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The Value of Intersectional Comparative Analysis to the “Post-Racial” Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study

TANYA KATERÍ HERNÁNDEZ

This Commentary Article aims to illustrate the value of comparative law to the jurisprudence of Critical Race Theory (CRT), particularly with reference to the CRT project of deconstructing the mystique of “post-racialism.” The central thesis of the Article is that the dangerous seductions of a U.S. ideology of “post-racialism” are more clearly identified when subject to the comparative law lens. In particular, a comparison to the Brazilian racial democracy version of “post-racialism” is an instructive platform from which to assess the advisability of promoting post-racial analyses of U.S. racial inequality. In Part I the Article introduces the value of comparative law to the future development of CRT. Part II provides an overview of Brazilian “post-racial” discourse. Part III then details the quantitative and qualitative indicators of racial discrimination and intersectional race and gender discrimination in Brazil. Part IV focuses upon the Brazilian legal opposition to post-racialism as evidenced by a recent intersectional anti-discrimination case. The Article then concludes that the critical comparative examination of the Brazilian version of “post-racialism” assists in elucidating the concrete counter-intuitive harms of a “post-racial” perspective in the United States.

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The Value of Intersectional Comparative Analysis to the “Post-Racial” Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study

TANYA KATERÍ HERNÁNDEZ*

I. INTRODUCTION

In her article in this volume, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, Kimberlé Williams Crenshaw turns her attention to considering the “contemporary significance of CRT’s trajectory in light of today’s ‘post-racial’ milieu.”¹ Post-racialism is characterized by a public policy agenda of colorblind universalism rooted in the assertion that society has transcended racism.² Post-racialism incorporates colorblindness but is distinct in extending beyond the colorblindness retreat from race as primarily an aspiration for eliminating racism. In contrast, the rhetoric of post-racialism contends that racism has already been largely transcended.³

In Crenshaw’s consideration of post-racialism she notes that the present challenge to Critical Race Theory (CRT)⁴ is to preclude an “over-investment in the symbolic significance” of post-racialism as a racial frame that disregards manifestations of racial inequality in its celebration of formal equality and a colorblindness that equates the articulation of racial concerns with an act of racism.⁵ Crenshaw convincingly demonstrates the fallacy of post-racialism and the simultaneous difficulty in dispelling it, given the contemporary racial fatigue and public desire to foreclose any discussions of race. To combat the Obama mania that Crenshaw notes sanctions all talk of racism as a racial grievance itself, Crenshaw urges CRT to develop a broader project “to remap the racial contours in the way that people see the world that we live in—then in so doing . . . create a new

* Professor of Law, Fordham University Law School and Visiting Research Scholar at Princeton University Program in Law and Public Affairs (2010–2011). All Portuguese sources have been translated by the author.

¹ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Backward To Move Forward*, 43 CONN. L. REV. 1253, 1256 (2011) [hereinafter Crenshaw, *Twenty Years*].

² TIM WISE, COLOR-BLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY 63 (2010) (defining post-racialism).

³ Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1597–98 (2009) (distinguishing post-racialism from colorblindness).

⁴ 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.

⁵ Crenshaw, *Twenty Years*, *supra* note 1, at 1318.

set of possibilities for racial-justice advocates.”⁶ Crenshaw urges that the “next turn in CRT should be decidedly interdisciplinary, intersectional and cross-institutional.”⁷ In this Commentary Article, I would like to suggest that the next turn in CRT also focus more deeply on comparative law.

Because the post-racialism racial frame casts a veil which hinders the ability to see racial disparities and understand them as connected to various forms of racial discrimination, what is needed is a mechanism for refocusing the U.S. racial lens. Comparative law can make a useful contribution in the effort to refocus the racial lens. A key insight from comparative law is its “potential for sharpening, deepening and expanding the lenses through which one perceives law,” because of its ability to “challenge entrenched categorizations and fundamental assumptions in one’s own and others’ legal cultures.”⁸ Indeed, anthropologists have long noted that we cannot fully see and appreciate our own “culture” until we have compared it to that of another.⁹ A number of CRT scholars and related LatCrit scholars¹⁰ have started the project of incorporating a comparative law component into CRT and the associated endeavor of applying CRT to non-U.S. legal jurisdictions.¹¹ What I am underscoring in

⁶ *Id.* at 1350.

