity of instances such as Pelé's that illustrate how "money whitens" reinforces the untenability of the hypothesis).

<sup>166</sup> See Helg, *supra* note 87, at 47–48 (discussing the esteem for Whiteness in Cuba); Torres, *supra* note 82, at 286 (explaining the hyper-privileging of persons associated with Whiteness in Puerto Rico).

claim a racial designation distinct from other persons with similar non-White origins. Consequently, the flexibility in the Latin American racial designation system is restricted to those persons whose lighter skin and European phenotype permit them to escape Blackness;<sup>167</sup> darker-skinned impoverished members of the non-White population are not at liberty to claim a Mulatto or White racial designation. In substance, the facial fluidity of the Latin American model, which presumably gives individuals more autonomy over racial designation, is in actuality restrictive and racist in its allocation of the White and Mulatto designations.<sup>168</sup> The restricted access to fluidity in racial designations operates cumulatively to the systematic disadvantage of dark-skinned persons of African ancestry because of the concomitant racially stratified access to socioeconomic opportunity. In short, the Latin American racial classification system views Whiteness as property to the same extent as Professor Cheryl I. Harris persuasively describes it with regard to the U.S. classification system.<sup>169</sup>

In Latin America, like in the United States, having lighter skin and European features increases the chances of socioeconomic opportunity, while having darker skin and African features severely limits such opportunity and social mobility.<sup>170</sup> Predictably, the poorest socioeconomic class is populated primarily by Afro-Latinos, the most

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<sup>167</sup> In those Latin American countries in which persons of indigenous ancestry are the more numerous non-White population, the Mestizo category provides an escape from pejorative associations with Indianess. See Léons, *supra* note 48, at 337 (describing the use of the Mestizo category); cf. Richard Rodriguez, *Mixed Blood: Columbus's Legacy: A World Made Mestizo*, HARPER'S, Nov. 1991, at 47, 52 ("Mexican mothers may wish for light-skinned children; touch blond hair and good luck will be yours. In private, in Mexican Spanish, *indio* is a seller of Chiclets, a sidewalk squatter. *Indio* means backward or lazy or lower-class.").

<sup>168</sup> Torres and Whitten posit that:

One would like to think, and many would have us believe, that in Latin America and the Caribbean there is substantial fluidity in class, ethnic, and power relationships. Such is not the case. Almost everywhere, serious research turns up a pyramidal class structure, cut variously by ethnic lines, but with a local, regional, and nation-state elite characterized as 'white' . . . that results in the perpetuation of lightness as superior to darkness . . . [.] add[ing] to the features of a racialist structure of domination . . .

Torres & Whitten, *supra* note 71, at 23; see also Booth, *supra* note 156, at 139 ("This scheme of classification is not and has never been evaluatively neutral, but rests upon straightforwardly racist assumptions.").

<sup>169</sup> See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

<sup>170</sup> See HOETINK, *supra* note 43, at 40; see also Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1708-11 (2000) (summarizing a wealth of literature documenting the skin privilege that light-skinned Blacks receive in the United States); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 159-62 (1997) (discussing studies comparing income and professional positions of light- and dark-skinned Blacks and Latinos in the United States); Robyn Meredith, *Color Counts*, USA TODAY, June 21, 1995, at 1B (citing a study by the Ford Foundation and Russell Sage Foundation that found that being Black and dark-skinned reduced the odds of finding employment in Los Angeles by fifty-two percent).

privileged class is populated primarily by Whites, and an elastic intermediary socioeconomic standing exists for some light-skinned Mulattos. Thus, race influences one's socioeconomic standing and class status informs the flexibility of one's racial designation.<sup>171</sup> During downturns in the national economy, when fewer economic benefits are provided to Mulattos as an intermediate class, Mulattos continue to experience their racial identification as an enhanced social status.<sup>172</sup> The restricted access to fluid racial identification highlights the manner in which the very flexibility of the racial designation system is designed to assist individuals to avoid pejorative associations with Blackness in order to maintain a system of White privilege, rather than stemming from a humanitarian impulse to place less emphasis on the importance of race. For instance, in Puerto Rico it has been noted that marriages frequently dissolve when the offspring turn out to be a darker shade than either parent, and each spouse accuses the other of closeting the African ancestors of the family.<sup>173</sup> The marital discord arises from the fact that darker-skinned offspring disrupt the couple's *blanqueamiento* social ascendancy, because their own racial status is called into question by their association with the child. This is yet another example of how the presumed fluidity of the Latin American race model is constricted when confronted with Blackness. The Latin American politics of racial fluidity have historically been—and continue to be—centered on supporting White supremacy.

At first glance Latin American racial fluidity may seem akin to “passing,” a practice that occurs both in the United States and Latin America.<sup>174</sup> However, one crucial distinction exists: passing entails the private and individuated decision to deny one's African ancestry for personal gain or survival, whereas Latin American fluidity is the

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<sup>171</sup> Cf. JORGE I. DOMÍNGUEZ, *CUBA: ORDER AND REVOLUTION* 225 (1978) (citing research conducted in Cuba in the late 1940s that showed that Whites who resided in the same tenements as Blacks in the same income group were accorded better accommodations); Helg, *supra* note 87, at 53–54 (noting that darkness of skin is also directly related to likelihood of imprisonment, inequality in education, jobs, income, and life chances in Cuba). *But see* ALINE HELG, *OUR RIGHTFUL SHARE: THE AFRO-CUBAN STRUGGLE FOR EQUALITY, 1886–1912*, at 3–4, 13–14 (1995) (stating that Cuba's virulent discrimination against both Blacks and Mulattos during periods of heavy Spanish immigration has resulted in moments of collective action between Blacks and Mulattos as a single “raza de color”).

<sup>172</sup> See WINANT, *supra* note 5, at 134–35 (observing that while Mulattos may not always statistically outrank Afro-Brazilians in socioeconomic status, their social status as Mulattos continues to be salient in the racial order). *But see* Nelson do Valle Silva, *Updating the Cost of Not Being White in Brazil*, in *RACE, CLASS, AND POWER IN BRAZIL* 42, 54–55 (Pierre-Michel Fontaine ed., 1985) (noting that Blacks and Mulattos face almost equal levels of discrimination).

<sup>173</sup> See Thomas G. Mathews, *The Question of Color in Puerto Rico*, in *SLAVERY AND RACE RELATIONS IN LATIN AMERICA*, *supra* note 81, at 317.

<sup>174</sup> “Passing” is the practice by which persons with African ancestry, but with a muted African phenotype, identify themselves as White. See Hernández, *supra* note 10, at 123 & n.124.

public endorsement of a national preference for Whiteness.<sup>175</sup> Nonetheless, the apparent similarity of passing and fluidity highlights the use of ancestry in the purportedly distinct prejudice-of-mark Latin American approach to race: African ancestry is the identification that an individual denies by passing, and from which the individual distances herself or himself through fluidity.

Thus, the operation of the U.S. and Latin American systems is similar in that racial ancestry pervades phenotype in Latin America, while phenotype is a marker of racial ancestry in the United States. To be precise, the Latin American model's formal and informal assessment of race—based on a visual inspection of skin color and phenotype—necessarily and primarily involves ancestry, which largely determines one's racial appearance. In Latin America, phenotype acts as a substitute for ancestry rather than as a determinant of ancestry, while in the United States, ancestry designations are a proxy for phenotype. The systemic difference between the Latin American and the U.S. model is neither one of kind nor even of degree; it is more of semantics. The Latin American model is promoted as flexible and therefore less focused on maintaining rigid racial distinctions, whereas the U.S. model is promoted as static and therefore reliable in its consistency. But in practice, the rigidity built into "fluid" Latin American visual assessments, and the imprecise and thus necessarily fluid, visual assessments that form a part of the rigid traditional U.S. model, both mix and deploy the politics of fluidity and rigidity to maintain a hierarchical preference for Whiteness in both places.

Latin American prejudice of mark is also viewed as more fluid in that Latin America has historically recognized mixed-race persons of African ancestry, like Mulattos, as formally distinct from persons of predominantly African descent.<sup>176</sup> The racial demography of much of Latin America provides the institutional rationale for recognizing a distinct Mulatto class privileged over those classified as Black. For example, the demographic pattern of Cuba since the invasion of the Spaniards and the forced labor of African slaves has consistently maintained a fluctuating minority of Whites and a significant proportion of persons of color.<sup>177</sup> Thus, the White fear of being overrun by a major-

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<sup>175</sup> *Id.* at 123–24.

<sup>176</sup> See HOETINK, *supra* note 43, at 40–41. A movement in the United States for a similar recognition of a mixed-race racial identification has recently emerged. See *supra* notes 15–16 and accompanying text.

<sup>177</sup> See Darién J. Davis, *The African Experience in Latin America—Resistance and Accommodation*, Introduction to SLAVERY AND BEYOND: THE AFRICAN IMPACT ON LATIN AMERICA AND THE CARIBBEAN, at xi, xx–xxiii & tbls.1–2 (Darién J. Davis ed. 1995) (observing the demographic pattern of non-White majorities in Latin American countries despite the prevalent manipulation of census racial data); McGarrity & Cárdenas, *supra* note 73, at 78.



ity of non-Whites<sup>178</sup> has motivated normative and official recognition throughout Cuba and Latin America of an intermediate racial class that buffers the most privileged from the wholly disenfranchised.<sup>179</sup> The demographic pattern of a White minority with a large non-White majority, historically and presently, is paralleled in most Latin American countries,<sup>180</sup> yet is markedly distinct from the United States's demographic of a White majority and non-White minority.<sup>181</sup> The intermediate category variance in racial designation systems is primarily attributable to this difference in racial demography, rather than to Latin American fluidity or respect for individual autonomy to informally self-determine a racial classification.<sup>182</sup> The changing demographics of the United States, reflecting a growing presence of non-White residents, has propelled a similar concern that Whites may become a numerical minority and thus have their race-based privileges threatened.<sup>183</sup> It is this very population shift to a non-White majority, along with the history of White supremacy, that makes the comparison to the Latin American context particularly relevant. Hence, sociologist Joe Feagin terms the demographic incentive to recognize intermediate status racial categories as the "Brazilianization" of the United States.<sup>184</sup>

Furthermore, the Latin American Mulatto category indicates how Whiteness dominates race in Latin America, as it does in the United

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<sup>178</sup> See, e.g., Rafael Duharte Jiménez, *The 19th Century Black Fear*, in *AFROCUBA: AN ANTHOLOGY OF CUBAN WRITING ON RACE, POLITICS AND CULTURE* 37 (Pedro Pérez Sarduy & Jean Stubbs eds., 1993); see also Matt D. Childs, "Sewing" Civilization: Cuban Female Education in the Context of Africanization, 1800-1860, 54 *AMERICAS* 83, 99 (1997) (noting that the nineteenth-century promotion of White female education was an effort to portray Cuba as a "civilized" (and not African) country and "also served a crucial function in defining differences between the races").

<sup>179</sup> See Hernández, *supra* note 10, at 121-39; see also Martínez-Echazábal, *supra* note 29, at 27-28 (describing the Latin American support for race mixture as a means of countering the threat of Black supremacy).

<sup>180</sup> Even the notable exception of Argentina, with its numerical majority of Whites, purposely cultivated such a demographic pattern at the expense of its Afro-Argentine residents. See GEORGE REID ANDREWS, *THE AFRO-ARGENTINES OF BUENOS AIRES, 1800-1900*, at 101-12 (1980) (describing Argentina's national campaign to "whiten" the country).

<sup>181</sup> HARRIS, *supra* note 20, at 128 fig.

<sup>182</sup> See DEGLER, *supra* note 22, at 245.

<sup>183</sup> See Farai Chideya, Editorial, *Shades of the Future: Will Race Provide the Midcentury Crisis?*, *TIME*, Feb. 1, 1999, at 54 ("The U.S. Census Bureau predicts that by the middle of the next century, race in America will be turned upside down. In 2050 whites will be a minority, and present-day minorities will be in the majority."); see also DALE MAHARIDGE, *THE COMING WHITE MINORITY* 1 (1996) (reviewing demographers' predictions that Whites will become a numerical minority in the United States within coming generations). *But see* DAVIS, *supra* note 14, at 35-37 (explaining that colonial South Carolina and Louisiana were exceptions to the U.S. demographic pattern, with their majority non-Whites and minority Whites, and that this distinction in racial demographics also accounts for South Carolina and Louisiana's recognition of Mulattos as a separate racial classification).

<sup>184</sup> See FEAGIN, *supra* note 13, at 232.

States: the Mulatto category feeds the preference for Whiteness and the privilege of Whites. For instance, until the Cuban revolution of 1959, certain occupations used explicit color preferences to hire Mulattos to the complete exclusion of dark-skinned Blacks,<sup>185</sup> based on the premise that Mulattos were superior to dark-skinned Blacks but not of the same status as Whites. Thus, a consequence of the exodus of many wealthy or middle-class White Cubans after the 1959 installation of the socialist government was that light-skinned Mulattos were socially promoted to the status of Whites.<sup>186</sup> But, when those same light-skinned Mulattos later managed to leave the island to resettle in the predominantly White Cuban exile communities of the United States, the altered racial demographics stripped them of their "White status" and they were once again treated as Mulattos by their fellow Cuban *émigrés* (and as Blacks by Anglo-Americans under the rule of hypo-descent).<sup>187</sup> The fluidity of the Cuban racial classification system, therefore, is not only constrained by the degree of one's pigmentation, African phenotype, and socioeconomic status, but also by a structural concern with the number of non-Whites vis-à-vis a privileged White class. This dynamic is found in much of Latin America.<sup>188</sup>

Another point of correspondence between Latin America and the United States is that the legacy of White supremacy is deeply ingrained. The tendency to mask African heritage remains pervasive in Cuba. For example, one scholar recounts that when he referred to a self-identified Mulatto law student as a person of color, the student quickly responded "Yes, but I am very advanced," referring to his light skin and European hair texture.<sup>189</sup> In other words, the Cuban law student immediately wished to distance himself from association with other persons of African ancestry by emphasizing his superior ("advanced") physical qualities because no plausible benefit inheres to identifying with African ancestry, and because only pejorative assessments are made about African ancestry. Similarly, in research conducted in Puerto Rico during the 1997–1998 academic year, the overwhelming majority of 187 interviewed college students described

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<sup>185</sup> See ROUT, *supra* note 34, at 305.

<sup>186</sup> See McGarrity & Cárdenas, *supra* note 73, at 103.

<sup>187</sup> See *id.*; see also Mirta Ojito, *Best of Friends, Worlds Apart*, N.Y. TIMES, June 5, 2000, at A1 (describing the heightened race bias expressed by exiled White Cubans in the United States against Cubans of color).

<sup>188</sup> Cf. ROUT, *supra* note 34, at 306 ("As in Santo Domingo [Dominican Republic] and elsewhere [in Latin America,] if Cubans wanted to believe that their nation was getting whiter, census statistics would be provided to help them preserve their beliefs.").

<sup>189</sup> See IAN LUMSDEN, MACHOS, MARICONES, AND GAYS: CUBA AND HOMOSEXUALITY 147 (1996).

“Puerto Ricans who are ‘dumb’” as having “dark skin.”<sup>190</sup> Conversely, the same interviewees correlated “light” skin color with a description of “Puerto Ricans who are physically strong.”<sup>191</sup> Such negative perspectives about African ancestry are not limited to this study’s participants. In 1988, when the presiding Governor of Puerto Rico publicly stated that “[t]he contribution of the black race to Puerto Rican culture is irrelevant, it is mere rhetoric,”<sup>192</sup> it was in keeping with what social scientists describe as the standard paradox in Puerto Rico: Puerto Ricans take great pride in the purported claim of being the whitest people among the Caribbean islands, while simultaneously assert themselves as non-racist.<sup>193</sup> The pride of being a presumably White population is a direct reaction to the Puerto Rican understanding that “black people . . . are perceived to be culturally unrefined and lack ambition.”<sup>194</sup>

Again, as in the United States, the disparagement of Black identity is not limited to Mulattos and Whites, but also extends to Blacks themselves, who can harbor internalized racist norms.<sup>195</sup> This internalization manifests itself in a widespread concern among Afro-Latinos with the degree of darkness in pigmentation, width of nose, thickness of lips, and quality of one’s hair—with straight, European hair denominated, literally, as “good” hair.<sup>196</sup> This concern with European skin and features also influences Afro-Latinos’ assessments of preferred marriage partners. Marrying someone lighter is called “*adelantando la raza*” (improving the race) under the theory of *blanqueamiento* (whitening), which prizes the mixture of races precisely to help diminish the existence of Blacks.<sup>197</sup> A European journalist noted the following as a typical response in interviews conducted in 1959 in Cuba:

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<sup>190</sup> See Ronald E. Hall, *A Descriptive Analysis of Skin Color Bias in Puerto Rico: Ecological Applications to Practice*, J. SOC. & SOC. WELFARE, Dec. 2000, at 171, 176–78 (detailing survey data that demonstrated that light skin is ideally valued among Puerto Ricans interviewed).

<sup>191</sup> *Id.* at 177–78 & tbl.2.

<sup>192</sup> Torres, *supra* note 82, at 286 (quoting Rafael Hernández Colón, *España, San Antón y el ser nacional*, EL NUEVO DÍA, June 6, 1988, at 53).

<sup>193</sup> See Robert A. Martínez, *Puerto Ricans: White or Non White? A Study of the Paradox of Race Perceptions Among Mainland Bred and Island Bred Puerto Ricans 2–3* (1985) (Educ. Res. Info. Ctr., U.S. Dep’t of Educ., No. ED 267 144) (unpublished manuscript, on file with author).

<sup>194</sup> Torres, *supra* note 82, at 297.

<sup>195</sup> See, e.g., Carmen Luz Valcarcel, *Growing Up Black in Puerto Rico*, in CHALLENGING RACISM AND SEXISM: ALTERNATIVES TO GENETIC EXPLANATIONS 284, 287 (Ethel Tobach & Betty Rosoff eds., 1994) (sharing experiences as an Afro-Latina who internalized Puerto Ricans’ negative assessments of Blacks).

<sup>196</sup> See Martínez, *supra* note 193, at 5 (describing Puerto Ricans’ fixation on the subtle racial markers of hair texture, lips, nose, and skin color).

<sup>197</sup> See Torres & Whitten, *supra* note 71, at 8–9, 13 (explaining *blanqueamiento* as the process of becoming increasingly acceptable to those classified and self-identified as White).

"Cuban girls like me, with mixed blood, dream of going out with a white man like you. The Revolution has done away with color prejudice but to marry a white man, one hundred percent white, that would be great. That's a wonderful thing the Revolution could do. It ought to step up the process of making Cuba white. . . . In that way the coloreds would soon become absorbed, and there'd be no more Negroes, no more prejudices, no more anything."<sup>198</sup>

Let us return to the case of Ms. Phipps, the Louisiana resident unhappily designated Black, and whose valuation of Whiteness resonates with that of the Afro-Cuban noted above. In the words of the plaintiff, "I am all white. I was raised as a white child. I went to white school. [sic] I married white twice."<sup>199</sup> Ms. Phipps also remarked that "[t]here are no blacks out where I live, except the hired hands."<sup>200</sup> Ms. Phipps took great pains to live her life within a White segregated context that would maintain the "purity," and thus the perceived superiority, of a White identity. Despite the richness of her racial ancestry, she fought to cling to an all-White racial classification because she understood that, unlike Blackness, Whiteness is not a trap—it is a prized possession.<sup>201</sup> But what Ms. Phipps and other critics of the rule of hypo-descent overlook is the way in which the narrow concern with being cabined into a Black racial designation supports White supremacy by preferring a White designation to all others in the stampede to avoid connections to Blackness. Thus, both the U.S. and Latin American models of race are constructed to prize Whiteness and devalue non-Whiteness.<sup>202</sup>

In sum, a critical comparison of Cuban, Puerto Rican, and the U.S.'s racial classification systems reveals that, although the Latin American model is sometimes described with relative approval because of its perceived accommodation of individual autonomy in informal racial designation, both the Latin American and United States's classification systems exist within a hierarchy that systematically and socially privileges Whiteness and constrains "choice."<sup>203</sup> In

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<sup>198</sup> MOORE, *supra* note 23, at 42–43 (quoting VICTOR FRANCE, *THE MORNING AFTER* 42–43 (1963)).

<sup>199</sup> *Slave Descendant Fights Race Listing*, N.Y. TIMES, Sept. 15, 1982, at A16.

<sup>200</sup> See Art Harris, *Louisiana Court Sees No Shades of Gray in Woman's Request*, WASH. POST, May 21, 1983, at A3.

<sup>201</sup> Unlike Ms. Phipps, there are many people who view the U.S. designation of all persons with any African ancestry as Black as a source of empowerment for all Blacks "trapped" within racially oppressive environments. See Hickman, *supra* note 147, at 1202–05.

<sup>202</sup> See Duany, *supra* note 49, at 25 ("It is sterile to argue that one scheme is right and the other wrong, or that one is morally superior to the other. Instead, both systems are historically and culturally grounded in racist projects originating in colonialism and slavery" (citation omitted)).

<sup>203</sup> See JOHN CLYTUS, *BLACK MAN IN RED CUBA* 158 (1970) (discussing the African-American experience living in revolutionary Cuba); DOMÍNGUEZ, *supra* note 171, at 225; DEBRA

fact, this analysis shows how the two systems have historically had more in common than is at first apparent. This correspondence persists under socialist Cuba despite its decreed abolition of race, and in Puerto Rico despite its long-standing democracy and extensive civil rights laws.

#### IV

#### THE EFFECTS OF RACE IDEOLOGY ON CIVIL RIGHTS LAW

*Racism is about race: more races can lead both to changes in the way racism is presented, and ultimately to more, rather than less, racism.*<sup>204</sup>

##### A. Introduction to the Latin American Commonalities

The vast majority of Latin American countries have mandates against race discrimination in their constitutions.<sup>205</sup> However, most

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EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 108–14 (1994); cf. LUMSDEN, *supra* note 189, at 147 (stating that “[w]ithin the gay community, as elsewhere, there is little or no space for blacks to articulate their feelings about racial prejudice let alone to respond to it in terms of self-organization”); ELISA LARKIN NASCIMENTO, *PAN-AFRICANISM IN SOUTH AMERICA: EMERGENCE OF A BLACK REBELLION* (1980) (discussing encouragement for Blacks in Latin America to dissociate from a Black identity); Alejandro de la Fuente, *Race and Inequality in Cuba, 1899–1981*, 30 J. CONTEMP. HIST. 131, 161 n.56 (1995) (noting “manifestations of cultural racism such as the persistence of white symbols in magazines”); T.Z. Parsa, *Club Red*, N.Y. MAG., Nov. 17, 1997, at 36, 42.

<sup>204</sup> Caldwell, *supra* note 109, at 63.

<sup>205</sup> E.g., BELIZE CONST. pt. II, § 3, reprinted in Jefri Jay Ruchti, *Belize*, in 2 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD Release 97-3, at 13 (Gisbert H. Flanz ed., 1997); CONSTITUIÇÃO FEDERAL tit. II, ch. I, art. 5, § XLII (Braz.), translated in Keith S. Rosenn, *Federative Republic of Brazil*, in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 2001-2, at 5 (2001); CONSTITUCIÓN POLÍTICA tit. II, ch. I, art. 13 (Colom.), translated in Gisbert H. Flanz, *Colombia*, in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 95-4, at 164–65 (Peter B. Heller & Marcia W. Coward trans., 1995); CONSTITUCIÓN ch. VI, arts. 42–43 (1992) (Cuba), translated in Inter-Univ. Assocs., Inc., *Republic of Cuba*, in 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 2000-1, at 12–13 (2000); CONSTITUCIÓN POLÍTICA tit. III, ch. 2, art. 23, cl. 3 (Ecuador), translated in Inter-Univ. Assocs., Inc., *Republic of Ecuador*, in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 99-4, at 5 (Reka Koerner trans., 1999); CONSTITUCIÓN tit. II, ch. I, art. 3 (El Sal.), translated in Inter-Univ. Assocs., Inc., *Republic of El Salvador*, in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 98-5, at 1 (Reka Koerner trans., 1998); CONSTITUCIÓN tit. III, ch. I, art. 60 (Hond.), translated in Gisbert H. Flanz & Jefri Jay Ruchti, *Republic of Honduras*, in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 97-2, at 16 (Reka Koerner trans., 1997); CONSTITUCIÓN POLÍTICA tit. IV, ch. I, art. 27 (Nicar.), translated in Inter-Univ. Assocs., Inc., *Republic of Nicaragua*, in 13 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 98-5, at 6 (Anna I. Vellvé Torras trans., 1998); CONSTITUCIÓN POLÍTICA tit. III, ch. I, art. 19 (Pan.), translated in Jorge Fabrega P. & Jefri Jay Ruchti, *Republic of Panama*, in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 95-8, at 105 (Jorge Fabrega P. trans., 1995); CONSTITUCIÓN POLÍTICA tit. I, ch. I, art. 2, cl. 2 (Peru), translated in Peter B. Heller, *Peru*, in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 95-1, at 113 (1995); CONSTITUCIÓN tit. III, ch. I, art. 21, cl. 1 (Venez.), translated in Gisbert H. Flanz, *Bolivarian Republic of Venezuela*, in 20 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, Release 2000-3, at 4 (2000).

lack either legislation to implement the antidiscrimination policy<sup>206</sup> or a governmental agency dedicated to enforcing them.<sup>207</sup> In fact, an examination of civil rights structures in six Latin American countries, sponsored by the Inter-American Development Bank, characterizes Latin American countries as generally lacking government agencies dedicated to handling or investigating charges of discrimination.<sup>208</sup> The few countries with enabling statutes have tended to focus on criminal law provisions as the primary vehicle for combating acts of discrimination,<sup>209</sup> in part because the criminal law venue does not require an investment of financial resources on the part of the victim.<sup>210</sup>

While criminal law enforcement carries a strong normative statement about the evils of racism, it has proven a poor means for handling incidents of race discrimination. In the case of Brazil, for example, because the criminal justice system is overloaded with traditional crimes involving physical harm to individuals and property, few race discrimination allegations are investigated.<sup>211</sup> In turn, the few allegations that are investigated encounter a judicial system that is reluctant to impose the sanction of prison for such a harm.<sup>212</sup> The aforementioned survey of legal systems also notes that Latin American civil rights structures are hampered by the lack of provisions for attorney's fees and other financial incentives for client representation, as well as the absence of an active civil rights bar.<sup>213</sup> While these hemi-

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<sup>206</sup> See generally Robert J. Cottrol & Tanya Katerí Hernández, *The Role of Law and Legal Institutions in Combating Social Exclusion in Latin American Countries: Afro-American Populations* (June 18, 2001) (presented at "Towards a Shared Vision of Development: High Level Dialogue on Race, Ethnicity and Inclusion in Latin America and the Caribbean" conference, Inter-American Development Bank) (while the Inter-American Development Bank funded the research for this report, none of the statements therein should be regarded as the official views of the institution) (unpublished manuscript, on file with author) (observing the absence of enabling legislation for constitutional racial equality provisions in Colombia, Honduras, Nicaragua, and Venezuela); see also Banco Interamericano de Desarrollo, *Political Feasibility Assessment: Country Potential for New Research on Race in Latin America 5-8* (Nov. 8-10, 2000) (presented at "Todos Contamos: Los Grupos Étnicos en los Censos" conference) (unpublished manuscript, on file with author) (observing that few countries in Latin America have laws that directly address racial hatred and discrimination) [hereinafter Banco Interamericano de Desarrollo].

<sup>207</sup> See *Interview with Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, US Department of Justice*, 4 GEO. PUB. POL'Y REV. 119, 119 (1999) (observing that unlike the United States, most other countries "don't have an office that is charged with the job of enforcing civil rights guarantees").

<sup>208</sup> See Cottrol & Hernández, *supra* note 206, at 35-37.

<sup>209</sup> See *id.* at 11.

<sup>210</sup> See Sueli Carneiro, *Estrategias Legais Para Promover A Justica Social*, in TIRANDO A MASCARA: ENSAIOS SOBRE O RACISMO NO BRASIL 311, 320 (Antonio Sergio Alfredo Guimaraes & Lynn Huntley eds., 2000).

<sup>211</sup> See Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11, 74-75 (2001).

<sup>212</sup> *Id.* at 75.

<sup>213</sup> Cottrol & Hernández, *supra* note 206, at 34-35.

spheric distinctions in structuring antidiscrimination lawmaking must certainly contribute to the general underenforcement of civil rights laws in Latin America, they do not provide a complete explanation for the distinct enforcement rates of civil rights laws.<sup>214</sup>

The variation among Latin American antidiscrimination lawmaking approaches undermines the notion that Latin America's legal approach for handling race discrimination is solely responsible for the difference in enforcement rates between the United States and Latin America. For example, although criminal law sanctions are a predominant format for antidiscrimination laws in Latin America, Peru employs civil law sanctions against discrimination in public accommodations.<sup>215</sup> Nevertheless, Peru also suffers from underutilization of its civil rights laws.<sup>216</sup> Moreover, Puerto Rico has access to all U.S. federal civil rights laws, yet similarly demonstrates an underutilization of those laws.<sup>217</sup> Nor can the poverty of the majority of Afro-Latinos be offered as the primary reason for underenforcement if the available criminal law venues are cost-free for the victims. In fact, some studies indicate that the number of criminal law complaints is deflated by the discriminatory pressure that victims encounter from law enforcement officials when they attempt to file a complaint.<sup>218</sup> In addition, the refusal of many Latin American nations to collect census data according to racial identity, or otherwise collect systematic information on the status of its racial and ethnic populations, is problematic. "Only 4 out of 26 countries in Latin America have census data on

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<sup>214</sup> Nor should the United States be viewed as the ideal in its civil rights lawmaking. See FEAGIN, *supra* note 13, at 242 ("The laws were never intended to uproot systemic racism. While they have gotten rid of legal segregation, they are for the most part ineffective in regard to much informal discrimination and segregation."). Recognizing the inherent efficacy limitations on all individual-focused and equal opportunity-based civil rights legal systems with limited group-based economic redistributive justice, this Article does not seek to provide a comparative analysis assessing the most effective civil rights structures or features. See Hernández, *supra* note 37, at 1159–67 (discussing the limitations of a legal approach to race discrimination that does not consider the group-based issues of socioeconomic status). Instead, this comparative study seeks to explore the threshold question about what effects race ideology has on the incentive to use the legal system for purposes of social justice reform.

<sup>215</sup> Ley No. 27,049 (Dec. 31, 1998) (Peru) (prohibiting discrimination in public accommodations), available at <http://www.leyes.congreso.gob.pe/Imágenes/leyes/27049.pdf>; Ley No. 27,270 arts. 2–3 (May 26, 2000) (Peru) (imposing civil fine sanction for racial discrimination in employment), available at <http://www.leyes.congreso.gob.pe/Imágenes/leyes/27270.pdf>.

<sup>216</sup> La Mesa de Trabajo para la No Discriminación de la Coordinadora Nacional de Derechos Humanos (Perú) & APRODEH/FIDH, *Reporte ante el Comité para la Eliminación de la Discriminación Racial* ¶ 30 (March 1999) (stating that the majority of Peruvian citizens are unaware of the activities of the government agency charged with implementing Peru's antidiscrimination laws), at <http://www.cnddhh.org.pe/infordisc99.htm> (last visited on Mar. 7, 2002).

<sup>217</sup> See *infra* Part IV.C.

<sup>218</sup> See Carneiro, *supra* note 210, at 314.

populations of African descent.”<sup>219</sup> The lack of census racial data obstructs the attempt to address widespread patterns of inequality that could, *inter alia*, more effectively address societal inequality through litigating individual acts of discrimination.<sup>220</sup>

More importantly, the widespread refusal to collect racial census data in Latin America is but one indication of the influence that Latin American race ideology has on the pursuit of racial justice, inasmuch as racism is not viewed as a problem, and any focus on race is thought to be adverse to maintaining a racially harmonious environment. Without census data aggregated by race, racial justice activists encounter greater difficulty in asserting that racism is a significant problem. In addition, the absence of census racial data effectively precludes the use of statistical evidence to prove a discrimination claim in court.

The influence of race ideology on the enforcement of antidiscrimination laws can also be noted in the judicial treatment of mixed-race racial identity. For instance, a recent empirical study of Brazil’s civil rights enforcement record reveals that judges frequently dismiss civil rights claims in which the accused asserts the “defense” of being mixed race.<sup>221</sup> Specifically, where defendants have asserted a mixed-race status, Brazilian judges have treated it as a demonstration of their inherent lack of racial bias by virtue of the Latin American *mestizaje* (and Brazilian *mestiçagem*) rhetorical device of promoting race mixture as the national norm.<sup>222</sup> It is no wonder that Brazilian judges are persuaded that race mixture can be a defense to a charge of racial discrimination, when the very image “of a racially democratic and nondiscriminatory society has hinged on the idea of racial mixture.”<sup>223</sup> As one close observer of Brazilian racial discourse notes: “a causal link was drawn that was often presented tautologically: Brazilians are racially mixed and therefore there can be no discrimination, or there can be no racial discrimination because Brazilians are racially mixed.”<sup>224</sup>

The Latin American mixed-race racial democracy myth is similarly deployed in the Peruvian and Colombian legal systems. In Peru, employers accused of racial discrimination are allowed to present the

<sup>219</sup> Banco Interamericano de Desarrollo, *supra* note 206, at 3.

<sup>220</sup> Cf. Cottrol & Hernández, *supra* note 206, at 34 (noting that “racial data has often proven to be extremely useful in employment discrimination cases in the United States”).

<sup>221</sup> See Seth Racusen, *Contesting Brazilian Racial Democracy Through the Law 2–4* (Mar. 16–18, 2000) (presented at the 22nd International Congress of the Latin American Studies Association meeting) (unpublished manuscript, on file with author).

<sup>222</sup> *Id.* at 2.

<sup>223</sup> Melissa Nobles, *Race and Poverty in Latin America: Conceptual Difficulties*, in INTER-AM. DIALOGUE, WORLD BANK, RACE AND POVERTY: INTERAGENCY CONSULTATION ON AFRO-LATIN AMERICANS 55, 61 (LCR Sustainable Dev., Working Paper No. 9, 2000).

<sup>224</sup> *Id.*



defense that the discrimination was “objective and reasonable.”<sup>225</sup> The premise that discrimination can somehow be objective and reasonable has its parallel in Colombia’s racial discourse. While Colombia has developed an extensive body of law protecting the equality rights of Afro-Colombians,<sup>226</sup> when Afro-Colombians do assert claims for racial justice they are in turn accused of promoting discrimination.<sup>227</sup> Such accusations are grounded in the cultural association of race-consciousness with racism itself; the mere discussion of race is understood as emblematic of racist divisions, while the social and economic stratification of persons of African ancestry is understood as a mere residue of class divisions. The influence of pervasive race denial in Latin America is made even more perverse by its interaction with the *blanqueamiento* aspect of Latin American race ideology. For example, the Peruvian government agency that investigates claims of race discrimination states that many racially victimized individuals feel too ashamed and embarrassed to assert a discrimination claim.<sup>228</sup> Filing a claim of discrimination would in effect be an admission that the victim was perceived as non-White—the ultimate shame in a society that esteems Whiteness.

In short, Latin American civil rights laws and their enforcement mechanisms are woefully inadequate for combating racism. A general disinterest in crafting elaborate civil rights structures in Latin America stems from the beliefs that there is little racism in the region and that a focus on race itself would foster racism. In those Latin American countries with a civil rights enforcement structure in place, the very same race ideology impedes the efficacy of the legal system. However, the failure of individuals and government officials in Latin America to enforce civil rights laws cannot be dismissed with the assertion that Latin Americans are less prone to litigate matters of social policy. In fact, a comparative study of civil litigation trends noted that some developing countries in Latin America have had higher litigation rates than more developed countries in Western Europe.<sup>229</sup> While Cuba

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<sup>225</sup> Ley No. 26,772 art. 2 (Apr. 14, 1997) (Peru), available at <http://www.leyes.congreso.gob.pe/Imagenes/Leyes/26772.pdf>; see also Jorge Ramirez Reyna, *Discrimination Against Afro-Peruvian Groups (Legal Framework)*, in INTER-AM. DIALOGUE, *supra* note 223, at 14, 16 (discussing the hindrance of the “objective and reasonable” discrimination defense).

<sup>226</sup> See Julio E. Gallardo Archbold, *Colombian Legislation: Regulations Governing Afro-Colombian Communities*, in INTER-AM. DIALOGUE, *supra* note 223, at 3, 4–6.

<sup>227</sup> *Id.* at 12. But it should be noted that, in actuality, few Latin Americans openly assert the existence of race discrimination. See *id.* at 13.

<sup>228</sup> See *Entrevista: Conversando con Teresa Ramírez, del INCECOPI*, at <http://www.geocities.com/mnfcongo/artic4.html> (last visited Feb. 11, 2002) (transcribed interview with Teresa Ramirez, representative of INCECOPI, the Peruvian government agency which investigates charges of racial discrimination).

<sup>229</sup> See David S. Clark, *Civil Litigation Trends in Europe and Latin America Since 1945: The Advantage of Intracountry Comparisons*, 24 LAW & SOC’Y REV. 549, 564–65 (1990).

and Puerto Rico are not culturally representative of the diversity of nations in Latin America,<sup>230</sup> the inquiry into the particularities of Cuba and Puerto Rico provides a rich basis for identifying the similarities in race discourse that are salient to the efficacy of civil rights enforcement. Indeed, a brief overview of Latin America, followed by close analysis of the Cuban and Puerto Rican legal systems, illustrates the manner in which Latin American race ideology transcends distinctions in governmental structures and philosophies—all in the service of White supremacy. Cuba and Puerto Rico are useful contexts from which to draw a comparison to the United States because all three were slaveholding societies with long legacies of anti-Black bias. In addition, Cuba and Puerto Rico each highlight different aspects of the multiracial discourse now beginning to manifest itself in the United States. The Cuban context highlights the manner in which the colorblind abolition of racial classifications in turn hinders the construction of an adequate civil rights enforcement structure and laws. The Puerto Rican context highlights the ways in which the Latin American race ideology focus on fluid racial categories impedes the enforcement and use of even the most elaborate civil rights structure.

## B. The Cuban Context

*Juntos pero no revueltos; cada cosa en su lugar!*

—Cuban adage<sup>231</sup>

Extreme racial stratification and de facto racial segregation existed in Cuba prior to the Socialist Revolution in 1959,<sup>232</sup> and had characterized the island's social structure as a Spanish colony.<sup>233</sup> On

<sup>230</sup> See Kevin R. Johnson, *Puerto Rico, Puerto Ricans and LatCrit Theory: Commonalities and Differences Between Latina/o Experiences*, 6 MICH. J. RACE & L. 107, 107–09 (2000) (stressing the importance of acknowledging and researching the salience of positional distinctions among Latin American nationals and immigrants).

<sup>231</sup> MOORE, *supra* note 23, at 22 (“Together but not mixed up, for everything has its place!”—a Cuban adage regarding race (translation mine)).

<sup>232</sup> Cuban census data and research compelled the following description of Cuba in the 1950s:

In the main Afro-Cubans occupied the lower end of the socio-economic order. Almost 30 percent of the population of color over twenty years of age was illiterate. Blacks tended to constitute a majority in the crowded tenement dwellings of Havana. They suffered greater job insecurity, more unemployment/underemployment, poorer health care, and constituted a proportionally larger part of the prison population. They generally earned lower wages than whites, even in the same industries. Afro-Cubans were subjected to systematic discrimination, barred from hotels, resorts, clubs, and restaurants.

LOUIS A. PÉREZ, JR., *CUBA: BETWEEN REFORM AND REVOLUTION* 307 (2d ed., 1995).

<sup>233</sup> See Philip A. Howard, *Creolization and Integration: The Development of a Political Culture Among the Pan-Afro-Cuban Benevolent Societies, 1878–1895*, in *CROSSING BOUNDARIES: COMPARATIVE HISTORY OF BLACK PEOPLE IN DIASPORA* 134, 136, 150 (Darlene Clark Hine & Jacqueline McLeod eds., 1999) (describing the colonial caste system that existed in Cuba and the

March 22, 1959, the Castro government officially ended legal racial discrimination in Cuba by outlawing Whites-only beaches and clubs.<sup>234</sup> Castro announced that “[a] Cuban is simply someone who belongs to no race in particular”;<sup>235</sup> nonetheless, each successive census continued to use racial classifications,<sup>236</sup> but dissemination of the racial census data was often withheld in order to deflect public focus on race.<sup>237</sup> The Revolution purportedly ended racial problems in Cuba by fiat—that is, by ordering the termination of references to persons by race and by decreeing that all Cubans are “simply” members of the “human” race.