⁷ *Id.* at 1262.

⁸ Vivian Grosswald Curran, *Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 658 (1998).

⁹ See RUTH BENEDICT, *PATTERNS OF CULTURE* 1–7, 16–20 (1934) (describing how with cultural relativity one’s own culture is more clearly seen and recognized as culture rather than the norm when compared to another culture); see also GEORGE E. MARCUS & MICHAEL M.J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* 1–6, 137–41 (1986) (stressing the importance of a comparative approach in anthropology); Deborah Waire Post, *Teaching Interdisciplinarily: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247, 1247–56 (2000) (comparing law students to anthropologists who need to be trained to be self-conscious observers of human relationships within their own cultures).

¹⁰ LatCrit theory is a jurisprudence dedicated to highlighting Latina/o concerns and voices in legal discourse and social policy for the attainment of broader social justice. See Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 1–11 (1996) [hereinafter Valdes, *Foreword*] (“On their face, these diversities evidence both the richness of the existing work produced by Latina/o legal scholars and the range of identity and intellectual pluralisms that presently exist in the Latina/o law professorate of the United States.”).

¹¹ See, e.g., Adrien Katherine Wing, *Introduction: Global Critical Race Feminism for the Twenty-First Century*, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 1, 7–12 (Adrien Katherine Wing ed., 2000) [hereinafter Wing, *Global Critical Race Feminism*] (“We are extending the narrow U.S. notion of race to examine the legal treatment of women of color, whether they are living in developing or industrialized societies.”); Tanya Katerí Hernández, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875, 881–86 (2003) [hereinafter Hernández, *Comparative Judging*] (“What is proposed here is a humble contribution towards practically applying the potent revelations of Critical Race Theory for judicial reform, in the hopes of spurring on many more Critical Race Theory-related legal reforms in the United States and in other regions like Latin America . . .”); Elizabeth M. Iglesias & Francisco Valdes, *Afterword: LatCrit at Five: Institutionalizing a Post-subordination Future*, 78 DENV. U. L. REV. 1249, 1311–14 (2001) (describing LatCrit’s work in organizing two colloquia, presented in Malaga, Spain, devoted to international and comparative law); Elizabeth M. Iglesias, *Foreword: LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT’L & COMP. L. REV. 1, 5 (2000)

this Article is the particular usefulness that comparative law presents for the specific project of combating the post-racialism racial frame. This is because contemporary U.S. CRT scholars can only set forth conjectures about the future long-term dangers of post-racial rhetoric (such as hindering the pursuit of racial equality by shutting down any discussion of race in favor of equating racial disparities with cultural deficiencies and socio-economic disadvantages).¹² In contrast, a comparative consideration of another region in which a form of post-racialism has long existed provides the opportunity to examine the actual adverse consequences of post-racial rhetoric.

As a vehicle for illustrating the value of comparative law to the CRT project of dismantling the post-racialism racial frame, I shall provide a