The government subsequently instituted a number of legal provisions. When the government amended the Cuban constitution in 1976 to align it with the socialist outlook, it maintained the racial equality provisions of the former (1940) version,<sup>238</sup> but added both a commitment to educate the public on the equality principle<sup>239</sup> as well as provisions proscribing racial discrimination in general regarding equal pay, equal education, housing, public accommodations, and promotion within the hierarchy of the armed forces, and other public employment sectors.<sup>240</sup> The current version, enacted in 1992, has maintained these broader provisions.<sup>241</sup> While citizens have the right to use the constitutional provision as a private cause of action, few if any actual cases have been filed seeking redress for a complaint of racial discrimination under either the 1992 constitution now in force or under the parallel provisions of the 1976 and 1940 constitutions.<sup>242</sup>

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unsuccessful attempts of Afro-Cubans to judicially desegregate the island’s public accommodations in 1885 and 1888).

<sup>234</sup> See DOMÍNGUEZ, *supra* note 171, at 225.

<sup>235</sup> MOORE, *supra* note 23, at 27 (quoting Castro’s unprecedented antiracist public speech). Castro was actually using a phrase coined by national icon José Martí, which “thereafter became the slogan of the Revolution concerning race relations.” *Id.* at 26.

<sup>236</sup> See GOVER & DOMSCHKE, *supra* note 45, at 144–47. One possible explanation for the government’s continued collection of racial census data in a race-less society may be the desire to monitor the success of social reforms aimed at diminishing racial disparities. The simultaneous desire to discourage a public focus on race may account for the sporadic release of the census racial data.

<sup>237</sup> The Cuban census bureau has on file census forms from census years 1970 and 1981, both of which contained Race/Color categories. See *id.* However, Cuban authorities have refused to release the racial statistics. MOORE, *supra* note 23, at 364.

<sup>238</sup> See CONSTITUCIÓN tit. IV, sec. 1, art. 20 (1940) (Cuba), translated in CONSTITUTION OF THE REPUBLIC OF CUBA 10 (Cuban Democratic Judiciary ed., 1965).

<sup>239</sup> See CONSTITUCIÓN ch. V, arts. 40–41 (1976) (Cuba), translated in CONSTITUTION OF THE REPUBLIC OF CUBA 13 (Ctr. for Cuban Studies ed., 1976).

<sup>240</sup> See *id.* art. 42, translated in CONSTITUTION OF THE REPUBLIC OF CUBA, *supra* note 239, at 14.

<sup>241</sup> See CONSTITUCIÓN ch. VI, arts. 42–43 (1992) (Cuba), translated in Inter-Univ. Assocs., Inc., *Republic of Cuba*, in 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 205.

<sup>242</sup> EVENSON, *supra* note 203, at 98, 112.

Similarly, other existing legal provisions—such as the labor law prohibition against employment discrimination,<sup>243</sup> and the criminal code provision that specifically prohibits the act, promotion, or incitement of discrimination, or other interference with the enjoyment of the right of equality<sup>244</sup>—are rarely invoked to redress racial discrimination complaints.<sup>245</sup> What is particularly striking about the absence of discrimination claims pursuant to the criminal code is that, unlike the context of civil litigation, the financial resources of the plaintiff are immaterial to the decision to bring a case: the government prosecutors are charged with “ensuring that the Constitution, the laws, and other legal regulations are strictly obeyed by state agencies, economic and social entities, and citizens.”<sup>246</sup> Furthermore, complainants need not rely on police officers’ reporting activity for enforcement, because Cuban citizens can bring complaints directly to the Department of Public Attention, and request investigation regarding the violation of their legal rights.<sup>247</sup> In the employment context, discrimination claims can be brought before labor councils, which “constitute a non-judicial forum for resolving disputes between workers and management.”<sup>248</sup> If the labor council is unable to resolve the claim to the satisfaction of the employee, that employee may appeal to the formal court system.<sup>249</sup>

Despite the existence of multiple venues for administering complaints of discrimination, few cases, if any, are brought regarding race discrimination. While the entire Latin American region is character-

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<sup>243</sup> CÓDIGO DE TRABAJO [LABOR CODE] art. 3(b) (Cuba), available at <http://natlex.ilo.org/txt/S84CUB01.htm>.

<sup>244</sup> CÓDIGO PENAL [CRIMINAL CODE] art. 295 (Cuba), available at [http://cubapolidata.com/gpc/gpc\\_codigo\\_penal\\_de\\_cuba.html](http://cubapolidata.com/gpc/gpc_codigo_penal_de_cuba.html) (last visited Apr. 16, 2002). The Criminal Code sanctions an act of racial discrimination with six months to two years of imprisonment or a fine. “The same sanction is imposed against anyone who disseminates ideas based in racial superiority or hatred or commits acts of violence or incites commission of such acts.” EVENSON, *supra* note 203, at 111–12.

<sup>245</sup> Evenson elaborates:

There is no information available regarding any individual case of race discrimination or enforcement of these laws. Unlike gender cases, where individual cases of job discrimination have been prosecuted or reported in the press, often leading to redress of the discriminatory conduct, complaints based on race have not been reported. If such incidents take place at all, they are probably rarer than cases of work place discrimination against women.

EVENSON, *supra* note 203, at 112.

<sup>246</sup> Angel Fernández-Rubio Legrá, Cuba: The Courts and the Office of the Attorney General. The Legislative System. The Legal Profession. Written Law Sources 6 (July 17–22, 1999) (presented at the Ninety-second Annual Meeting and Conference, American Association of Law Libraries) (unpublished manuscript, on file with author).

<sup>247</sup> See EVENSON, *supra* note 203, at 81.

<sup>248</sup> MARJORIE S. ZATZ, PRODUCING LEGALITY: LAW AND SOCIALISM IN CUBA 185 (1994).

<sup>249</sup> *Id.* at 186. Plaintiffs in labor councils or in court can represent themselves or be represented by lawyers, union officials, coworkers, and even family members. *Id.*

ized by low rates of race-discrimination case-filing, the low filing rate in Cuba is particularly troubling because Cubans are especially knowledgeable about the law. The socialist government's tradition of lay judges and direct community activism results in a much more well-informed citizenry than that which exists in the rest of Latin America or the United States.<sup>250</sup>

Furthermore, despite the existence of parallel systems for redressing complaints of gender and race discrimination in Cuba, only gender discrimination claims are brought publicly.<sup>251</sup> The contrast between the existence of gender discrimination claims and the absence of race discrimination claims is especially stark when one considers that the socialist government's abolition of the private practice of law for the creation of a system of law-collective attorneys has made public access to legal counsel relatively easy and inexpensive.<sup>252</sup> Moreover, a large number of the law-collective lawyers are White women, and a large percentage of law students are White women.<sup>253</sup> While White women have encountered hardships in making the socialist revolution responsive to gender issues, they have fared better as a group than both Afro-Cuban women and men.<sup>254</sup> Thus, despite the fact that the Cuban civil rights structure has many parallels to that of the United States, and in some respects more expansively embraces the United Nations Convention on the Discrimination of Apartheid

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<sup>250</sup> *Id.* at 163–84 (describing Cuban lay judges as “bidirectional transmitters of legality”).

<sup>251</sup> See EVENSON, *supra* note 203, at 98, 112.

<sup>252</sup> See Raymond J. Michalowski, *Between Citizens and the Socialist State: The Negotiation of Legal Practice in Socialist Cuba*, 29 LAW & SOC'Y REV. 65, 74–75 (1995) (describing the 1973 abolition of private law practice and its replacement with the “*bufetes colectivos*” system of self-financed law collectives for the purpose of ensuring universal public access to legal services).

<sup>253</sup> Commentators have observed the preponderance of women (without identifying them by race) in legal practice and in law schools because of their better scholarly records. See *id.* at 81. But it should be noted that the racial hierarchy that exists in elementary, intermediate, and high-school placement will logically influence the race of the women who predominate in the legal field—namely White women. See Fernandez, *supra* note 46, at 176.

<sup>254</sup> See LUMSDEN, *supra* note 189, at 186 (“[W]omen . . . , as a group, may have benefited more from the revolution than blacks.”). Discussions of Cuban women are often made in a race-neutral fashion that ignores the intersectional realities of Afro-Cuban women's lives. See Debra Evenson, *Women's Equality in Cuba: What Difference Does a Revolution Make?*, 4 LAW & INEQ. 295 (1986) (discussing the evolving status of women generally in Cuba). But an examination of the impoverished status of Afro-Cuban women that has caused them disproportionately to turn to prostitution as a means of survival makes it clear that the benefits women have obtained from the revolution are more accurately portrayed as White women's benefits. See Georgina Herrera, *Poetry, Prostitution, and Gender Esteem*, in AFRO-CUBAN VOICES, *supra* note 85, at 118, 123 (describing the disproportionate economic pressure on Afro-Cuban women to enter into prostitution).

and All Forms of Racism,<sup>255</sup> race discrimination claims are simply not brought before the legal system for resolution.

When government officials address the question of race discrimination in Cuba, they have traditionally described Cuban society as free of such bias because of the cultural focus on national identity rather than on racial identity.<sup>256</sup> In fact, Cuba's cultural focus on the "Cubanness" of its citizens was inadvertently transformed into an ideology that perceives discourse about race matters to be a threat to the government's nationalist agenda.<sup>257</sup> After assuming power, the Castro government even discouraged the formation of Black solidarity organizations.<sup>258</sup> The government confiscated materials on race in Cuba, warning that such writings cause division among people.<sup>259</sup> The government also took firm measures against persons who wore African-inspired apparel or hairstyles because they were "acts of 'racial provocation' leading to the division of the Cuban people."<sup>260</sup> In effect, despite the government's stated commitment to racial equality, Cuba's formalistic abolition of race translated into a prohibition against the possibility of subordinated groups identifying along race lines for purposes of empowerment.

Concurrent with the abolition of formal references to race, actual racial stereotyping and stratification continued unabated, as evinced in manifold social settings. For example, in a 1994 ethnographic study,<sup>261</sup> seventy-five percent of Whites and Mulattos surveyed en-

<sup>255</sup> See, e.g., EVENSON, *supra* note 203, at 111–12.

<sup>256</sup> See Hernández, *supra* note 37, at 1158 n.147 (citing a speech to the United Nations Human Rights Commission by then-Cuban Ambassador to the United Nations, Carlos Lage, in which he asserted that racial discrimination does not exist in Cuba).

<sup>257</sup> David Booth describes this phenomenon:

Since, as it has been defined, racial discrimination has been abolished, it is easy to accuse those who insist that there is still a color problem in Cuba of gratuitously creating division in the ranks of the people, of being inverted racists, and even of acting as the conscious or 'unconscious' agents of imperialism.

Booth, *supra* note 156, at 171; see also Enid Logan, *El Apóstol y el Comandante en Jefe: Dialectics of Racial Discourse and Racial Practice in Cuba, 1890–1999*, in 6 RESEARCH IN POLITICS AND SOCIETY: THE GLOBAL COLOR LINE: RACIAL AND ETHNIC INEQUALITY AND STRUGGLE FROM A GLOBAL PERSPECTIVE 195, 196–99 (Pinar Batur-VanderLippe & Joe Feagin eds., 1999) (describing the politics of unity as subsuming racial identity into national identity).

<sup>258</sup> Some authors have suggested that the socialist government overtly stamped out the incipient Black Power movement. See, e.g., HUGH THOMAS, *CUBA: THE PURSUIT OF FREEDOM* 888 n.51 (1971). But other observers suggest that the reality was less dramatic in that efforts to generate debate on racial issues were simply rebuffed. See Booth, *supra* note 156, at 171–72.

<sup>259</sup> See, e.g., CLYTUS, *supra* note 203, at 76.

<sup>260</sup> MOORE, *supra* note 23, at 259. There was even a criminal sanction for performing African dances in public without government permission, a vestige of Spanish colonial rule. See EVENSON, *supra* note 203, at 110.

<sup>261</sup> See Gayle McGarrity, *Cubans in Jamaica: A Previously Neglected Segment of the Cuban Diaspora*, 42 CARIBBEAN Q. 55, 64–65 (1996). Although the survey pool was geographically

dorsed the practice of seeking a higher societal status by marrying someone who is lighter-skinned.<sup>262</sup> As a result, these same persons surveyed indicated that they would disapprove of their children participating in intimate relationships with persons who were darker than themselves.<sup>263</sup> The study also revealed that seventy percent of Whites and Mulattos interviewed felt that Black Cubans engaged in delinquent behavior and rarely worked.<sup>264</sup>

Similarly, a cultural anthropologist conducting research in Cuba in the early 1980s noted that Whites attributed Black Cuban poverty to Black culture.<sup>265</sup> The problematic aspects of Black culture, as described by the White Cubans questioned, included lack of importance placed on education, propensity for violence and crime, and lack of discipline.<sup>266</sup> For instance, it is still customary in Cuba for notices of robbery to be greeted with the comment, "It was probably a Negro."<sup>267</sup> Complaints about the economic crisis are characterized as akin to living like "Negroes in our own country,"<sup>268</sup> a stereotype exacerbated by the fact that Blacks still disproportionately inhabit the areas with the worst housing conditions.<sup>269</sup>

Social or romantic interactions are also bifurcated across a color hierarchy in which the few dark-skinned Blacks and Whites who choose to date cross-racially are subject to prejudicial reaction and commentary.<sup>270</sup> In fact, among interracial couples who have spent time together in both Cuba and the United States, many report more harassment from White people *in Cuba* than from Whites in the United States.<sup>271</sup> Pervasive racial stereotypes also continue to exist along a color hierarchy in which Blacks are portrayed as "good" mainly for sexual potency because "[t]hey are a shameless race."<sup>272</sup> This racial stereotype of Black sexuality accounts for the predominance of Afro-Cubans within the population of prostitutes, a population that foreign tourism has revitalized.<sup>273</sup> In short, the abolition of "race" was not an effective cure for racial bias and hierarchy because race continues to be a determinant of social status.

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limited to six Havana neighborhoods, and "there are some methodological problems over the often problematic definition *mulato, negro* and *blanco*," *id.* at 64, the results are telling of broader Cuban attitudes towards race.

<sup>262</sup> See *id.* at 64–65.

<sup>263</sup> See *id.* at 65.

<sup>264</sup> See *id.*

<sup>265</sup> See *id.* at 66–67.

<sup>266</sup> See *id.* at 67.

<sup>267</sup> de la Fuente, *supra* note 203, at 161–62.

<sup>268</sup> Johanna McGeary & Cathy Booth, *Cuba Alone*, TIME, Dec. 6, 1993, at 42, 54.

<sup>269</sup> See Fernandez, *supra* note 46, at 45–46.

<sup>270</sup> See *id.* at 190–222.

<sup>271</sup> See McGarrity & Cárdenas, *supra* note 73, at 102.

<sup>272</sup> LUMSDEN, *supra* note 189, at 148.

<sup>273</sup> See Logan, *supra* note 257, at 208–09.

An examination of economic and social indicators also indicates that racial disparities continue to exist in Cuba.<sup>274</sup> For instance, despite universal health care coverage, health and medical gaps continue to exist between Whites and Afro-Cubans in Cuba, as indicated by the higher vulnerability of Afro-Cubans to the parasitic diseases of the poor.<sup>275</sup> Afro-Cubans are also subject to greater police scrutiny and harassment<sup>276</sup> and are over-represented in prosecuted crimes.<sup>277</sup> This greater level of police repression targeted against Afro-Cubans likely accounts for a Cuban prison population that is estimated to be seventy percent Black.<sup>278</sup> With respect to education, Afro-Cubans are not proportionately represented in university programs.<sup>279</sup> A color hierarchy in education is apparent in the greater representation of Whites in institutions of higher education, while mixed-race Mulattos and Mestizos predominate in technical and vocational schools and darker-skinned Afro-Cubans dominate in the junior high schools.<sup>280</sup>

Perhaps most telling is that despite the large demographic proportion of Blacks in socialist Cuba, they are not represented in the Politburo of the Communist Party—the most privileged class of today's Cuban society.<sup>281</sup> Indeed, in 1986, the Third Congress of the Cuban Communist Party called for a more racially equal representation in the government and party leadership.<sup>282</sup> However, after the 1991 Meeting of the Fourth Congress of the Cuban Communist Party, Afro-Cubans continued to make up less than fifteen percent of the

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<sup>274</sup> It should be noted that a racial hierarchy has long existed in Cuba. See VERENA MARTINEZ-ALIER, *MARRIAGE, CLASS AND COLOR IN NINETEENTH CENTURY CUBA: A STUDY OF RACIAL ATTITUDES AND SEXUAL VALUES IN A SLAVE SOCIETY* 91–99 (1974); ROUT, *supra* note 34, at 301–06; ELIZABETH SUTHERLAND, *THE YOUNGEST REVOLUTION* 149 (1969); de la Fuente, *supra* note 203, at 144, 155; de la Fuente, *supra* note 27; Aline Helg, *Race and Black Mobilization in Colonial and Early Independent Cuba: A Comparative Perspective*, 44 *ETHNOHISTORY* 53, 64–65 (1997); Louis A. Pérez, Jr., *Politics, Peasants, and People of Color: The 1912 "Race War" in Cuba Reconsidered*, 66 *HISP. AM. HIST. REV.* 509 (1986); see also STEPAN, *supra* note 97, at 174 (noting that although some commentators attribute Cuban segregation policies to the work of the U.S. occupation forces, Cuba had a long history of racism that complemented the race-based intervention of the United States).

<sup>275</sup> Jorge Domínguez, *Cuba Since 1959*, in *CUBA: A SHORT HISTORY* 95, 119 (Leslie Bethell ed., 1993).

<sup>276</sup> See Jody Benjamin, *Police Racism Flourishes in Castro's 'Workers' Paradise'*, *L.A. DAILY J.*, May 21, 1992, at 6 (describing the African-American journalist's consistent harassment by Cuban police and the similar experience of other Afro-Cuban residents whom he interviewed).

<sup>277</sup> See de la Fuente, *supra* note 203, at 161–62.

<sup>278</sup> See McGarrity & Cárdenas, *supra* note 73, at 101.

<sup>279</sup> EVENSON, *supra* note 203, at 110. *But see id.* at 111 (noting the "increasing numbers of blacks and mulattos enter[ing] university and the professions").

<sup>280</sup> See Fernandez, *supra* note 46, at 176.

<sup>281</sup> See EVENSON, *supra* note 203, at 112–13; cf. LUMSDEN, *supra* note 189, at 149 (noting the general dissociation between homosexuals and elite government ranks).

<sup>282</sup> See Fidel Castro, *Renewal or Death*, *BLACK SCHOLAR*, Winter 1989, at 5, 6–7.



party members elevated to the Political Bureau.<sup>283</sup> Thereafter, in 1997, the Fifth Congress of the Cuban Communist Party acknowledged that the political leadership still notably lacked Afro-Cubans.<sup>284</sup> In fact, the proportion of Afro-Cubans in high positions has diminished from the already-low levels of the 1960s and 1970s.<sup>285</sup> The under-representation of Afro-Cubans similarly extends to other important agencies of the government, including the military, the Ministry of Interior, the state apparatus, and mass organizations.<sup>286</sup> Furthermore, Cuba has appointed mostly White ambassadors as its representatives to predominantly Black countries.<sup>287</sup> The longstanding pattern of exclusion from the ranks of socialist government leadership carries far-reaching implications, given the connection between the distribution of economic privileges and services and one's status in the government.<sup>288</sup> For example, soon after the installation of the socialist government, high-ranking government officials were allocated residences in the abandoned homes of wealthy Cuban *émigrés*.<sup>289</sup> Today, it is believed that government leaders are granted their requests for larger housing units and housing relocation more quickly than other members of the society.<sup>290</sup> Mona Rosendahl, a Swedish social anthropologist who recently conducted fieldwork in Cuba, has also noted that "[w]hereas political leaders at the municipal level [who are popularly elected] have few privileges, those at the national level [who are specially appointed] live rather privileged and secluded lives."<sup>291</sup>

Currently, the only dynamic sector of the Cuban economy—tourism—is developed and managed in a racially imbalanced manner. Well-paying jobs in the tourist industry and within foreign enterprises,

283 See EVENSON, *supra* note 203, at 112–13.

284 See de la Fuente, *supra* note 203, at 63.

285 See McGarrity & Cárdenas, *supra* note 73, at 97.

286 See *id.* at 97–98.

287 See *id.*

288 The Cuban government administers a controlled system for the distribution of consumer goods entitled "*Los Estímulos de la Emulación Socialista*" (economic incentive award program) whereby government employers award consumer goods at reduced costs to model workers. See MONA ROSENDAHL, *INSIDE THE REVOLUTION: EVERYDAY LIFE IN SOCIALIST CUBA* 37–38 (1997). The economic incentives program distributes goods like electric fans, refrigerators, and television sets, and privileges like housing relocation permits and foreign travel permits. Conflicts often arise over who is a model worker in the disbursement of merit points. Although selection of a model worker is presumably based on workplace performance, commentators equate the selection process with a political favoritism that is itself imbued with racial bias. See, e.g., Stuart Grider, *A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation—A New Form of Property*, 27 U. MIAMI INTER-AM. L. REV. 453, 474 (1996) (describing the distribution of newly built housing units in the 1970s based on political favoritism disguised as workplace performance).

289 See Fernandez, *supra* note 46, at 80.

290 See ROSENDAHL, *supra* note 288, at 124 (presenting the narrative of a Cuban woman who had sought housing relocation for a long time and was convinced that government officials did not experience such delays).

291 *Id.* at 165.

both providing prized access to valued foreign currency, are reserved for persons "*de buena apariencia*" (good-looking)—commonly understood as White Cubans.<sup>292</sup> The impact of employment within the tourist industry is profound because it also provides access to scarce foods and consumer goods (like soap) that are extremely difficult to locate within the strained government rationing system.<sup>293</sup> The ability to earn extra income with foreign currency tips from tourists enables these lucky Cubans to shop for scarce foods and consumer goods within the better stocked U.S. dollar-only shops and restaurants.<sup>294</sup> Therefore, exclusion from employment in the tourist sector restricts Afro-Cubans to low-ranking government positions for which they are paid in the undervalued domestic currency.<sup>295</sup> Moreover, the constraint on Afro-Cuban access to foreign currency also operates as a rationalization of race-based exclusion policies at restaurants, nightclubs, and other tourist establishments (which only accept payment in foreign currency) because all Afro-Cubans are automatically presumed not to have the preferred currency for payment.<sup>296</sup> In fact, middle-class Afro-Cubans today note that they are visibly treated poorly by restaurant staff.<sup>297</sup> The racially skewed development of the tourist industry is diminishing the ability of Afro-Cubans to improve their socioeconomic situation, which in turn helps to perpetuate the equation of Blackness with low social and economic status. Thus, Cuba is structuring one of its most lucrative economic fields in racist ways despite the government's formal abolition of race.

Afro-Cubans' limited access to tourism's profitable foreign currency economy is concentrated in the entertainment industry.<sup>298</sup> Entertainment and sports are economic contexts that traditionally have been racially defined as the appropriate venues for Black achievement both in Latin America and the United States.<sup>299</sup> Thus, the prominent

<sup>292</sup> See McGarrity & Cárdenas, *supra* note 73, at 98–100.

<sup>293</sup> *Id.* at 99–100.

<sup>294</sup> See Alma Guillermoprieto, *A Visit to Havana*, N.Y. REV. BOOKS, Mar. 26, 1998, at 19, 20–23.

<sup>295</sup> The contemporary dynamic of a racially restrictive dual-currency economy replicates the multiple-currency economy of nineteenth-century Cuba that harmed Afro-Cubans after the War of Independence in 1898. See HELG, *supra* note 171, at 100–01 (describing how Afro-Cuban laborers were paid pre-war wages in depreciated Spanish silver that could not match the cost of goods graduated to the value of the U.S. dollar in post-war Cuba).

<sup>296</sup> See McGarrity & Cárdenas, *supra* note 73, at 99.

<sup>297</sup> See Guillermoprieto, *supra* note 294, at 22.

<sup>298</sup> See McGarrity & Cárdenas, *supra* note 73, at 99–100 (describing the growth of the tourist sector with its access to valued foreign currency as racially skewed and limited to the following jobs for Afro-Cubans: entertainers, performers, artists, artisans, and athletes).

<sup>299</sup> See, e.g., Flagg, *supra* note 6, at 980 n.100 (discussing the United States's "cultural stereotype" that assumes that blacks are fit only for certain roles in society (such as musician or athlete), but not others (such as doctor or lawyer)); Logan, *supra* note 257, at 208

promotion of Afro-Cuban music, dance, and religion as part of the burgeoning foreign tourist trade should not be viewed as Cuba's progressive celebration of Afro-Cuban culture, but rather as another use of Black entertainers for economic profit and the consumption of a White audience.<sup>300</sup> This exploitation is corroborated by the present practices of police and state security officers, who continue to harass Afro-Cubans for organizing African-based cultural activities outside the context of tourist folklore shows.<sup>301</sup>

Indeed, the special access of Mulattas (mixed-race women of partial African ancestry) to the foreign currency economy highlights the racially skewed construction of this industry. Mulatta showgirls have a key role in the promotion of the tourism industry, playing on racial and gender stereotypes about their exaggerated promiscuity, wantonness, and sensuality.<sup>302</sup> Widely promoted cabaret shows feature scantily clad Mulattas who dance provocatively for visitors, prompting foreign tourists to visit Cuba as a location for a cheap "sex tour" where prostitutes and "wanton" Mulatta women can be easily groped at dollar-only nightclubs.<sup>303</sup> Current trends are equally alarming: Cuba's growing economic dependence on tourism is likely to only encourage further exploitation of Mulattas as commodified sex objects.<sup>304</sup> In fact, the resurgence of a tourist-driven prostitution industry has already intensified the racial stereotype of Mulattas as sexual objects.<sup>305</sup> This trend vividly demonstrates how gender stratification can continue to combine with racism to specifically subordinate women of color, even in states where "race" does not exist.

Cuba's tangible improvements in health and education, which have benefited Afro-Cubans, generally can be attributed to the government's redistribution programs, which are designed for all Cubans in an effort to destroy pre-revolution class and political structures.<sup>306</sup> Although Afro-Cubans have benefited from the redistribution programs in education, public employment, housing and, primarily, na-

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(describing racial stereotypes of Afro-Cubans as naturally excelling at music, dance, and sports).

<sup>300</sup> See Logan, *supra* note 257, at 208 (observing the commodification of Black bodies and culture through the tourist industry).

<sup>301</sup> See McGarrity & Cárdenas, *supra* note 73, at 102.

<sup>302</sup> For a more in-depth discussion of the portrayal of Mulattas in Cuban popular culture, see generally Elizabeth Ruf, *¡Qué Linda es Cuba! Issues of Gender, Color, and Nationalism in Cuba's Tropicana Nightclub Performance*, DRAMA REV., Spring 1997, at 86.

<sup>303</sup> See Parsa, *supra* note 203, at 40 (describing Cuba's growing popularity as a "sex tour" destination).

<sup>304</sup> See *id.* at 41 ("In 1996, tourism surpassed sugar production as Cuba's largest source of hard currency for the first time since the revolution.").

<sup>305</sup> See Frank Bruni, *Island of Forbidden Fruits*, N.Y. TIMES, Aug. 8, 1999, § 5, at 15 (describing Cuba as an attraction for tourists seeking "sexy, cash-strapped young women").

<sup>306</sup> See Hernández, *supra* note 37, at 1138-42.

tionalized health care,<sup>307</sup> the continuing racial disparities in socioeconomic status demonstrate the persistence of both class structures and the biased use of race.<sup>308</sup> While the redistribution programs have significantly altered the poor standard of living under which many Cubans historically suffered, the colorblind nature of the programs have made them an indirect, incomplete remedy for racial inequality.<sup>309</sup>

Perhaps most perniciously, the government's formal position, which asserts that race (and class) distinctions have been renounced—when, in fact, they continue to virulently operate through both public and private sectors of the society—impairs the ability of Afro-Cubans to recognize, name, and address systemic racism through legal or other means.<sup>310</sup> Because the government denies the existence of class-based economic disparities, Afro-Cubans cannot assert a class-based systemic harm. At the same time, the public ban against references to race leaves Afro-Cubans without the ability to identify another locus of their oppression, in that they are unable to use race to demonstrate the existence of economic and social disparities that correlate to race. The inability to name the source of racialized harm relegates Afro-Cubans to explaining their persistently low socioeconomic status in terms of individual misfortune and/or lack of ability. Such explanations can never address the systemic nature of racism. Thus, the net effect of the formal ban on race is the suppression of antiracist color-consciousness and the perpetuation of supremacist color-consciousness.

The removal of race-based (and class-based) explanations for the continued poor condition of Afro-Cubans consigns Afro-Cubans to a demoralizing and simplistic explanation for their status.<sup>311</sup> The dominant pejorative views regarding Afro-Cuban culture also dissuade Afro-Cubans from organizing around racial identity to challenge racial subordination in today's Cuba, thus leaving substantially intact the pre-Socialist racial caste system. Furthermore, the purported non-existence of racial barriers to socioeconomic opportunity encourages

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<sup>307</sup> *Id.*

<sup>308</sup> See *id.* at 1142–46 (summarizing racial disparities in social and economic indicators).

<sup>309</sup> A race-based analysis is not interchangeable with a class-based analysis, because race and class, like sex and race, are still intimately tied together to maintain a system of White, male privilege in which Afro-Cubans constitute the lowest-paid and lowest-ranked laborers. Cf. Evenson, *supra* note 254, at 296–304 (describing the challenges of overcoming gender bias even in a socialist system).

<sup>310</sup> See Booth, *supra* note 156, at 171–72 (concluding that the “abolition of race” has inhibited the formation of social justice movements that could more effectively eradicate racism).

<sup>311</sup> See Pedro Pérez Sarduy & Jean Stubbs, *Race and Politics of Memory in Contemporary Black Cuban Consciousness*, Introduction to AFRO-CUBAN VOICES, *supra* note 85, at 1, 17.

individual Afro-Cubans to distance themselves from a Black racial identity associated with low economic status and uncivilized culture.<sup>312</sup> Thus, the bitter irony of banning race to discourage divisions amongst the populace lies in the continued social dissociation, specifically of Mulattos, from other persons of African ancestry. In effect, this dissociation provides Afro-Cubans additional license and incentive to denigrate Black identity each time they downplay their African identity.<sup>313</sup> Thus, few Afro-Cubans are compelled to use existing legal remedies for racial discrimination for fear of public association with Blackness.

The pejorative view of Blackness also discourages demands for additional legislation to make the existing legal structure more effective. And the few Afro-Cubans who do speak out on issues of race are in turn labeled racists because of the ideological equivalence drawn between discussing the taboo subject of race and an act of discrimination itself.<sup>314</sup> Therefore, even though Cubans have long been discussing the possibilities of promoting racial justice with race-based affirmative action programs,<sup>315</sup> no concrete actions have yet been taken to effectuate such programs. Moreover, some Afro-Cubans have expressed great ambivalence toward such an initiative.<sup>316</sup> The abolition of racial classifications has neither made Cuba a racial democracy nor allowed it to effectively pursue racial justice through civil rights laws. In contrast to Cuba, Puerto Rico is a Latin American context with an extensive civil rights structure, in part because of its unique political status as a United States commonwealth.

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<sup>312</sup> See Elvira Cervera, *Todo en Sepia: An All Black Theater Project*, in *AFRO-CUBAN VOICES*, *supra* note 85, at 97, 98.

<sup>313</sup> See Guillermina Ramos Cruz, *Grupo Antillano and the Marginalization of Black Artists*, in *AFRO-CUBAN VOICES*, *supra* note 85, at 147, 152.

<sup>314</sup> Cf. Logan, *supra* note 257, at 206–07 (arguing that race is taboo and that “the lack of critique concerning race in Cuba has lent utopic and mythical proportions to popular notions of contemporary race relations”). Furthermore, Afro-Cuban dissidents assert that the Cuban government uses the revolution to stifle Black dissent. See Tom Carter, *Cuban Racial Equality Termed a Myth: White Minority Has Most Power*, *WASH. TIMES*, Oct. 24, 2000, at A12 (“The Cuban government always reminds us that ‘We gave you this revolution.’ Behind this is racism.”). To the extent that the government may use totalitarian force to silence racial justice movements, or inhibit the filing of race discrimination claims, such force would be yet another indicator of how Cuba’s Latin American race ideology equates the assertion of racial difference as incompatible with national identity.

<sup>315</sup> See Castro, *supra* note 282, at 6; de la Fuente, *supra* note 203, at 161. The government’s contemplation of a racially conscious affirmative action program may be interpreted as recognition that the government’s race-less project is limited in its ability to eradicate racism. In fact, the 1986 “Rectification Campaign” was an effort to correct past policy efforts and “recognize some of the shortcomings of the revolution’s attempts to build a socialist society.” Fernandez, *supra* note 46, at 137.

<sup>316</sup> See Gisela Arandía Covarrubia, *A Panorama of AfroCuban Culture and History: One Way to Strengthen Nationality*, at <http://afrocubaweb.com/arandia-art.htm> (last visited Jan. 22, 2002) (expressing concern that a quota system or method of numerical participation could produce adverse reactions in the Cuban population).

## C. The Puerto Rican Context

*Si no tiene dinga tiene mandinga.*

—Puerto Rican adage<sup>317</sup>

Puerto Rico, like Cuba and the rest of Latin America, has a long history of racial stratification stemming from its use of chattel slavery.<sup>318</sup> Puerto Rico's Spanish settlers extensively relied on chattel slave labor after having decimated the indigenous population in the early 1500s.<sup>319</sup> As a Spanish colony, Puerto Rico did not abolish slavery until 1873.<sup>320</sup> Thereafter, the colonial racial hierarchy continued as a privileged White elite, an intermediate "buffer" class of persons of African ancestry with physically apparent European ancestry and a sizeable population of disempowered darker-skinned African descendants.<sup>321</sup> Indeed, when U.S. troops invaded Puerto Rico during the Spanish-American War of 1898, they were greeted by Puerto Ricans of African descent with U.S. flags pinned to their clothing.<sup>322</sup> But after becoming subject to U.S. governmental authority after the Spanish-American War, Puerto Rican society continued to be racially stratified—and is so today.<sup>323</sup> In fact, Puerto Rico's legislature had enacted a variety of measures discussed below to address race discrimination long before the U.S. federal government enacted the Civil Rights Act of 1964.

The Puerto Rican legal system's most popularly referenced vehicle for combating race discrimination is embodied in Law 100 of its Labor Code.<sup>324</sup> Enacted in 1959, Law 100 prohibits race, color, and

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<sup>317</sup> "If you don't have an ancestor from one African country then you certainly have an ancestor from some other African country" (translation mine). See Eneid Routh-Gomez, *So, Are We Racists???? A Conspiracy of Silence: Racism in Puerto Rico*, SAN JUAN, Dec./Jan. 1996, at 54, 55 (describing the Puerto Rican saying which emphasizes the mixed-race nature of the entire Puerto Rican populace).

<sup>318</sup> Kinsbruner describes Puerto Rican race relations from a historical perspective: [W]hen it came to the daily lives of the people of color in Puerto Rico, there were indeed clear lines of demarcation between whites and non-whites, as indeed there were between the colored subcastes. People of color rarely became white during their lifetimes, and people of dark skin rarely overcame the racially imposed barriers to socioeconomic advancement during their lifetimes. This was the racial reality that faced people of color in their everyday lives, a reality that manifested some troubling similarities to that of the United States.

KINSBRUNER, *supra* note 35, at 32–33.

<sup>319</sup> See Jorge Duany, *Making Indians out of Blacks: The Revitalization of Taíno Identity in Contemporary Puerto Rico*, in *TAÍNO REVIVAL: CRITICAL PERSPECTIVES ON PUERTO RICAN IDENTITY AND CULTURAL POLITICS* 31, 32 (Gabriel Haslip-Viera ed., 1999).

<sup>320</sup> See Santiago-Valles, *supra* note 50, at 44.

<sup>321</sup> See *id.*

<sup>322</sup> See Samuel Betances, *The Prejudice of Having No Prejudice in Puerto Rico* (pt. 2), RICAN, Spring 1973, at 22, 33.

<sup>323</sup> See Santiago-Valles, *supra* note 50.

<sup>324</sup> 29 P.R. LAWS ANN. § 146 (Supp. 1998) (codifying as amended 1959 P.R. Laws 100).

social or national origin discrimination in the employment context, in addition to discrimination based on age, sex, social condition, political affiliation, and political or religious ideology.<sup>325</sup> Employers who discriminate are subject to double civil damages, imprisonment for a term ranging from thirty to ninety days as a misdemeanor conviction, and an order to reinstate a wrongfully discharged employee.<sup>326</sup> Although Law 100 preceded the U.S. Congress's enactment of the Civil Rights Act of 1964, few cases have been litigated for race discrimination pursuant to Law 100. In fact, an electronic database search of reported cases involving Law 100 since its enactment has turned up a paltry four cases alleging race or color discrimination.<sup>327</sup>

An examination of Puerto Rico's use of federal employment discrimination laws yielded similar results. A comprehensive survey of Equal Employment Opportunity Commission (EEOC) data from 1992 through 2000 reveals that Puerto Rico's number of race charge filings<sup>328</sup> consistently ranked amongst the lowest of U.S. territories and states.<sup>329</sup> The only other jurisdictions with comparably low numbers were the states of Maine, North Dakota, Rhode Island, Utah, and Vermont, all of which are racially homogeneous and smaller in population size than Puerto Rico.<sup>330</sup> The number of cases does not dramatically rise when the database search is expanded to encompass any local or federal cases alleging an act of race or color discrimination under any law.<sup>331</sup> Twenty-three cases in Puerto Rico were reported between January 1, 1945 and July 19, 2001.<sup>332</sup> Compared to the totals of the District of Columbia and all U.S. states, Puerto Rico ranks the lowest.<sup>333</sup> The number of race-related cases in U.S. jurisdic-

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<sup>325</sup> See *id.*

<sup>326</sup> See *id.*

<sup>327</sup> See *Rivera v. Walgreens de P.R.*, No. KLCE0100267, 2001 P.R. App. LEXIS 303 (Mar. 21, 2001); *Falu v. Autoridad Metropolitana de Autobuses*, No. KLAN9701013, 1997 P.R. App. LEXIS 30 (Dec. 22, 1997); *Nieves v. Alltrista Unimark, Inc.*, No. KLCE9500545, 1995 P.R. App. LEXIS 904 (Oct. 23, 1995); *Olmo v. Young & Rubicam of P.R., Inc.*, No. R-80-215, 1981 P.R. Sup. LEXIS 82 (Mar. 10, 1981).

<sup>328</sup> "Race charge filings" are the claims filed under Title VII of the Civil Rights Act alleging race-based discrimination. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, RACE-BASED CHARGES FY 1992-FY 2000, at <http://www.eeoc.gov/stats/race.html> (last modified Feb. 22, 2002).

<sup>329</sup> See *infra* Appendix A.

<sup>330</sup> In the 2000 census, Maine, North Dakota, Rhode Island, Utah, and Vermont reported the following percentages of non-Whites: Maine 3%; North Dakota 8%; Rhode Island 16%; Utah 11%; and Vermont 3%. See *infra* Appendix C. These percentages are significantly lower than Puerto Rico's reported 20%, *id.*, which is an overly conservative account of Puerto Rico's non-White population, as discussed *supra* Part I.A. In addition, Puerto Rico's total population of 3,808,610 in the year 2000, far exceeds that of Maine (1,274,923), North Dakota (642,200), Rhode Island (1,048,319), Utah (2,233,169), and Vermont (608,827). See *id.*

<sup>331</sup> See *infra* Appendix D.