("Spain offers a valuable point of reference for examining a host of pending issues that are especially germane to Latinas/os and to other political identity groups committed to the articulation of an expansive anti-subordination agenda without borders or boundaries."); Antoinette Sedillo Lopez, *Ethnocentrism and Feminism: Using a Contextual Methodology in International Women's Rights Advocacy and Education*, 28 S.U. L. REV. 279, 283 (2001) (proposing a method of comparative analysis that uses Critical Race Feminism in order to respect cultural differences in advocating for human rights); Pedro A. Malavet, *LatCritical Encounters with Culture*, in *North-South Frameworks*, 55 FLA. L. REV. 1, 1-5 (2003) (discussing how essays in the Sixth Annual LatCrit Conference fit within the present and the future of LatCrit Theory); Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293, 1315-24 (2000) (describing his experiences with CRT and how they inform his work in comparative law); Mathias Moschel, *Color Blindness or Total Blindness? The Absence of Critical Race Theory in Europe*, 9 RUTGERS RACE & L. REV. 57, 57-60 (2007) (analyzing why European countries have not engaged in CRT and discussing areas of European law that would benefit from CRT analysis); Joshua Price & Maria Lugones, *Encuentros and Desencuentros: Reflections on a LatCrit Colloquium in Latin America*, 16 FLA. J. INT'L L. 743, 743 (2004) (commenting on the LatCrit Colloquium on International and Comparative Law that took place in Buenos Aires at the University of Buenos Aires Law School); Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 BERKELEY LA RAZA L.J. 137, 152 (2001) (describing a LatCrit project, the Critical Global Classroom, which endeavors to teach critical global studies in international and comparative law); Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 944-47 (1997) (using Critical Race Feminism to perform a comparative law analysis to determine whether South African and Palestinian laws help or hinder in dealing with violence against women); Adrien Katherine Wing, *Conceptualizing Global Substantive Justice in the Age of Obama*, 13 J. GENDER RACE & JUST. 705, 711 (2010) (arguing that comparative law, among other subfields of public international law, stands to benefit from CRT); Adrien Katherine Wing, *International Law, Secularism, and the Islamic World*, 24 AM. U. INT'L L. REV. 407, 407-08, 418-25 (2009) (comparing religious-secular tensions in France, Turkey, Tunisia, and Palestine from the perspective of Global Critical Race Feminism); Adrien Katherine Wing, *Polygamy from Southern Africa To Black Britannia To Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 812-14 (2001) ("I will discuss polygamy from the perspective of a loosely woven intellectual tapestry I have labeled 'Global Critical Race Feminism' (GCRF), an emphasis on the legal status of women of color outside and inside the United States."); Adrien Katherine Wing, Speech at the Washington University School of Law's Public Interest Law Speakers Series (2002), Global Critical Race Feminism Post 9-11: Afghanistan, in 10 WASH. U. J.L. & POL'Y 19, 19-20 (2002) (applying Global Critical Race Feminism to women in Afghanistan).

¹² WISE, *supra* note 2, at 136 (speculating about the future harms of post-racialism); Cho, *supra* note 3, at 1646 (assessing the potential dangers of post-racialism).

comparative analysis of an instructive Brazilian intersectionality case.¹³ Because Brazil is a country that has long claimed that all racial distinctions were abandoned with the abolition of slavery, it is an instructive platform from which to assess the viability of contemporary assertions of post-racialism in the United States.¹⁴ Yet, as shall be discussed below, growing discrimination jurisprudence in Brazil shows the longstanding post-racial assertion to be false. To the extent that a century-old claim to a form of post-racialism in Brazil is shown to be a fallacy, the many parallels that exist between Brazil and the United States enable a salient critique of U.S. post-racialism. In particular, because of their objectified and denigrated status, examining the treatment of Black women as an intersectional matter, helps to demystify the barriers to productive transnational comparisons of racial ideologies between the United States and Latin America. In order to be concrete, I shall focus on a recent intersectional discrimination case that was litigated in Brazil. But before discussing the case, it will be helpful to first explain the contours of the “post-racial” Brazilian racial ideology.

II. BRAZILIAN “POST-RACIAL” RACIAL DISCOURSE

Like the United States, Brazil is a racially diverse nation with a significant number of persons of African descent stemming from the country’s history of slavery.¹⁵ Yet Brazil’s involvement in the African slave trade was even longer and more intense than that of the United States.¹⁶ This accounts for the fact that, aside from Nigeria, Brazil is the

¹³ One of CRT’s many useful analytical tools is the theory of intersectionality, which posits that women of color experience unique discrimination distinct from men of color and white women because of the intersection of race and gender. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 57, 63–64 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (“I am suggesting that Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women’s experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.”).

¹⁴ See *infra* notes 15–32 and accompanying text.

¹⁵ The commonality in the two nations’ multiracial histories and concerns with racial equality are reflected in the 2008 mutual decision to enter into a joint action plan to eliminate racial and ethnic discrimination. Press Release, U.S. Dep’t of State, Joint Action Plan Between the Government of the Federative Republic of Brazil and the Government of the United States of America to Eliminate Racial and Ethnic Discrimination and Promote Equality (Mar. 13, 2008), *available at* <http://www.state.gov/p/wha/rls/2008/111446.htm>.

¹⁶ See A.J.R. RUSSELL-WOOD, *THE BLACK MAN IN SLAVERY AND FREEDOM IN COLONIAL BRAZIL* 1–10 (1982) (discussing Brazil’s importation of a greater concentration of African slaves than the United States as well as the last nation in the world to legally emancipate its slaves in 1888).

nation with the largest number of people of African descent in the world.¹⁷ After emancipation, Brazil continued to be a racially divided nation, but occasionally provided social mobility for a few light-skinned mixed-race individuals. This social mobility was directly tied to the racist nation-building concepts of *branqueamento* (whitening) and *mestiçagem* (racial mixing/miscegenation), which can best be described as campaigns to whiten the population through a combination of European immigration incentives and the encouraging of racial mixture in order to diminish over time the visible number of persons of African decent.¹⁸ Indeed, the social recognition of the racially-mixed racial identity of *mulato/pardo* was a mechanism for buffering the numerical minority of white-identified elite Brazilians from the discontent of the vast majority of persons of African descent.¹⁹ Greater symbolic social status and occasional economic privilege were accorded based on one's light skin color and approximation of a European phenotype, which simultaneously denigrated Blackness and encouraged individuals to disassociate from their African ancestry.²⁰ It should be noted that in terms of concrete economic benefits, few mulattoes radically superseded the status of those Afro-descendants viewed as "Black."²¹ Rather, the recognition of mulattoes as racially distinctive from

¹⁷ Peggy A. Lovell, *Race, Gender, and Development in Brazil*, LATIN AM. RES. REV., 1994, at 7, 7 [hereinafter Lovell, *Brazil*]; INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, SÍNTESE DE INDICADORES SOCIAIS: UMA ANÁLISE DAS CONDIÇÕES DE VIDA DA POPULAÇÃO BRASILEIRA [BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS, SYNTHESIS OF SOCIAL INDICATORS: AN ANALYSIS OF THE BRAZILIAN POPULATION'S SOCIAL CONDITIONS] [hereinafter IBGE, 2010] tbl.8.1 (2010), available at http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadores_minimos/sinteseindicais2010/default.shtm (detailing that Brazil's population of 191.7 million has 51.1%, of people, who identify as black or brown-skinned).

¹⁸ EDWARD E. TELLES, RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL 4–6, 24–31 (2004); Lourdes Martínez-Echazábal, *Mestizaje and the Discourse of National/Cultural Identity in Latin America, 1845–1959*, LATIN AM. PERSP., May 1998, at 21, 26–37.

¹⁹ See CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 223–27 (1971) (describing the concept of a "mulatto escape hatch" that serves to maintain white privilege by "spread[ing] people of color through the society" and "literally blur[ring] and thereby soften[ing] the line between black and white").

²⁰ See TELLES, *supra* note 18, at 27 (noting that mulattos "were clearly perceived as distinct from pure-blood blacks and Indians, and there was often an optimistic sense that they were more like whites"). Persons with darker skin, especially the highly educated, sometimes employed the ambiguous racial identification term *moreno* to avoid the more stigmatized non-white categories such as *Negro*. *Id.* at 98–99, 105–06.

²¹ See Nelson do Valle Silva, *Updating the Cost of Not Being White in Brazil*, in RACE, CLASS, AND POWER IN BRAZIL 42, 42–46 (Pierre-Michel Fontaine ed., 1985) (documenting the statistical insignificance of average incomes for mulattoes versus Blacks in Brazil as compared to the huge difference between white and collective non-white average incomes); George Reid Andrews, *Brazilian Racial Democracy, 1900–90: An American Counterpoint*, 31 J. CONTEMP. HIST. 483, 499 (1996) ("As [contemporary social scientists in Brazil] have demonstrated Brazil's black and mulatto populations do not differ greatly from each other on most social and economic indicators—life expectancy, earnings, education—while both groups are clearly differentiated from whites."); Peggy A. Lovell & Charles H. Wood, *Skin Color, Racial Identity, and Life Chances in Brazil*, LATIN AM. PERSP., May 1998, at 90, 94, 96–104 (showing that nationwide black and mulattoes in Brazil face similar disadvantages on issues critical to life expectancy, school enrollment, and occupational distribution); Anthony W. Marx, *Race-*