<sup>332</sup> *Id.*

<sup>333</sup> See *id.*

tions ranged from the high of 1,339 in New York to the low of 280 in New Hampshire.<sup>334</sup> Another point of comparison that suggests a disinclination for filing race discrimination cases is the statistical database maintained by the Puerto Rico Department of Labor's Anti-Discrimination Unit. For the year 2000-2001, only sixty complaints of race discrimination were filed. In contrast, 358 gender discrimination complaints and 225 age discrimination complaints were filed.<sup>335</sup>

The other Puerto Rico laws that target race discrimination, the Puerto Rico Civil Rights Act<sup>336</sup> and the Puerto Rico Constitution,<sup>337</sup> are just as underenforced as Law 100. The Civil Rights Act bars discrimination in public places, businesses, transportation, and housing.<sup>338</sup> As a guiding principle, the Puerto Rico Constitution affirms the dignity and equality of human beings by asserting that the state cannot discriminate on the basis of race, color, national origin, sex, social condition, or political and religious ideology.<sup>339</sup> The civil rights group "*Liga Para el Progreso de la Gente de Color en Puerto Rico*" ["League for the Progress of People of Color in Puerto Rico"], which existed on the island at the time of the drafting of the 1952 Constitution, lobbied for the antidiscrimination provision because of concern regarding the treatment of non-Whites on the island.<sup>340</sup> Enacted in 1943, Puerto Rico's Civil Rights Act<sup>341</sup> was initially considered ineffective because it only established a criminal penalty.<sup>342</sup> A judicial opinion later inferred an additional civil action component,<sup>343</sup> which was then codified into law in 1960.<sup>344</sup> In addition, the Puerto Rico Criminal Code imposes a penalty of up to six months of imprisonment or a fine not exceeding five hundred dollars, for race-based refusal to provide access to public accommodations, employment, or to engage in real

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<sup>334</sup> See *id.*

<sup>335</sup> See E-mail from Nora Vargas, Civil Rights Attorney in Puerto Rico, to Tanya Hernández, Professor of Law, Rutgers University School of Law-Newark (Feb. 22, 2002, 17:21:09 EST) (on file with author). While seventy-six complaints of national origin discrimination were filed during the same time frame, they may very well represent overlapping claims with the race discrimination complaints. In my own review of race discrimination cases in Puerto Rico, I discovered that many cases were filed by non-Puerto Ricans who alleged concurrent claims of race discrimination and national origin discrimination. See, e.g., *Mandavilli v. Maldonado*, 38 F. Supp. 2d 180 (D.P.R. 1999) (three former professors of Indian, Colombian, and Peruvian descent who were denied tenure at a public university alleged discrimination based on race and national origin).

<sup>336</sup> 1 P.R. LAWS ANN. §§ 13-19 (1999).

<sup>337</sup> P.R. CONST. art. II, § 1.

<sup>338</sup> See 1 P.R. LAWS ANN. § 13.

<sup>339</sup> P.R. CONST. art. II, § 1.

<sup>340</sup> See Betances, *supra* note 322, at 26.

<sup>341</sup> 1 P.R. LAWS ANN. §§ 13-19 (codifying as amended 1943 P.R. Laws 131).

<sup>342</sup> See, e.g., *People v. Suazo*, 63 P.R.R. 869 (1944).

<sup>343</sup> *Muriel v. Suazo*, 72 P.R.R. 348 (1951).

<sup>344</sup> 1 P.R. LAWS ANN. § 14 (codifying as amended 1960 P.R. Laws 125).



property transactions.<sup>345</sup> But similar to other Latin American jurisdictions with criminal law models for race discrimination enforcement,<sup>346</sup> few complaints, if any, are made to the police on an annual basis.<sup>347</sup>

This rich panoply of civil rights laws provided by local and federal frameworks is essentially underutilized despite the ongoing reports of continued race discrimination in Puerto Rico and the variety of administrative venues for reporting complaints of race discrimination. Unlike many Latin American countries that lack the administrative structure to process and investigate race discrimination claims, Puerto Rico has a local and federal structure for such action. Under a work-share agreement with the EEOC, complaints filed with the local Puerto Rico Department of Labor's Anti-Discrimination Unit are investigated by the local agency itself.<sup>348</sup> Puerto Ricans also have the choice of filing a complaint directly with the EEOC for investigation by EEOC officers—as of July 30, 2001, they can do so in an EEOC office established in San Juan, Puerto Rico.<sup>349</sup> In addition, complaints can be brought to the Puerto Rico Civil Rights Commission, a government agency created in 1965 to promote civil rights through public education.<sup>350</sup> Although the Commission does not have the authority to adjudicate cases, it is empowered to participate as *amicus curiae*.<sup>351</sup> More importantly, the Commission is authorized to investigate claims of racial discrimination and issue opinion letters that are not legally binding on a defendant, but which can be used by plaintiffs to support their claims once a case is filed in court.<sup>352</sup> The Commission's ability to investigate and issue opinion letters is especially helpful to victims with few financial resources to retain an attorney, conduct discovery, or otherwise build a case. Similarly, the additional administrative venues—the EEOC and Puerto Rico Department of Labor—also provide a mechanism for financially constrained victims to redress their

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<sup>345</sup> See 33 P.R. LAWS ANN. § 4195 (1983).

<sup>346</sup> See, e.g., *supra* text accompanying notes 211–12 (describing Brazil's system).

<sup>347</sup> Telephone Interview with René Pinto-Lugo, President of the Board of Commissioners of the Puerto Rico Civil Rights Commission (Aug. 1, 2001) (observing that virtually no claims of race discrimination are ever made to the police in Puerto Rico).

<sup>348</sup> See Telephone Interview with Joseph Alvarado, Equal Employment Opportunity Commission New York District Office Staff Attorney & Puerto Rico Liaison (Aug. 9, 2001) (explaining that the EEOC only investigates cases regarding civil rights violations by the local government and claims of retaliation except for sexual harassment retaliation).

<sup>349</sup> See Press Release, Equal Employment Opportunity Comm'n, *EEOC to Open Area Office in Puerto Rico* (July 18, 2001), at <http://www.eeoc.gov/press/7-18-01.html> (last visited Feb. 8, 2002).

<sup>350</sup> 1 P.R. LAWS ANN. § 151 (1999) (codifying as amended 1965 P.R. Laws 102).

<sup>351</sup> *Id.* § 155 (1999).

<sup>352</sup> COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, ¿SOMOS RACISTAS? CÓMO PODEMOS COMBATIR EL RACISMO 39–45 (2d rev. ed., 1998).

harms without retaining an attorney and litigating in court.<sup>353</sup> Consequently, while Puerto Rico parallels other Latin American regions in its scarcity of race discrimination complaints, an explanation cannot be sought in the absence of an administrative structure, as might be the case in other Latin American contexts. Nor can the dearth of cases be explained as evidence of Puerto Rico's lack of racism, as numerous investigations indicate otherwise.<sup>354</sup> For instance, the Puerto Rico Civil Rights Commission issued a report in 1998 that indicated that race harassment in the employment sector is routine.<sup>355</sup>

At the same time, the Commission notes great confusion amongst the Puerto Rican populace as to what behavior violates the antidiscrimination laws.<sup>356</sup> A comparison to claims of political discrimination and sex discrimination, each of which vastly outnumbers race discrimination claims, validates the Commission's conclusion.<sup>357</sup> Indeed, a recent book about race discrimination in Puerto Rico, authored by a prominent Black attorney on the island, primarily describes criminal cases he has litigated in which the issue of race was relevant rather than the use of civil rights laws to combat race discrimination.<sup>358</sup> In one example involving the defense of a client facing a murder charge, the attorney found the client's ongoing experience of unsanctioned workplace racial harassment and humiliation at the hands of the decedent to be the most salient aspect of the criminal defense.<sup>359</sup>

In short, Puerto Rico's Latin American race ideology complicates the use of civil rights laws.<sup>360</sup> Victims of race discrimination—along with the rest of Puerto Rican society—view race as a taboo subject<sup>361</sup> and assertions of racial identity as divisive to the Puerto Rican commu-

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<sup>353</sup> *Id.* at 39–41 (explaining the ways in which a victim of discrimination can file a complaint with the Puerto Rico Department of Labor's Anti-Discrimination Unit or the Equal Employment Opportunity Commission as an alternative to the expense of litigating a discrimination case in court).

<sup>354</sup> See *infra* notes 375–93 and accompanying text.

<sup>355</sup> See COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 352, at 41–45.

<sup>356</sup> *Id.* at 41.

<sup>357</sup> See Telephone Interview with René Pinto-Lugo, *supra* note 347.

<sup>358</sup> See RIVERA ORTIZ, *supra* note 65, at 45–47, 123, 135 (describing criminal law cases in Puerto Rico in which racial bias was a salient issue).

<sup>359</sup> *Id.* at 45–46.

<sup>360</sup> See KINSBRUNER, *supra* note 35, at 5 (lamenting the propensity of Puerto Ricans to disregard the salience of race and thus discourage people of African ancestry from embracing the fight for equal access).

<sup>361</sup> René Pinto Lugo, *Mensaje Introductorio* [Introductory Message] to MARYA MUÑOZ VÁZQUEZ & IDSA E. ALEGRÍA ORTEGA, *DISCRIMEN POR RAZÓN DE RAZA EN LOS SISTEMAS DE SEGURIDAD Y JUSTICIA EN PUERTO RICO*, at iii (Comisión de Derechos Civiles de Puerto Rico ed., 1999) (observing the tendency of the Puerto Rican populace to treat race as a subject that should never be discussed).

nity.<sup>362</sup> More importantly, victims of discrimination are socially dissuaded from conceptualizing their oppression as race discrimination and from identifying with a denigrated social class; filing a claim of race discrimination and publicly identifying oneself as a member of an unworthy race is thus counterintuitive.<sup>363</sup> Instead, Puerto Ricans of African descent “employ[ ] [the] ideologies of *mestizaje* and *blanqueamiento* to gain conditional [social] acceptance,”<sup>364</sup> all the while denying that racism exists on the island.<sup>365</sup> Perversely, Puerto Rico’s Latin American race ideology prevents many victims of racism from identifying with the civil rights movement either in Puerto Rico or in the United States.<sup>366</sup> In addition, the inclination to generally speak out against racism is inhibited by fears of being “accused” of having African ancestry.<sup>367</sup>

It is thus no wonder that Puerto Rico Law 80<sup>368</sup> employment cases are more frequently litigated than Law 100 cases, despite the more generous damages provision of Law 100 and its wider applicability. Puerto Rico Law 80, enacted in 1976, seventeen years after Law 100, is popularly known as the “law of unjust discharge.”<sup>369</sup> Law 80 provides that any discharge from employment that lacks just cause entitles the former employee to the remedy of lost wages and a minimum of one month’s salary.<sup>370</sup> Because Law 80 encompasses any unjust discharge, it does not require the victim to assert a racial identity.<sup>371</sup>

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<sup>362</sup> See Routte-Gomez, *supra* note 317, at 56 (remarking on the dearth of popular discussions about race and race prejudice in Puerto Rico). *But see* Palmira N. Rios, *The Growing Concern About Racism Among Spanish-Speaking Scholars of the Caribbean*, 1978 BLACK SOCIOLOGIST 13 (discussing the few books that break away from the traditional Caribbean scholarship that ignores the existence of Blacks and racism in the region).

<sup>363</sup> See Torres, *supra* note 82, at 297 (“The view here is that upward mobility cannot be achieved if a black identity is maintained because there are negative cultural ascriptions associated with blackness.”).

<sup>364</sup> *Id.*

<sup>365</sup> KINSBRUNER, *supra* note 35, at 6 (citing MELVIN M. TUMIN, SOCIAL CLASS AND SOCIAL CHANGE IN PUERTO RICO 245 (2d ed. 1971)) (observing how the majority of Puerto Ricans deny the existence of racism).

<sup>366</sup> *Id.* at 5 (describing Puerto Rico’s indifferent reception of Martin Luther King Jr. when he visited the island); *see also* Mathews, *supra* note 173, at 311–14 (describing the lack of demonstrated interest in racial justice movements in Puerto Rico).

<sup>367</sup> See Mathews, *supra* note 173, at 318 (detailing news report of a university professor who was accused of only caring about racial discrimination because “his family had African blood”). “[T]here is silence, because any protest might cast doubt on the racial identity of the individual, his family, or his group.” *Id.* at 319.

<sup>368</sup> 29 P.R. LAWS ANN. § 185a (Supp. 1998) (codifying as amended 1976 P.R. Laws 80).

<sup>369</sup> Luis Oscar Meléndez Dones, *Esquemas Probatorios: El Discrimen Intencional al Amparo de la Ley Núm. 100 y el Título VII*, 34 REVISTA JURÍDICA UNIVERSIDAD INTERAMERICA DE PUERTO RICO 239, 251 (2000) (noting the popular term for Law 80 as “*Ley de Despido Injustificado*”).

<sup>370</sup> 29 P.R. LAWS ANN. § 185a. A progressive scale based on length of employment determines how much additional salary a discharged employee should receive. *See id.*

<sup>371</sup> The disadvantage of filing a Law 80 claim is that it precludes the pursuit of any other statutory basis for compensation. *See* Teresa Chevres, Statutory Note, *The Definition of Unjust Dismissal in Puerto Rico: Act No. 80 of May 30, 1976*, 9 COMP. LAB. L.J. 320, 320 (1988).

Yet the complexity of Puerto Rico's race ideology is problematic not only from the perspective of victims' willingness to file complaints, but also with respect to governmental willingness to take the initiative in enforcing civil rights laws.<sup>372</sup> Furthermore, perpetrators of race discrimination also use the ideology to obfuscate their illegal conduct. For example, the Puerto Rico Commission on Civil Rights reports that employers who refuse to hire dark-skinned Puerto Ricans of African ancestry instead purposely hire light-skinned employees of less prominent African ancestry.<sup>373</sup> Employers do so to deter and escape charges of race discrimination by establishing a record of hiring persons of African ancestry (even if the employees only nominally approximate an African phenotype), despite an underlying preference for Whiteness and approximations of Whiteness.<sup>374</sup>

Such conduct on the part of Puerto Rican employers thus belies one possible interpretation of the pattern of civil rights underenforcement as an indicator of a racially harmonious society. The "racial harmony" premise is not only a retrograde perspective on Latin American race relations, but it is also directly undermined by numerous studies of racial disparity in Puerto Rico. As early as 1969, University of Puerto Rico Professor of Anthropology Eduardo Seda Bonilla surveyed and documented the particularities of race discrimination in Puerto Rico, finding "substantial evidence that racial prejudice constitutes a serious problem in Puerto Rico."<sup>375</sup> At the same time, Bonilla's research revealed the way in which racial harmony rhetoric leads individuals to characterize their racial bias as a reflection of what others think, as opposed to overtly claiming such perspectives. For example, when asked the question, "Would you be in favor or against a 'non-white' family's moving into this neighborhood?" 70.3% of respondents indicated that they would be in favor of such a proposition.<sup>376</sup> But when asked how they thought their neighbors would respond to the same question, the number decreased by almost 50%, with only 36.3% of respondents believing their neighbors would be in favor of the proposition.<sup>377</sup> Bonilla's survey data is supported by a study on urbanism that showed the existence of residential racial segregation

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<sup>372</sup> See Mathews, *supra* note 173, at 310–11 (describing two instances in which the local government failed to act upon detailed legislative inquiries into the discriminatory hiring practices of banks and private and military schools in the 1960s).

<sup>373</sup> See COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 352, at 43.

<sup>374</sup> See *id.*

<sup>375</sup> See Bonilla, *supra* note 51, at 33. Bonilla's report was more comprehensive than an earlier investigation of racial discrimination on the island. See Mathews, *supra* note 173, at 310–11 (describing a 1963 local legislative inquiry into the racially biased hiring practices of banks in Puerto Rico).

<sup>376</sup> Bonilla, *supra* note 51, at 35 tbl.X.

<sup>377</sup> *Id.*

in Puerto Rico.<sup>378</sup> At the time of Bonilla's research, the Puerto Rican Committee on Civil Rights (later renamed the Commission on Civil Rights) made the following findings: university fraternities, clubs, private associations and casinos openly and routinely rejected non-White candidates;<sup>379</sup> racially discriminatory practices existed in the administration of private schools;<sup>380</sup> and the employment sector maintained significant racial disparities by occupation type, creating an almost complete absence of non-Whites in bank employment and in many retail stores.<sup>381</sup>

The race problems researched by Professor Bonilla continue to be documented today.<sup>382</sup> For example, in a 1994 essay, author Carmen Luz Valcarcel described the contemporary residential segregation identified by the large concentrations of Black Puerto Ricans in poor metropolitan areas of the island.<sup>383</sup> The high cement walls that physically enclose and separate the concentration of poor Black Puerto Ricans also illustrate residential segregation.<sup>384</sup> In fact, the growing desire to isolate oneself from interacting with Blacks—who are presumed to be criminals<sup>385</sup>—has fostered the popularity of gated communities and otherwise has enclosed already-existing communities.<sup>386</sup> Valcarcel also notes the lack of racial proportionality in government positions<sup>387</sup> and the continued use of race as a criterion for employment,<sup>388</sup> a phenomenon evidenced by the homogeneity in various employment sectors such as banking, the media, and even religious leadership.<sup>389</sup>

In addition, current immigration patterns have only exacerbated the reliance upon skin color as a proxy for intelligence and good character. The growing communities of Dominican and Haitian immigrants within Puerto Rico have ignited a public discourse that extends the racist stereotypes (regarding stupidity, uncleanliness, and ugly-

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<sup>378</sup> *Id.* at 35 (describing a study by Dr. Caplow of the Center of Social Research).

<sup>379</sup> *See id.* at 36.

<sup>380</sup> *Id.* at 38.

<sup>381</sup> *Id.* at 39.

<sup>382</sup> *See, e.g.,* COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 352.

<sup>383</sup> *See* Valcarcel, *supra* note 195, at 291–92.

<sup>384</sup> *Id.* at 292.

<sup>385</sup> *Cf.* Santiago-Valles, *supra* note 50, at 50–51 (analyzing the Puerto Rican racialization of crime).

<sup>386</sup> *Cf. id.* at 51 (describing how residential racial segregation has facilitated intensive policing of non-white areas).

<sup>387</sup> *See* Valcarcel, *supra* note 195, at 292.

<sup>388</sup> *See id.* at 286–87.

<sup>389</sup> Telephone Interview with René Pinto-Lugo, *supra* note 347; *see also* KINSBRUNER, *supra* note 35, at 8 (detailing the limited range of opportunity for Puerto Ricans of color in politics, banking, business, and education).

ness) about Black Puerto Ricans to Dominicans and Haitians.<sup>390</sup> Yet, the perpetuation of racist stereotypes through the vehicle of nativism simultaneously supports the illusion of a racial democracy by making non-Puerto Ricans the “scapegoats for underlying racial tensions,”<sup>391</sup> while preserving the notion that all Puerto Ricans—regardless of color—have social and economic mobility. Accordingly, Puerto Ricans of African descent are becoming increasingly incensed with the way in which other Puerto Ricans now presume them to be foreigners in their own land because of their dark skin or African phenotype and hair texture.<sup>392</sup> But the targeting of Dominicans with racial slurs cannot be understood simply as the unfortunate and universal historical pattern of demonizing immigrants because light-skinned Dominicans have been reported to have better prospects for social acceptance in Puerto Rico than dark-skinned migrants.<sup>393</sup> In the Puerto Rican social ordering of individuals by status, appearances of African ancestry remain salient and the ideological esteem for race mixture remains conditioned on the preference for Whiteness. Neither fluidity in racial classification nor extensive race mixture have made Puerto Rico’s fantasy of being a racial paradise a reality.

## V

### THE LATIN AMERICAN LESSON FOR THE FUTURE OF U.S. CIVIL RIGHTS

*History has shown that the most valuable political asset of the Black community has been its ability to assert a collective identity and to name its collective political reality.*<sup>394</sup>

The contemporary U.S. racial justice movement may find utility in the comparative analysis deployed in this Article. Legal analyses that cross geographic and cultural borders enrich our understanding of the connections between race, discourse, and the subtle permutations of racial subordination.<sup>395</sup> The examination of the Latin American context cautions against the complacent acceptance of multiracial

<sup>390</sup> See Jorge Duany, *Reconstructing Racial Identity: Ethnicity, Color, and Class Among Dominicans in the United States and Puerto Rico*, LATIN AM. PERSP., May 1998, at 147, 166.

<sup>391</sup> *Id.* at 164. A similar dynamic occurs in the Dominican Republic itself, where Haitians are racially stereotyped as “Black” in order to distinguish all Dominicans as non-Black. See Duany, *supra* note 319, at 41.

<sup>392</sup> See Santiago-Valles, *supra* note 50, at 51 (describing how darker-skinned Puerto Ricans are mistaken for Dominicans and are sometimes falsely arrested for failing to produce the appropriate immigration papers).

<sup>393</sup> See Duany, *supra* note 390, at 162–63.

<sup>394</sup> Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988).

<sup>395</sup> See Tanya Katerí Hernández, *Pioneering the Lens of Comparative Race Relations in Law: A. Leon Higginbotham, Jr. as a Model of Scholarly Activism*, 20 YALE L. & POL’Y REV. (forthcoming 2002) (concluding that comparative race relations in legal scholarship “offers a tool for

discourse as a definitive indicator that race hierarchy and privilege are no longer a problem. With the possible shift to a new multiracial race ideology in the United States, the racial justice movement will have to be particularly attentive to unveiling all of the ways in which race hierarchy and privilege can thrive in a racially diverse population with a facially fluid approach to race that discourages the formation of racial identity and race-conscious social policies.<sup>396</sup> Specifically, multiracial discourse may hinder efforts to eradicate racism by discouraging people of color from using the legal system to redress the harms of discrimination and thereby further discouraging government officials from enforcing existing civil rights laws and legislating more effective civil rights laws.<sup>397</sup>

Although any comparative analysis is limited by the unique circumstances of each context, this discussion of the Latin American context demonstrates, at the very least, the difficulty of shedding race as a concept within racially stratified environments. This example also shows why the strategy of dismantling White supremacy through the elimination of antiracist race-conscious discourse and politics may be a dangerous and utopian vision: it is utopian because it overlooks the normative resilience of racial subordination and it is dangerous because it simultaneously hampers the ability of the subordinated to address the racialized causes of structural disparity and societal bias. In an era such as this one, in which a retrenchment of civil rights and affirmative action undercuts the reformation of White privilege in the United States,<sup>398</sup> such a vision could be misappropriated by regressive forces.

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demonstrating the continued role of race and racial hierarchy in an increasingly diverse society”).

<sup>396</sup> Of course, multiracial discourse will only further complicate the constriction in antidiscrimination laws experienced since the 1980s. See Crenshaw, *supra* note 394, at 1376–81 (arguing that antidiscrimination law has largely succeeded in eliminating symbolic manifestations of racial oppression but has allowed the perpetuation of material subordination of people of color); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1834–44 (2000) (using institutional racism theory to critique central facets of the Supreme Court’s contemporary equal protection jurisprudence—particularly its exclusive focus on purposeful racism and its increasingly strict equation of purposeful racism with open considerations of race).

<sup>397</sup> Scholars such as those in the Critical Legal Studies movement suggest that it is counterproductive to seek racial equality through the use of legal rights because the legal system legitimates the very racial inequality it purports to remedy. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978). But as Kimberlé Williams Crenshaw persuasively argues, “the limited alternatives available to Blacks make[ ] it clear that legal reform [is] a viable pragmatic strategy for Blacks confronted with the threat of unbridled racism on one hand and co-optation on the other.” Crenshaw, *supra* note 394, at 1335.

<sup>398</sup> See STEINBERG, *supra* note 4, at 107–36.

In fact, a regressive misappropriation of idealistic proposals for the elimination of race-based discourse is a significant concern given White disquietude over the increasing numbers of non-White persons populating the United States—a population that in the near future may come to outnumber Whites.<sup>399</sup> Because alarmist concerns regarding changing racial demographics in the United States correspond with the apprehension that systemic White privilege will be upset by the growing number of non-Whites, Cuba provides a disturbing example of the manner in which White privilege can be sustained in spite of an abolition of race-based analysis and the existence of a large non-White population. The absence of official references to race has not diminished the dominance of phenotype and ancestry as a locus of oppression in Cuba; instead, it has silenced discourse and politics against that dominance. The same can happen in the United States—a nation with a growing commitment to color-blindness, a fascination with race mixture, a growing proportion of non-White residents, and increasing numbers of persons for whom our Jim Crow history is not especially pressing. All are characteristics that speak to the salience of the Latin American experience with race under parallel conditions. While the United States has yet to capitulate to those who would like to completely eliminate the use of racial classifications, the recent change allowing multiple-race designations on the census may significantly hamper the enforcement of civil rights. Commentators have already begun to suggest that the new racial categories may complicate bloc voting analysis pursuant to the Voting Rights Act.<sup>400</sup>

The added complexity in antidiscrimination law enforcement heralded by the new shift in U.S. race ideology is also reflected in cases involving skin-color discrimination<sup>401</sup> and claims of intra-racial bias.<sup>402</sup> Professor Taunya Lovell Banks notes that skin tone increas-

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<sup>399</sup> See MAHARIDGE, *supra* note 183, at 3 (stating that sometime after 2050 the United States's entire population will shift to a majority of persons of color) (citing U.S. BUREAU OF THE CENSUS, POPULATION PROJECTIONS FOR STATES, BY AGE, SEX, RACE AND HISPANIC ORIGIN: 1995 TO 2020 (1996)); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 776 (1994) (reviewing APPIAH, *supra* note 142) (delineating how the conservative element of the United States Supreme Court has inappropriately equated the social construction of race as precluding the importance of examining the political significance of race altogether).

<sup>400</sup> See Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 936 (2001) ("a decisive number of multiracial respondents could decrease the size of a minority community to the point that it would not form a majority in a compact single-member district."); Saunders, *supra* note 130, at 1373 ("The format of the 2000 census data will exacerbate these difficulties with the Gingles analysis.").

<sup>401</sup> See Banks, *supra* note 170, 1724–34; Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1532–55 (2000).

<sup>402</sup> See ERIC K. YAMAMOTO, INTER-RACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1997); cf. KINSBRUNER, *supra* note 35, at 11 (describing the internalized racism of Puerto Ricans of color when rejecting any association with an African-based racial identity).



ingly mediates how people of color are racialized in the United States<sup>403</sup> and that the differential racialization creates different levels of status and power among people of color and within a racial group.<sup>404</sup> Yet courts presently are uncomfortable engaging “in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit.”<sup>405</sup> Banks suggests that the confusion of courts regarding the colorism aspects of a race discrimination claim will only increase with the growing number of individuals who identify as multi-racial, and who may “nevertheless encounter discrimination because others identify them as black or nonwhite.”<sup>406</sup>

Furthermore, the growing ethnic diversity of U.S. immigrants and citizens will only add greater complexity to the traditional vision of race discrimination claims as White versus non-White. Specifically, given the decreasing numbers of Whites in the United States, many colorism claims may soon be filed by one ethnic group member against a distinct ethnic group member. Indeed, Professor Eric Yamamoto has noted the increasing number of inter-minority race-based grievances, and the difficulty that the parties encounter in recognizing the White supremacy aspects of their interaction.<sup>407</sup> Multiracial

<sup>403</sup> See Banks, *supra* note 170, at 1708–11, 1723.

<sup>404</sup> See *id.* at 1715; see also Michael Omi, *Out of the Melting Pot and into the Fire: Race Relations Policy, in THE STATE OF ASIAN PACIFIC AMERICA: A PUBLIC POLICY REPORT, POLICY ISSUES TO THE YEAR 2020*, at 199, 206–08 (1993) (describing differential racialization along class lines).

<sup>405</sup> *Sere v. Bd. of Trs. of Univ. of Ill.*, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

<sup>406</sup> Banks, *supra* note 170, at 1738; see also *id.* at 1739 n.150 (observing that in “several recent Title VII cases before the Equal Employment Opportunity Commission, . . . complaining parties described themselves as of mixed race,” and discussing several such cases).

<sup>407</sup> YAMAMOTO, *supra* note 402, at 8, 236–53. Civil rights activist and scholar William Tamayo suggests that public education is needed to foster greater intraracial racial harmony and coalition-building:

Within Asian and Latino immigrant communities, there is a need for education on the history of the Civil Rights Movement, the history of African American oppression, and the historical role of racism in U.S. society. Simultaneously, the broader public needs to be educated about the global migration of the 1990s. Information about the impact of racism on non-white, non-Black communities must be made more readily available.

Finally, immigrants, especially non-white immigrants, must remember that they owe their success and opportunities in part to the vision, sacrifices, and commitment of the Civil Rights Movement. If immigrants are to share in these civil rights gains, they must also play a critical role in this Movement and help address the plight of the African American community. They must develop the compassion to understand historical conditions which have shaped the present. Immigrants have a duty to participate in the Civil Rights Movement and to protect its gains, and those active in the Movement must encourage immigrants to play a significant role. Fuller inclusion and survival in our society will remain a dream for these new “coloreds” if we cannot bring a broader vision to the Civil Rights Movement.

discourse further obfuscates the complexity of inter-minority racial discrimination claims through its superficial celebration of racial fluidity and diversity, which only veils the maintenance of race-based privilege.<sup>408</sup> Thus, Professor Paulette Caldwell appropriately cautions race scholars to distrust demography and the temptation to equate increased racial diversity with the complete destruction of a Black-White paradigm of racism.<sup>409</sup> She notes that “periods of high immigration are not new in the history of the United States. In the past, the ideology of whiteness has not decentered the Black-White paradigm but has actually intensified it.”<sup>410</sup>

Should the United States continue its trajectory towards a Latin American-style race ideology, the failure of courts to attend to the nuances of inter-minority racism and properly adjudicate colorism claims will impede contemporary efforts to eliminate discrimination.<sup>411</sup> Professor Trina Jones’s examination of the contemporary colorism dynamic suggests that courts may soon be confronted with

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Tamayo, *supra* note 39, at 25 (emphasis omitted).

<sup>408</sup> The power of multiracial discourse to veil racial hierarchy and privilege is exemplified by the Brazilian context. See Sergio da Silva Martins, *Direito e Combate A Discriminacao Racial no Brasil*, in TIRANDO A MASCARA: ENSAIOS SOBRE O RACISMO NO BRASIL, *supra* note 210, at 411, 416 (“The so called ‘Brazilian racial democracy,’ symbolized by the Mulatto as its cornerstone and synonymous with racial mixture and harmonious race relations, has amongst other uses, the ability to hinder a lucid analysis of the race problem in Brazil and its consequences for the Afro-Brazilian population.”) (translation mine).

<sup>409</sup> Caldwell, *supra* note 109, at 107. She elaborates:

[D]emography can be used deliberately, rather than inadvertently, in the service of particular reconstructions. The principal ideological effect of the Black-White paradigm has been to create a hierarchy of races with Whites and whiteness at the top, Blacks and blackness at the bottom, and other colors and color groups along a continuum between the two. Economic and other social indicators, including salient changes in demography, both capture and complicate but do not completely reflect or supplant the essence of this historic relationship or its ideological underpinnings.

*Id.*

<sup>410</sup> *Id.* at 106. In fact, the ideology of Whiteness has such force that even in West African countries such as Ghana, many Black residents are seduced by the appeal of chemical skin bleachers to lighten their skin color. See N. Jamiyla Chisholm, *Fade to White: Skin Bleaching and the Rejection of Blackness*, 47 VILLAGE VOICE, Jan. 29, 2002, at 49–50 (reporting that Ghanaians have been trying to lighten their skin since the 1500s when the first Europeans arrived and have continued doing so in larger waves despite the associated health risks, such as skin diseases in which the skin falls apart upon suturing, and legislation outlawing the practice). An interesting parallel that can be drawn between the West African skin bleaching phenomenon and Latin American *blanqueamiento* ideology is the West African belief that skin bleaching is an escape mechanism for feeling more attractive and appearing financially secure. See *id.* at 50.

<sup>411</sup> See Jones, *supra* note 401, at 1531. Jones is so concerned about the inability of courts to properly adjudicate colorism issues that she goes as far as recommending that colorism claims be viewed as distinct from race discrimination claims. See *id.* at 1544. The danger of such a recommendation is that it inadvertently overlooks the ways in which colorism operates as a manifestation of racism and not something apart from it. In fact, it is Latin America’s insistence that colorism is different and less problematic than racism that has proved to be an obstacle for racial justice activists.

defenses to race discrimination charges veiled by racist skin-color preferences.<sup>412</sup> This is epitomized by such statements as: "I can't be prejudiced, I hire other people of color (who happen to be light-skinned rather than dark-skinned)."<sup>413</sup> This has tragically been the case in Latin America and particularly Brazil.<sup>414</sup> Closer to home, Puerto Rico serves as an example of how even the most extensive civil rights structure can remain in disuse if societal forces equate assertions of racial identity and claims of race discrimination as racism itself.

And yet race continues to be a prominent concept in Puerto Rico, Latin America, and even in the formally declared race-less Cuba. After decades of living in a formally race-less Cuba, Afro-Cubans continue to suffer systemic racism and individualized bias, while White Cubans benefit socially, politically, and economically from their Whiteness.<sup>415</sup> The racial hierarchy remains, but now it can be discussed only in abstracted terms that reduce its effects to isolated or individuated instances of racial discrimination. Thus, the Cuban disavowal of the concept of race in its nationalistic focus on the "Cubanness" of its residents did not result in the egalitarian eradication of racism.<sup>416</sup> Race-less Cuba was also ineffective in preventing racial divisiveness amongst its residents: Afro-Cubans and White Cubans still see themselves as different from one another.<sup>417</sup> The only unification that has resulted from promoting a purportedly race-less nation is the confirmation of the internalized understanding that it is better to be White. This experience illustrates how the well-meaning tendency of some Critical Race theorists to promote the end of racism by advocat-

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<sup>412</sup> See *id.* at 1542.

<sup>413</sup> In fact, advertising agencies in the United States have begun to deploy multiracial discourse, which resonates with such defenses against racism. See Jiménez Román, *supra* note 19, at 1 (describing a New York City bus-shelter blue-jeans advertisement in 2000 with the "grammatically incorrect but nonetheless eloquent" caption, "I cant be prejudice, Im Mulatto"). Roger Sanjek similarly offers a contemporary example of racism with a multicultural face. When White politician Peter Chema opposed a court's housing desegregation order issued in 1985, he defended himself against charges of being racist with the following statements. "My wife is minority [Filipina]. My brother-in-law is a minority [Peruvian]." Roger Sanjek, *Intermarriage and the Future of Races in the United States*, in RACE, *supra* note 11, at 103, 122.

<sup>414</sup> See Seth Racusen, Race, Nation, and Justice: Punishing Prejudice in a *Racial Democracy* (Sept. 2001) (presented at the 23rd Congress of the Latin American Studies Association meeting) (unpublished manuscript, on file with author).

<sup>415</sup> See CLYTUS, *supra* note 203, at 13; NASCIMENTO, *supra* note 203.

<sup>416</sup> See Marie Arana-Ward, *Three Marielitos, Three Manifest Destinies*, WASH. POST, July 9, 1996, at A1 ("There is racism in Cuba, too, though everyone there is trained to deny it."); Susan Ferriss, *Afro-Cuban Writer Studies Black Emigrés in America*, S.F. EXAMINER, May 16, 1997, at A8 (interviewing an Afro-Cuban writer who has found that racism still exists in Cuba); Mireya Navarro, *Black and Cuban-American: Bias in 2 Worlds*, N.Y. TIMES, Sept. 13, 1997, § 1, at 8 ("In Cuba, racism dictates who is a leader and who is not.").

<sup>417</sup> See *supra* note 231 and accompanying text.

ing the elimination of “the iron cage of racial categories” may be misplaced.<sup>418</sup> Instead, the multiracial matrix establishes an ideological terrain in which the reality of racial hierarchy is veiled by symbolic messages of racial harmony through race mixture and avoidance of race-consciousness.<sup>419</sup>

Thus, the comparative analysis of this Article cautions race scholars against uncritical adoptions of “race-less multiracial” ideology as well. The lack of scientific racial determinacy established in the first decade of CRT does not undermine the potential utility of race in legal analysis, given its continued significance in the maintenance of White privilege. On the contrary, the abandonment of race as a concept of social or legal antistatization analysis may actually impede CRT’s unfinished project of unveiling the systemic sources and manifestations of racial hierarchy.<sup>420</sup> CRT arose in part out of a dissatisfaction with the traditional civil rights focus on individual perpetrators of discriminatory conduct, which left unchallenged the more pervasive harms of institutionalized racism and White supremacy.<sup>421</sup> Given these origins, it is striking that race-less CRT theorists’ interpretation of discursive references to racial difference as a cause of racial bias should tend to overlook the systemic and material nature of racial oppression, as so vividly depicted in the race-less Cuba example.

Because race-less CRT theorists may overlook the importance of structural privilege in their zeal to eradicate racism with the abolition of racial labeling, the Cuba example is instructive: it powerfully suggests that systemic attachment to privilege can successfully thrive without official references to race. Indeed, it is even plausible to postulate

<sup>418</sup> Robinson, *Critical Reply*, *supra* note 136, at 289

<sup>419</sup> The following description of the factors that inhibit Black protest in Brazil, serves as an excellent synopsis of how multiracial discourse in general can impede racial justice movements and legal reform:

Among the factors most frequently mentioned in the literature as a source of containment of black protest are: . . . the “whitening” doctrine or ideal that, together with the social perception of race as a color continuum, fragments racial identity and promotes aspirations for social mobility; the notion of racial democracy itself as an ideological recourse that tends to disguise racial divisions and inequalities through symbolic forms of integration . . . .

Carlos Hasenbalg & Nelson do Valle Silva, *Notes on Racial and Political Inequality in Brazil*, in *RACIAL POLITICS IN CONTEMPORARY BRAZIL*, *supra* note 15, at 154, 165; *see also* Wachowski & Wachowski, *supra* note 26, at 300 (“The Matrix is everywhere . . . . It is the world that has been pulled over your eyes to blind you from the truth,” the truth that you are “kept inside a prison that you cannot smell, taste, or touch. A prison for your mind.”).

<sup>420</sup> *Cf.* Chong-Soon Lee, *supra* note 399, at 771 (“[R]econceptualizations of race as ethnicity may actually hinder our ability to resist entrenched forms of racism.”).

<sup>421</sup> *See* CRITICAL RACE THEORY: THE KEY WRITING THAT FORMED THE MOVEMENT, *supra* note 6, at xiii, xiv (noting CRT is unified by an interest in understanding “how a regime of white supremacy and its subordination of people of color have been created and maintained in America”).

that racism is better suited to race-less contexts because it more effectively veils the institutionalized causes of racial disparities.<sup>422</sup> For instance, the examination of the Latin American context has shown how existing racial disparities and hierarchy are explained as the result of the “bad culture” that racial minorities manifest.<sup>423</sup> Racism is not viewed to be the culprit; rather, a presumably race-less but nonetheless racially specific entity of culture is understood as the causal factor for pervasive institutionalized racial disparities. Similarly, contemporary race apologists in the United States rationalize the persistence of racially specific poverty and hardship on the basis of culture rather than genetics<sup>424</sup> or institutionalized racism.<sup>425</sup> Yet both contexts essentialize minorities’ cultures in such a way as to effectively treat culture as genetically preordained and thus treat differences as mere semantic difference rather than a true ideological difference.<sup>426</sup> Focusing upon racial labeling per se as a harm therefore deflects attention from the important CRT task of challenging race as a tool and technology of oppression.

Those CRT theorists who advocate the shift from race-consciousness to “human-ness” misperceive the abolition of racial labeling as a progressive gain in and of itself.<sup>427</sup> Ironically, the call to employ a CRT analysis that focuses on the universality of being human<sup>428</sup> also presupposes that a race-conscious analytical lens cannot be humanistic. Yet, CRT’s historical focus on eradicating racial discrimination speaks precisely to that concern by recognizing the universal right of all human beings to be treated with equal dignity and respect. “Race” consciousness and “human” dignity are not per se incompatible, after all.

The official Cuban eradication of racial differences and the concomitant failure to end racism serve as an admonition against the pos-

<sup>422</sup> See Booth, *supra* note 156, at 172.

<sup>423</sup> See *supra* notes 264–69 and accompanying text.

<sup>424</sup> See Crenshaw, *supra* note 394, at 1379 (describing how old racist stereotypes of Blacks as “victims of self-imposed ignorance, lack of direction, and poor work attitudes” are now characterized as culturally based rather than genetically based).

<sup>425</sup> In fact, the U.S. legal system is intentionally ill-equipped to administer claims of institutionalized racism. See Haney López, *supra* note 396, at 1834 (demonstrating that courts do not understand that seemingly race-neutral institutional practices also produce racially discriminatory harms because of how much institutional racism permeates society).

<sup>426</sup> See FEAGIN, *supra* note 13, at 95 (“Another aspect of older racist views that can be found in new dress is the idea of what one might call “cultural racism”—the view that blacks have done less well than whites because of their allegedly deficient culture with its weak work ethic and family values.”).

<sup>427</sup> Even those commentators who find the race-less CRT proposal to destabilize racial classifications as inherently attractive doubt its ability to eradicate racism. See, e.g., Alexander Polikoff, *Comments on Alex M. Johnson, Jr.’s Destabilizing Race*, 143 U. PA. L. REV. 1685, 1688 (1995).