Blacks served primarily as a kind of “psychological wage” associated with the prestige of approximating whiteness without any significant group-wide monetary benefit for such status.²² As a result, Brazil was able to maintain a rigid racial hierarchy that served white supremacy in a demographically-patterned society where people of African descent approximated and sometimes even outnumbered the white elite.²³ This is in marked contrast to the demographic pattern in the United States, where, with just a few exceptions, Blacks have always been a numerical minority and have thus been more vulnerable to the white majority’s enforcement of Jim Crow racial segregation after emancipation from slavery.²⁴ In Brazil, with its greater population of people of African descent, the ideological use of the “mulatto escape hatch” was such an effective tool of racial subordination that Jim Crow legal segregation was never needed and all racial justice movements were efficiently hindered.²⁵ But it was the absence of Jim Crow in Brazil that later enabled the nation to promote itself as a country in which racial mixture had created a racially harmonious society.²⁶ In fact, until recently, it has been a firmly entrenched notion that Brazil was a model of race relations that could be described as a “racial democracy” exemplified by racial fluidity in its racial classification practices.²⁷ Hence, post-racialism in Brazil, and much of Latin America is characterized by a negation that racism exists after the

Making and the Nation-State, 48 *WORLD POL.* 180, 187 (1996) (“With a few notable exceptions, mulattoes were and remain largely underprivileged.”).

²² W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 700–01 (1935) (articulating the notion of a “psychological wage” of racially constructed social status that supplements the wages of low-income white workers in the United States, who as a result have more of an allegiance to white elites by virtue of their shared whiteness rather than to fellow low-income workers who share their economic plight, but happen to be black); see also Howard Winant, *Rethinking Race in Brazil*, 24 *J. LATIN AM. STUD.* 173, 176–79 (1992) (observing that Degler’s “mulatto escape hatch” still retains relevance in Brazilian racial ideology and perception of status).

²³ See Winant, *supra* note 22, at 177, 181–84 (describing how the Brazilian elite historically promoted “whitening,” which ranked individual worth or quality on the basis of race).

²⁴ See DEGLER, *supra* note 19, at 3–5 (contrasting Brazil, which “in the nineteenth century was known as the country of blacks and mixed bloods,” with the United States, which “has always been dominated by whites and so perceived by outsiders”).

²⁵ See Edward E. Telles, *Ethnic Boundaries and Political Mobilization among African Brazilians: Comparisons with the U.S. Case*, in *RACIAL POLITICS IN CONTEMPORARY BRAZIL* 82, 84 (Michael Hanchard ed., 1999) (“In Brazil, legal segregation did not occur for reasons that continue to be highly debated, and one’s skin color on a racial continuum became the dominant means for classification.” (citation omitted)).

²⁶ Ariel E. Dulitzky, *A Region in Denial: Racial Discrimination and Racism in Latin America*, in *NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS* 39, 49–50 (Anani Dzidzienyo & Suzanne Oboler eds., 2005).

²⁷ See G. REGINALD DANIEL, *RACE AND MULTIRACIALITY IN BRAZIL AND THE UNITED STATES: CONVERGING PATHS?* 178–93 (2006) (describing the slow deconstruction of the racial democracy mythology in Brazil); THOMAS E. SKIDMORE, *BLACK INTO WHITE: RACE AND NATIONALITY IN BRAZILIAN THOUGHT* 216–17 (3d prtg. 1993) (detailing the history of the racial democracy ideology in Brazil and its insistence that no racial prejudice exists in Brazil).