<sup>428</sup> See, e.g., Stubbs, *supra* note 136.

sibility of deconstructing away the concept of race in the United States. Puerto Rico's failure thus far to avail itself of an elaborate system of civil rights laws because of a parallel deflection from racial identity should also serve as a warning for the continental United States. Puerto Rico's public pride in its race mixture and fluid racial categories have only hindered racial justice efforts because of their validation of White supremacy and simultaneous distaste for focusing on race issues. Although an appreciation of the common humanity shared by all persons should underlie the articulation of all antistatist legal theories, a focus upon the commonality of being human in lieu of race-conscious antiracist analysis does not directly or adequately address the material persistence of racial subordination. The Latin American comparison thus demonstrates one way in which shedding the concept of race can work directly against the CRT mission of unveiling systemic or structural mechanisms of White supremacy. As CRT enters its second decade, its continuing development can be enriched through its embrace of transnational comparative analyses that seek to unearth the commonalities—as well as the particularities—of oppression in order to transform subordination in all social, cultural, and legal contexts.

What, then, is the answer? Now that the United States's race ideology is slowly starting to approximate that of Latin America, it may very well be that contemporary Latin American movements for racial equality may illuminate a new path towards racial justice. Unlike the U.S. Civil Rights Movement, which was aided in its ability to organize by the presumed fixed nature of race classification and the lack of inhibition in calling attention to racial disparities as a matter of group-based bias,<sup>429</sup> Latin American racial justice movements organize them-

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<sup>429</sup> See Crenshaw, *supra* note 394, at 1384 ("Although 'White Only' signs may have been crude and debilitating, they at least presented a readily discernible target around which to organize."); see also Anthony W. Marx, *Contested Citizenship: The Dynamics of Racial Identity and Social Movements*, 40 INT'L REV. OF SOC. HIST. supp. 3, at 159, 169 (1995) (describing how in South Africa "black racial identity was forged in response to official state discrimination. . . . Segregation and apartheid forced together its victims, whose direct experiences informed their common identity as blacks and provoked protest."). This is not to suggest that Jim Crow segregation made civil rights organizing in the United States automatic or particularly easy. In fact, concentrated effort was dedicated towards motivating Black support for the civil rights movement before direct action plans could even be mounted. See ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 66 (1984) ("The mass movement . . . was not spontaneous; it grew out of the deliberate efforts of organizers . . ."); HARVARD SITKOFF, *A NEW DEAL FOR BLACKS* 11 (1978) ("The civil rights organizations of the early twentieth century lacked . . . the support of most blacks . . ."); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* 42 (1994) ("[The NAACP] . . . understood that [to fulfill its job of fighting] segregation[,] [it] required a mobilized African-American community."); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 149 (1987) (describing how civil rights lawyers and activists had to confront those members of the Black community who were accommodationists who opposed active efforts to alter the system of race relations); Martin Luther King, Jr., Eulogy for the

selves by: (1) deconstructing the ideological notion that racial mixture is not itself a resolution of racial hierarchy and privilege; and (2) emphasizing that assertions of racial identity and the recognition of societal discrimination are not themselves manifestations of racism.<sup>430</sup>

Nascent racial justice movements in Latin America resonate with the contemporary U.S. context inasmuch as the post-Jim Crow United States no longer has readily discernible emblems of skin-based privilege and hierarchy around which to collectively organize.<sup>431</sup> The legal successes of the Civil Rights Movement now place racial minorities in the United States in a situation comparable to that of minorities in Latin America—struggling against racial hierarchy without formal legal discrimination as a target.<sup>432</sup> While Latin American racial justice movements have come no closer to resolving the problem of lingering racial discrimination and institutional bias, its activists are at least aware of the organizational and legal challenges manifested by multi-racial discourse.<sup>433</sup> In contrast, the United States remains enraptured with the sheen of humanitarianism that multiracial discourse uses to veil and maintain racial hierarchy. Seeing beyond the attractive veil of multiracial discourse will be one of many challenges that the contemporary U.S. racial justice movement will need to learn how to address.<sup>434</sup> Consequently, the Latin American context, despite its

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Young Victims of the Sixteenth Street Baptist Church Bombing (Sept. 18, 1963), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 95, 96 (Clayborne Carson & Kris Shepard eds., 2001) (detailing King's chastisement of "every Negro . . . who has passively accepted the evil system of segregation and who has stood on the sidelines in a mighty struggle for justice").

<sup>430</sup> See Elisa Larkin Nascimento, *It's in the Blood: Notes on Race Attitudes in Brazil from a Different Perspective*, in *BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES* 509, 509 (Charles V. Hamilton et al. eds., 2001) (describing how social movements that focus on an Afro-Brazilian identity are accused of being racist themselves).

<sup>431</sup> See Crenshaw, *supra* note 394, at 1384 ("Now, the targets are obscure and diffuse, and this difference may create doubt among some Blacks whether there is enough similarity between their life experiences and those of other Blacks to warrant collective political action.").

<sup>432</sup> See Cottrol, *supra* note 211, at 61–79 (contrasting formal legal discrimination in post-slavery Latin America with the historical situation of the United States following emancipation).

<sup>433</sup> See, e.g., *infra* notes 436–38 and accompanying text (discussing Brazilian movements).

<sup>434</sup> Another continuing challenge will be the struggle to inspire collective action across class lines. Crenshaw describes such action:

By "collectivity," I refer to the recognition of common interests and the benefits derived by Blacks of all classes in sharing the burdens of social struggle. The potential for collective struggle is maximized where the grievance is shared by all. It was clear that racial segregation, for example, affected all Blacks. The creation of opportunity for some Blacks—however small the number may be—can obscure the degree to which Blacks have common interests that warrant continual collective struggle.

Crenshaw, *supra* note 394, at 1383 n.197.

multitude of regional and historical differences, has much to show the United States.

Brazil is the country in Latin America with probably the most articulated racial justice movement today.<sup>435</sup> Its Black Movement is a living movement comprised of more than two hundred organizations throughout the country.<sup>436</sup> Its activists counter those aspects of multi-racial discourse that discourage collective identity and action<sup>437</sup> by “situating themselves within a transnational community outside the conventional boundaries of the territorial nation,”<sup>438</sup> efforts that in turn contribute to heightened racial consciousness. Indeed, sociologist Howard Winant notes that “the comparative analysis of race responds to a growing awareness of race as a global phenomenon whose

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<sup>435</sup> Brazil’s contemporary racial justice movement proceeds from both the country’s long legacy of racial discrimination behind the veil of its racial democracy rhetoric, and its origins as a large scale slave society. See HERBERT S. KLEIN, *AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN* 67–88, 113–38 (1986) (describing the great importance Brazil placed upon its slave labor and role as a slave society); Arthur F. Corwin, *Afro-Brazilians: Myths and Realities*, in *SLAVERY AND RACE RELATIONS IN LATIN AMERICA*, *supra* note 81, at 385–437 (presenting a race and class analysis of the subordination of Afro-Brazilians that disrupts Brazil’s mythology as a racial democracy); Florestan Fernandes, *Beyond Poverty: The Negro and the Mulatto in Brazil*, in *SLAVERY AND RACE RELATIONS IN LATIN AMERICA*, *supra* note 81, at 277–97 (describing Brazil’s tortured history with racism after the abolition of slavery).

<sup>436</sup> See Antônio Pitanga, *Where Are the Blacks?*, in *BLACK BRAZIL: CULTURE, IDENTITY, AND SOCIAL MOBILIZATION*, *supra* note 77, at 31, 39. “Brazil is changing. Race is becoming politicized and activists are making some headway.” John A. Powell, *Transformative Action: A Strategy for Ending Racial Hierarchy and Achieving True Democracy*, in *BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES*, *supra* note 430, at 371, 389. The move to re-examine racial equality was also spurred on by the election of President Fernando Henrique Cardoso, who made racial equality a governmental priority. See Cotrol, *supra* note 211, at 76 (observing that by the 1990s, the Brazilian Congress was beginning to propose and debate racially based affirmative action legislation and attempted to strengthen existing antidiscrimination legislation). The Afro-Brazilian organization with perhaps the most international prominence is Geledés—the Institute for Black Women located in Sao Paulo. Geledés is a nongovernmental organization that provides legal assistance, human rights education, vocational training, and leadership development programs for people to combat racism and gender inequality. Geledés embodies the global approach to law reform and social justice inasmuch as it complements community-based organizing with transnational collaborations and networks. See Carneiro, *supra* note 210, at 312–22 (describing the work of Geledés and its formation of a network of legal assistance units for race-related cases).

<sup>437</sup> See Michael Hanchard, *Introduction to RACIAL POLITICS IN CONTEMPORARY BRAZIL*, *supra* note 15, at 7 (noting that one recurrent theme in Afro-Brazilian politics is the problem of generating a political movement based on sharing a common racial identity because there is no such thing in Brazilian society as a whole). “The continuing reproduction and dissemination of stereotypes denigrating blacks and valorizing whites which results in low, distorted self-images and an aversion to collective action among the former.” Howard Winant, *Racial Democracy and Racial Identity: Comparing the United States and Brazil*, in *RACIAL POLITICS IN CONTEMPORARY BRAZIL*, *supra* note 15, at 101 (quoting MICHAEL GEORGE HANCHARD, *ORPHEUS AND POWER: THE MOVIMENTO NEGRO OF RIO DE JANEIRO AND SÃO PAULO, BRAZIL, 1945–1988*, at 103 (1994)).

<sup>438</sup> See Hanchard, *supra* note 437, at 15.



importance, far from diminishing in the postindustrial, post-cold war, postmarxist, and incipient postapartheid world, is in fact increasing.<sup>439</sup> In fact, Afro-Brazilian activism with other Afro-Latin organizations leading up to the 2001 United Nations World Conference Against Racism held in Durban, South Africa, is part of what recently caused a number of Brazilian officials to institute racial quotas in government hiring.<sup>440</sup> By operating both within the international sphere as well as domestically, Afro-Brazilian racial justice organizations have another mechanism for revealing to Afro-Brazilians the global commonalities of racial hierarchy and its existence within Brazil itself alongside its multiracial discourse. Furthermore, working within the international sphere also heightens the pressure on domestic governments to accommodate some of the demands of marginalized populations in order to preserve their image abroad.<sup>441</sup> The Brazilian experience suggests that the U.S. focus on globalization should expand to incorporate transnational collaborations on matters of racial justice in order to maintain clarity about the nature of racism in the face of obfuscating changes in race ideology and demography.<sup>442</sup> Treating race as a global issue and understanding the failure of race mixture to solve racism elsewhere will assist U.S. activists in revealing that race mixture is unlikely to do so in the United States.

Another fundamental aspect of the Brazilian racial justice movement is its critical analysis of multiracial discourse.<sup>443</sup> Effective critical

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<sup>439</sup> Winant, *supra* note 15, at 100. "In Brazil," Winant observes, "race is becoming more politicized, so that the color continuum and the techniques available to elites to deny and diffuse racial difference, and to disrupt and suppress racially based politics, are breaking down." *Id.* at 101.

<sup>440</sup> See Miriam Jordan, *Quotas for Blacks in Brazil Cause Hubbub*, WALL ST. J., Dec. 27, 2001, at A6 (reporting that, in response to pressure from Black activists, the Brazilian Agrarian Ministry and Justice Ministry have instituted 20% Black racial quotas, and that lawmakers in Rio de Janeiro voted to reserve 40% of all slots for minority students in state universities). Brazilian President Fernando Henrique Cardoso has stated that a commission will be instituted to phase in racial quotas in other spheres of government. *Id.*

<sup>441</sup> Professor Derrick Bell has termed this dynamic "the convergence theory." See Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 6-13 (1976) (discussing abolition, the Civil War Amendments, and school desegregation as examples of this theory in practice in U.S. history).

<sup>442</sup> Despite the United States's refusal to send high-level official representatives to the 2001 United Nations World Conference Against Racism because of the conference's later-abandoned proposal to name Israel as a racist state and because of the conference's discussion of slavery reparations, several U.S.-based nongovernmental organizations and a mid-level official attended and sought common ground on global racism. See Rachel L. Swarns, *Race Talks Finally Reach Accord on Slavery and Palestinian Plight*, N.Y. TIMES, Sept. 9, 2001, at A1. Some U.S. race scholars are also beginning to incorporate analyses of racism from a global perspective. See, e.g., GLOBAL CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 2000); HOWARD WINANT, *THE WORLD IS A GHETTO: RACE AND DEMOCRACY SINCE WORLD WAR II* (2001).

<sup>443</sup> See Rosana Heringer, *A Agenda Anti-Racista das ONGs Brasileiras Nos Anos 90*, in TIRANDO A MASCARA: ENSAIOS SOBRE O RACISMO NO BRASIL, *supra* note 210, at 343, 354

analysis is achieved by consistently demonstrating the marginal effect of fluid racial self-identification on the persistence of socioeconomic racial disparities. For instance, the Brazilian Institute for Social and Economic Analysis (IBASE), a nongovernmental organization, systematically compiles and distributes statistics regarding racial disparities in the labor market.<sup>444</sup> IBASE was also responsible for the public campaign to consciously politicize racial self-classification on the 1991 Brazilian census for the purpose of collecting more detailed racial statistics.<sup>445</sup> Entitled the “Don’t Let Your Color Pass for White—Respond with Good Sense” campaign, it encouraged census respondents to treat the color categories of *Preto* (Black), *Pardo* (Brown), and *Branco* (White) as ethnic categories instead of color categories, and to have all persons of African descent check a darker color category to better reflect the population of African descent.<sup>446</sup> The goal was to encourage a collective political-racial identity for persons of African descent regardless of their personal perspectives about their color and racial appearance.<sup>447</sup> Although the campaign was successful in raising awareness about the political content of racial identification, persons of African descent did not overwhelmingly flock to the Black category on the census.<sup>448</sup> These results indicate that it may take quite some time to persuade census respondents to use the census as a venue for asserting a personal racial identity informed by phenotype rather than a racial identity rooted in the political realities of racial subordination.

Despite Brazil’s experience, IBASE’s census strategy offers a potential mechanism by which mixed-race persons in the United States can continue to assert a multiracial racial identity in a social context

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(describing how Brazilian NGOs focus on deconstructing the national myth of Brazil as being a “racial democracy”).

<sup>444</sup> *Id.* at 347.

<sup>445</sup> *Id.* at 348.

<sup>446</sup> See Melissa Nobles, “Responding with Good Sense”: The Politics of Race and Censuses in Contemporary Brazil I (1995) (unpublished Ph.D. dissertation, Yale University) (on file with author).

<sup>447</sup> The 1991 Brazilian census campaign stood in marked contrast to the 1990 U.S. Multiracial Movement census campaign, which had persons of mixed racial ancestry designated separately as “multiracial” rather than as descended from any particular race or ethnic group. See Hernández, *supra* note 10, at 98–99.

<sup>448</sup> The 1991 census results reflect a slight increase in the number of Brazilians using the Brown category in comparison to the 1980 census numbers, and a slight decrease in the numbers using the White category. The Black category maintained roughly the same numbers. See IBGE Informações Estatísticas e Geocientíficas, *Censo Demográfico de 1991*, at <http://www.ibge.gov.br/ibge/estatistica/populacao/censodem/default.shtm> (last visited Mar. 13, 2002). Although by quantitative measures the campaign was only negligibly successful, the campaign proponents claimed a victory in causing the Brazilian census officials to publicly state that they would rethink the color categories for future census years in order to more accurately reflect the number of persons of African ancestry. See Telephone Interview with Melissa Nobles, Professor of Political Science, Massachusetts Institute of Technology (Nov. 6, 1997).

while still selecting a racially specific collective identity on the census to further statistical monitoring of racial disparities.<sup>449</sup> Encouraging the distinction between social/cultural and political racial identities<sup>450</sup> may be an effective way to respond to the growing number of mixed-race persons in the United States who wish to assert a multiracial identity,<sup>451</sup> and who state that they will continue to campaign for such a classification on the decennial census until they are successful.<sup>452</sup> While it is true that the Multiracial Category Movement proponents have indicated that they will be satisfied with nothing less than an actual "multiracial" racial category on the census forms,<sup>453</sup> an IBASE-inspired encouragement of multiple notions of racial identification may create the flexibility needed to sustain collective political action in the midst of a postmodern expansion of social racial identities. Because "[p]olitical race helps us understand who is functionally black, whether that person identifies with blackness or not."<sup>454</sup> Like the IBASE census campaign, the U.S. Census Bureau and concerned non-governmental organizations would have to develop a massive marketing plan to convince the public to regard the census racial classifications as an inquiry solely concerning political-racial identification and not a more personal inquiry into social or cultural racial identities.

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<sup>449</sup> This proposal resonates with Sanjek's prediction that U.S. residents may one day come to have one racial identity privately and another publicly. See Sanjek, *supra* note 413, at 119–20.

<sup>450</sup> An understanding of racial categories as political in nature has informed the work of a number of scholars. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 15 (2002) ("The political race project is an effort to change the framework of the conversation about race by naming relationships to power within the context of our racial and political history. This approach reveals race as a political, not just a social, construction."); FELIX M. PADILLA, *LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO* 154–63 (1985) (describing "Latinismo" as a collective political ethnicity Latinos came to identify with despite a plethora of cultural differences amongst Spanish-speaking communities in the United States in response to structural commonalities of racism, inequality, and discrimination).

<sup>451</sup> See, e.g., Ramon G. McLeod, *Tiger Woods an Emblem for Census Issue*, S.F. CHRON., Apr. 24, 1997, at A4.

<sup>452</sup> Gotanda, *supra* note 6, at 257–58 (articulating multiple notions of race, which author describes as status-race, formal-race, historical-race, and culture-race).

<sup>453</sup> See Project Race, *Census 2000 Results: Questions and Answers*, at <http://www.projectrace.com/statefederalcensus/census> (Mar. 19, 2001) (articulating Multiracial Category Movement proponents' dissatisfaction with multiple-race option because of preference for an actual multiracial classification); see also Charles Michael Byrd, *Census 2000 Protest: Check American Indian!*, INTERRACIAL VOICE, at <http://www.webcom.com/intvoice/protest.html> (Jan. 1, 1998) (advocating that mixed-race persons protest against a multiple-race option on the census with acts of civil disobedience, such as checking only the White racial classification, checking any other racial classification but Black, checking every classification, not returning the census form, checking Hispanic ethnicity, or checking the American Indian box).

<sup>454</sup> GUINIER & TORRES, *supra* note 450, at 300.

Of course, government bureaucrats might be concerned that encouraging a conscious social acceptance of multiple notions of race will add needless complexity to the data collection process and civil rights enforcement. But the reality is that this complexity is already present but ineffectively addressed by a social and legal context that ignores its manifestations by trying to reconcile distinct views of race that are highly personal and yet of inherent public importance.<sup>455</sup> In contrast, the IBASE approach openly acknowledges the futility of trying to impose a particular social racial identity upon individuals and stresses the importance of educating the public about the significance of the alternative political notion of race and of strategic essentialist collective identity.<sup>456</sup> While the concern may continue to exist that the pursuit of “multiracial” identity is more a pursuit of White-like status<sup>457</sup> than the affirmation of an inherent racial and cultural identity, the IBASE approach, by divorcing social race from political race, creates the opportunity to reveal any White supremacist aspects of a mixed-race identity discourse. This opportunity is made possible by the public focus on the political nature of collective identity and those aspects of public discourse that further racial hierarchy and privilege. At present, the U.S. system of permitting multiple responses to the census racial category question obviates any ability to openly deconstruct racial hierarchy. This is because the U.S. system attempts to aggregate data about racial status through the vehicle of a modified social race inquiry about personal identity. By providing census respondents with the space to assert fluid notions of race, the government forfeits the opportunity to encourage a public focus on racial classifications as political in nature.<sup>458</sup> With the advent of a shift in

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<sup>455</sup> Thus, the U.S. federal government’s recent decision to permit multiple box-checking in response to the racial category inquiry neither addresses the desire by some for an actual multiracial category nor adequately aggregates racial data for statistical civil rights enforcement because of the difficulty of comparing historical single-box-checking responses to the fractionated racial category responses presently used. See *supra* note 16 and accompanying text.

<sup>456</sup> “Strategic essentialism” involves the choice a group can consciously make to refer to itself by a set of characteristics that are oversimplified and static, and that gloss over the group’s own internal diversity, but in turn serve to advance the group’s ability to mobilize its members for some political purpose. See GAYATRI CHAKRAVORTY SPIVAK, *Subaltern Studies: Deconstructing Historiography*, in *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 197, 205 (1988) (describing strategic essentialism as “a *strategic* use of positivist essentialism in a scrupulously visible political interest” (emphasis in original)); see also Leti Volpp, *(Mis)identifying Culture: Asian Women and the “Cultural Defense”*, 17 *HARV. WOMEN’S L.J.* 57, 95 (1994) (proposing the use of strategic essentialism in the proffer of cultural information to explain an individual’s state of mind in criminal law cases).

<sup>457</sup> See Hernández, *supra* note 10, at 115–21 (discussing the value attached to Whiteness in the United States and its manifestation in the Multiracial Category Movement).

<sup>458</sup> Yet, the government does understand the political content of racial categories, as demonstrated by the Office of Management and Budget’s (OMB) guidelines issued to assist census data users when examining the racial data. Because the multiple-box-checking

race ideology, the impoverished U.S. characterization of the import of its race inquiry will only diminish efforts to unmask the reality of racial hierarchy.

At first blush it may appear incongruent that a Latin American context completely immersed in the labyrinth of multiracial discourse, like Brazil, seems in a better position to deconstruct its racist ideology. For instance, some commentators have been doubtful about the ability to legislate affirmative action programs in Brazil because of the Latin American deflection from race and associations with Blackness, in addition to the prevalence of racial mixing.<sup>459</sup> But not only have Afro-Brazilian activists been successful at instituting affirmative action programs, they have also succeeded in requiring the programs' beneficiaries to identify themselves as Black.<sup>460</sup> Afro-Brazilian activists are generally confident that those who socially identify as *Pardo* or *Mulatto*, for example, will understand that the programmatic limitation to Blacks is an umbrella category that includes them in much the same way that racism against those of African descent includes them as well.<sup>461</sup> In other words, even though social racial classifications in Brazil are characterized as fluid, racism is manifested in more precise

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option on the 2000 census creates sixty-three possible combinations of racial categories, it is impossible to directly compare the census 2000 racial data to any other racial data from previous years for the purpose of investigating the extent of socioeconomic stratification across the years. In order to facilitate the use of the census racial data for civil rights monitoring and enforcement, the OMB issued guidelines that detail how multiple-race responses can be reallocated to single responses. The re-allocation guidelines incorporate a political approach to race. Specifically, the provisional guidelines recommend that responses that combine one minority race and the White race should be allocated to the minority race. There are two methods for allocating responses that include two or more minority races. For civil rights enforcement action in response to a complaint, the multiple race response is allocated to the race upon which the complainant alleges the discrimination was based. For civil rights enforcement action involving disparate impact analysis, alternative allocations to each of the minority groups is recommended. See OFFICE OF MGMT. AND BUDGET, TABULATION WORKING GROUP, INTERAGENCY COMM. FOR THE REVIEW OF STANDARDS FOR DATA ON RACE AND ETHNICITY, PROVISIONAL GUIDANCE ON THE IMPLEMENTATION OF THE 1997 STANDARDS FOR FEDERAL DATA ON RACE AND ETHNICITY 60-62 (Dec. 15, 2000). Objections to the OMB guidelines have already been expressed as contradicting the goal of fluidity of the multiple-race response option. See Persily, *supra* note 400, at 933 ("Critics of the OMB guidelines have described them as a modern version of the 'One Drop Rule'—the Jim Crow-era law where one drop of black blood, or one iota of black ancestry, made someone black."). Such objections will certainly continue to arise as long as the government publicly encourages a fluid and individuated approach to racial classification while simultaneously permitting a reallocation of those responses for civil rights enforcement with no further explanation about the political nature of race.

<sup>459</sup> See, e.g., George M. Frederickson, *Race and Racism in Historical Perspective: Comparing the United States, South Africa, and Brazil*, in *BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES*, *supra* note 430, at 1, 13-14.

<sup>460</sup> See Jordan, *supra* note 440.

<sup>461</sup> See da Silva Martins, *supra* note 408, at 424 (remarking that perpetrators of racism in Brazil identify their victims racially in the binary terms of Black and White); see also Heringer, *supra* note 443, at 354 (observing that even though Brazilians use a different racial classification system from that of the United States, all Brazilians nonetheless recog-

ways that divide the world between White and non-White.<sup>462</sup> By viewing the affirmative action “Black” qualifier as a political category rather than a social one, the Brazilian programs naturally tie political racial identity to the materiality of racism and racial hierarchy. In short, social identities may be fluid but political identities rooted in the reality of racism are more binary in nature along a White/non-White spectrum.

Remaining cognizant of the White/non-White binary nature of racism should also be helpful in the U.S. judiciary’s confrontation with colorism cases. Rather than becoming enmeshed in the intricacies of skin-color differentiation, civil rights activists should instead encourage judges to focus on the ways in which racial status and hierarchy are asserted and who is harmed as a consequence. As one Brazilian scholar has noted, “[C]olor (along with some facial characteristics) is for us a synthesis and the most visible expression of an individual’s racial origin.”<sup>463</sup> In other words, color distinctions are as much about race and racism as are biologically based notions of race and racial distinctions—an aspect of multiracial discourse to which the legal system must become attentive.

#### CONCLUSION

The racial justice movement in the United States today must take note of the new race ideology slowly permeating our society and formulate legal strategies that will critically reveal its subordinating tendencies.<sup>464</sup> Focusing on racism as a global issue that treats race as a collective political identity formation will assist racial justice activists to recognize and address the civil rights dangers of a multiracial matrix. This Article is an attempt to “broadcast [a] pirate signal and hack into the Matrix”<sup>465</sup> of a new race ideology that is developing in the United States in order to unmask the racially subordinating power veiled by its humanistic cast.<sup>466</sup>

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nize the remarks by famous Brazilian poet Caetano Veloso: “we all know how Blacks are treated” (translation mine)).

<sup>462</sup> Caetana Maria Damasceno, “*Em Casa De Enforcado Nao Se Fala Em Corda*”: *Notas Sobre a Construção Social da “Boa” Aparência No Brasil*, in *TIRANDO A MASCARA: ENSAIOS SOBRE O RACISMO NO BRASIL*, *supra* note 210, at 165, 175.

<sup>463</sup> Heringer, *supra* note 443, at 354 (translation mine).

<sup>464</sup> See FEACIN, *supra* note 13, at 244 (“As the 1960s civil rights movement demonstrated, successful antioppression movements require a shattering of negative racial images in the minds of the oppressed themselves. How to increase this self-consciousness remains an ongoing task for antiracist struggles.”).

<sup>465</sup> Wachowski & Wachowski, *supra* note 26, at 308.

<sup>466</sup> See *id.* at 314 (“[A]s long as the Matrix exists, the human race will never be free.”).

APPENDIX A  
EEOC RACE CHARGE STATISTICS 1992-2000

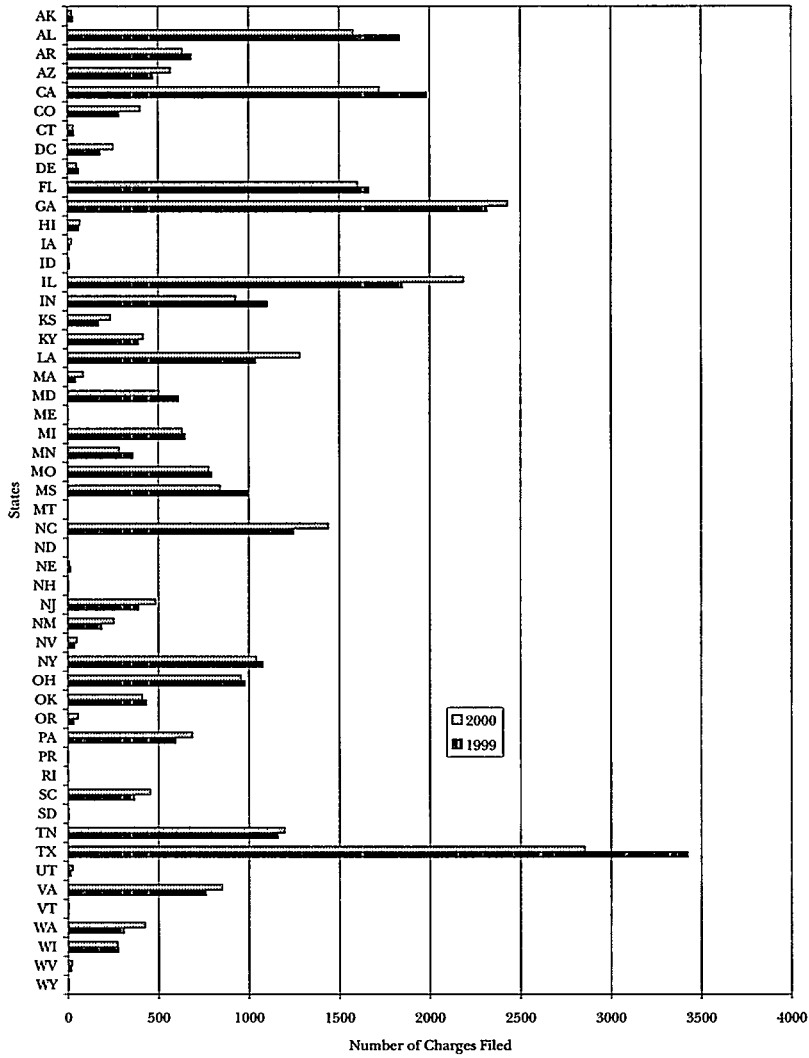
	1992	1993	1994	1995	1996	1997	1998	1999	2000	State Total
AK	13	12	17	25	17	17	16	29	22	168
AL	1,545	1,837	1,744	1,576	1,693	1,920	1,867	1,835	1,577	15,594
AR	730	713	790	952	630	740	691	683	634	6,563
AZ	389	369	431	502	465	560	557	471	568	4,312
CA	1,998	1,793	1,740	1,648	1,564	1,741	1,605	1,983	1,721	15,793
CO	485	512	479	419	499	353	284	284	402	3,717
CT	29	31	23	33	36	25	37	34	30	278
DC	375	369	350	245	222	305	227	179	253	2,525
DE	70	71	78	74	39	29	47	61	49	518
FL	1,399	1,690	1,706	1,566	1,606	1,791	1,851	1,662	1,602	14,873
GA	2,047	2,461	2,511	2,196	2,074	2,265	2,317	2,316	2,429	20,616
HI	53	44	51	58	50	75	67	60	68	526
IA	13	20	12	19	22	15	12	12	21	146
ID	6	3	2	7	5	3	2	10	6	44
IL	1,476	1,604	1,533	1,671	1,523	1,701	1,671	1,848	2,187	15,214
IN	471	652	734	749	832	1,020	937	1,103	928	7,426
KS	206	246	227	243	197	180	255	170	236	1,960
KY	371	441	379	371	393	382	428	389	417	3,571
LA	1,147	1,078	1,126	969	559	743	989	1,037	1,282	8,930
MA	86	78	65	38	39	51	47	43	85	532
MD	922	1,025	827	805	512	607	512	611	503	6,324
ME	2	5	0	1	1	3	1	3	2	18
MI	838	1,123	1,182	967	671	817	816	647	632	7,693
MN	181	260	287	343	416	436	313	358	284	2,878
MO	1,013	1,129	964	1,024	766	844	800	793	778	8,111
MS	841	871	664	735	947	1,095	1,061	991	841	8,046
MT	0	1	2	3	5	1	6	1	1	20
NC	1,856	1,656	1,703	1,308	1,198	1,414	1,465	1,246	1,438	13,284
ND	4	5	9	1	0	4	5	1	0	29
NE	36	26	13	13	21	11	12	16	8	156
NH	0	1	0	2	3	5	3	2	3	19
NJ	419	460	403	471	388	425	469	390	484	3,909
NM	227	210	281	318	222	213	196	186	253	2,106
NV	33	20	20	44	28	36	29	37	50	297
NY	923	1,090	920	966	1,008	868	1,054	1,075	1,041	8,945
OH	1,019	1,168	1,117	840	788	849	971	978	956	8,686
OK	418	471	554	435	379	464	422	433	410	3,986
OR	53	53	54	54	40	40	36	32	55	417
PA	963	945	1,001	912	719	694	658	595	687	7,174

PR	1	5	2	2	0	2	0	1	1	14
RI	2	1	0	3	1	3	2	3	1	16
SC	223	243	231	303	245	302	401	366	453	2,767
SD	3	12	13	3	9	3	5	4	3	55
TN	1,393	1,012	1,227	1,686	1,198	1,181	1,102	1,158	1,195	11,152
TX	3,071	3,476	3,524	3,229	2,951	3,486	3,109	3,424	2,854	29,124
UT	5	2	7	4	5	6	20	14	25	88
VA	1,179	1,134	1,161	1,008	798	807	767	761	851	8,466
VT	3	5	2	3	2	2	1	1	3	22
WA	369	373	385	384	280	302	390	308	425	3,216
WI	361	427	390	419	386	466	396	277	272	3,394
WV	52	44	38	32	22	30	20	17	20	275
WY	8	7	2	1	1	1	4	1	4	29
Year Total	29,327	31,284	30,981	29,680	26,475	29,333	28,953	28,939	29,050	

Source: U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N NAT'L DATABASE, AUTOMATIC REPORTING FACILITY LISTING OF RACE-BASED CHARGES FILED IN THE UNITED STATES AND PUERTO RICO (charts on file with author)



APPENDIX B  
EEOC RACE CHARGES FILED 1999-2000



APPENDIX C  
EEOC RACE CHARGES COMPARED TO CENSUS  
POPULATION STATISTICS

1999	Race Charges	Population 07/98-07/99	Total Minority	% Minority	2000	Race Charges	Population 2000	Total Minority	% Minority
AK	29	619,500	178,254	29%	AK	22	626,932	199,740	32%
AL	1,835	4,369,862	1,227,109	28%	AL	1,577	4,447,100	1,294,275	29%
AR	683	2,551,373	497,305	19%	AR	634	2,673,400	540,951	20%
AZ	471	4,778,332	1,623,463	34%	AZ	568	5,130,632	1,287,630	25%
CA	1,983	33,145,121	17,298,573	52%	CA	1,721	33,871,648	14,093,371	42%
CO	284	4,056,133	917,346	23%	CO	402	4,301,261	766,184	18%
CT	34	3,282,031	680,366	21%	CT	30	3,405,565	649,244	19%
DC	179	519,000	375,015	72%	DC	253	572,059	402,598	70%
DE	61	753,538	195,502	26%	DE	49	783,600	203,227	26%
FL	1,662	15,111,244	5,009,551	33%	FL	1,602	15,982,378	3,643,695	23%
GA	2,316	7,788,240	2,654,746	34%	GA	2,429	8,186,453	2,897,421	35%
HI	60	1,185,497	889,464	75%	HI	68	1,211,537	1,091,727	90%
IA	12	2,869,413	165,390	6%	IA	21	2,926,324	182,931	6%
ID	10	1,251,700	131,675	11%	ID	6	1,293,953	119,990	9%
IL	1,848	12,128,370	3,574,359	29%	IL	2,187	12,419,293	3,343,698	27%
IN	1,103	5,942,901	725,676	12%	IN	928	6,080,485	774,070	13%
KS	170	2,654,052	376,976	14%	KS	236	2,688,418	384,928	14%
KY	389	3,960,825	357,256	9%	KY	417	4,041,769	408,459	10%
LA	1,037	4,372,035	1,608,750	37%	LA	1,282	4,468,976	1,626,557	36%
MA	43	6,175,169	1,044,574	17%	MA	85	6,349,097	1,030,954	16%
MD	611	5,171,634	1,878,728	36%	MD	503	5,296,486	1,943,681	37%
ME	3	1,253,040	30,672	2%	ME	2	1,274,923	40,555	3%
MI	647	9,863,775	1,917,234	19%	MI	632	9,938,444	2,010,354	20%
MN	358	4,775,508	430,297	9%	MN	284	4,919,479	541,369	11%
MO	793	5,468,338	790,808	14%	MO	778	5,595,211	863,201	15%
MS	991	2,768,619	1,064,074	38%	MS	841	2,844,658	1,105,080	39%
MT	1	882,779	81,936	9%	MT	1	902,195	86,773	10%
NC	1,246	7,650,789	2,066,816	27%	NC	1,438	8,049,313	2,276,027	28%
ND	1	633,666	47,181	7%	ND	0	642,200	50,084	8%
NE	16	1,666,028	182,855	11%	NE	8	1,711,263	182,575	11%
NH	2	1,201,134	46,167	4%	NH	3	1,235,786	50,994	4%
NJ	390	8,143,412	2,716,767	33%	NJ	484	8,414,350	2,378,802	28%
NM	186	1,739,844	946,570	54%	NM	253	1,819,046	616,538	34%
NV	37	1,809,253	565,474	31%	NV	50	1,998,257	515,140	26%
NY	1,075	18,196,601	6,984,526	38%	NY	1,041	18,976,457	6,325,257	33%
OH	978	11,256,654	1,645,003	15%	OH	956	11,353,140	1,744,007	15%
OK	433	3,358,044	706,652	21%	OK	410	3,450,654	843,146	24%
OR	32	3,316,154	430,530	13%	OR	55	3,421,399	478,538	14%
PA	595	11,994,016	1,717,336	14%	PA	687	12,281,054	1,837,864	15%
PR	1	3,889,507	0	0%	PR	1	3,808,610	780,399	20%
RI	3	990,819	147,362	15%	RI	1	1,048,319	167,851	16%

SC	366	3,885,736	1,256,450	32%	SC	453	4,012,012	1,328,412	33%
SD	4	733,133	79,290	11%	SD	3	754,844	86,884	12%
TN	1,158	5,483,535	1,045,939	19%	TN	1,195	5,689,283	1,138,971	20%
TX	3,424	20,044,141	9,190,342	46%	TX	2,854	20,851,820	6,148,529	29%
UT	14	2,129,836	254,872	12%	UT	25	2,233,169	248,836	11%
VA	761	6,872,912	1,928,646	28%	VA	851	7,078,515	1,998,922	28%
VT	1	593,740	14,692	2%	VT	3	608,827	20,545	3%
WA	308	5,756,361	1,029,026	18%	WA	425	5,894,121	1,123,240	19%
WI	277	5,250,446	563,697	11%	WI	272	5,363,675	607,632	11%
WV	17	1,806,928	77,656	4%	WV	20	1,808,344	91,800	5%
WY	1	479,602	48,190	10%	WY	4	493,782	40,206	8%
Year total	28,939	276,580,320	79,417,138		Year total	29,050	285,230,516	72,613,862	

Sources: (1) U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N NAT'L DATABASE, AUTOMATIC REPORTING FACILITY LISTING OF RACE-BASED CHARGES FILED IN THE UNITED STATES AND PUERTO RICO (charts on file with author); (2) U.S. Census Bureau, *Population Estimates*, at <http://eire.census.gov/popest/estimates.php>.

APPENDIX D  
TABLE OF U.S. RACE-RELATED REPORTED FEDERAL AND  
STATE CASES AVAILABLE IN WESTLAW DATABASE  
FROM JANUARY 1, 1945 TO JULY 19, 2001

Alabama	1,093
Alaska	413
Arizona	427
Arkansas	690
California	658
Colorado	450
Connecticut	447
District of Columbia	615
Delaware	372
Florida	997
Georgia	977
Hawaii	419
Idaho	404
Illinois	1,023
Indiana	651
Iowa	623
Kansas	533
Kentucky	443
Louisiana	982
Maine	289
Maryland	603
Massachusetts	408
Michigan	676
Minnesota	646
Mississippi	928
Missouri	1,035

Montana	860
Nebraska	630
Nevada	413
New Hampshire	280
New Jersey	406
New Mexico	372
New York	1,339
North Carolina	624
North Dakota	592
Ohio	675
Oklahoma	404
Oregon	418
Pennsylvania	738
Puerto Rico	23
Rhode Island	290
South Carolina	477
South Dakota	590
Tennessee	525
Texas	1,122
Utah	363
Vermont	366
Virginia	591
Washington	444
West Virginia	454
Wisconsin	620
Wyoming	354

Methodology: The number of race-related cases for each state was obtained on July 19, 2001 by performing a "KeySearch" on <http://www.westlaw.com> for each state and Puerto Rico. The steps followed for the KeySearch were: (1) selecting "KeySearch"; (2) selecting the topic "Civil Rights"; (3) selecting the subtopic "Race or Nationality Discrimination"; (4) selecting "Search All of Race or Nationality Discrimination"; (5) selecting "Reported Cases"; (6) choosing the designated state and its "federal & state cases"; and (7) adding the additional search terms "plaintiff s/s rac! s/s discrim!". When the same KeySearch was performed for the territory of Puerto Rico, I discovered that the search only produced federal cases. Accordingly, the Puerto Rico tabulation was supplemented by a search of cases on <http://www.microjuris.com>, Puerto Rico's own electronic legal database.

APPENDIX E  
 WESTLAW RACE-RELATED REPORTED CASES FROM JANUARY 1,  
 1945 TO JULY 19, 2001