abolition of slavery.²⁸ The denial of racism is justified by the racial mixture of the population which has presumably “transcended” racism.²⁹ Existing racial disparities are instead attributed to the cultural deficiencies and socio-economic disadvantages of Afro-Brazilians.³⁰ As a result, those who raise the issue of racial discrimination are viewed as racist themselves.³¹ These facets of Brazilian post-racialism closely parallel the rhetoric of post-racialism in the United States and the related fascination with racial mixture as emblematic of racial harmony.³²

Today, racial fluidity in Brazil is rhetorically based upon the premise that racial classifications are determined more closely by how one phenotypically appears rather than strictly by one’s genetic history or ancestors.³³ For instance, before a racial designation of Black/“negro” is deemed appropriate, custom dictates that an informal visual assessment of an individual’s hair texture, nose width, thickness of lips, and degree of dark pigmentation be compared with what are stereotypically viewed as the characteristics of a Black person.³⁴ Accordingly, individuals with identical racial heritage are often identified socially or informally by distinct racial designations based on their phenotype.³⁵ For this reason, Brazilian and Latin American racial classification practices have been termed a “prejudice of mark,” in contrast to the “prejudice of origin” which has traditionally guided racial classification in the United States, with its focus on familial and ancestral origins as the determination of racial identification.³⁶ Contemporary scholars, however, note that the distinctions between prejudice of mark and prejudice of origin are overstated given the Latin American use of ancestry to inform phenotype

²⁸ Francisco Martins, *Racism in Brazilian Aquarelle—The Place of Denying*, 4 INT’L J. MIGRATION, HEALTH & SOC. CARE 37, 37–39 (2008) (describing the Brazilian negation of racism that coexists with racist rhetoric).

²⁹ Brian Owensby, *Toward a History of Brazil’s “Cordial Racism:” Race Beyond Liberalism*, 47 COMP. STUD. SOC. & HIST. 318, 319 (2005) (describing the Brazilian universalism that is thought to transcend race).

³⁰ Tanya Kateri Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1160 (2002) (discussing the Latin American deflection from race that attributes racial disparities to class and bad culture of Afro-descendants).

³¹ Dulitzky, *supra* note 26, at 50.

³² Hernández, *supra* note 30, at 1112–18 (discussing the U.S. reconsideration of race in light of growing racial mixture).

³³ ROBIN E. SHERIFF, DREAMING EQUALITY: COLOR, RACE, AND RACISM IN URBAN BRAZIL 29–32 (2001); *see also* MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 57 (1964) (describing racial identity in Brazil as governed by phenotype: “Over a dozen racial categories may be recognized in conformity with the combinations of hair color, hair texture, eye color and skin color . . .”).

³⁴ HARRIS, *supra* note 33, at 57–58 (detailing anthropological accounting of at least forty different racial terms to identify people with some African ancestry depending on color and phenotype variations).

³⁵ *Id.* at 57.

³⁶ Oracy Nogueira, *Skin Color and Social Class*, in PLANTATION SYSTEMS OF THE NEW WORLD (1959), *reprinted in* 5 VIBRANT, at iii, viii, xii (2008).

assessments and the use of phenotype to inform assessments of ancestry.³⁷ Brazilian social etiquette may permit the use of a wide spectrum of color and racial categories—but Blackness is still disfavored.³⁸ While the United States has traditionally relegated all persons of African ancestry regardless of skin color shade to a single racial category of Black, there is a commonality with the Brazilian disregard for Blackness itself.

To a certain extent, prejudice of mark practices also permit economic and social status to mediate the determination of racial classification. As a result, dark-skinned Afro-Brazilians with higher socioeconomic standing may feel more entitled to claim a racial classification invoking greater whiteness than more impoverished individuals with the same skin-color.³⁹ The interplay between social class and racial classification is rooted in the *branqueamento* (and Latin American/Caribbean *blanqueamiento*) whitening ideal which continues to be central to Brazilian, Latin American, and Caribbean race ideology.⁴⁰ *Branqueamento* refers to the aspiration of transforming one's social status by approaching whiteness.⁴¹ An individual can become symbolically lighter by marrying a lighter-skinned partner, or by becoming wealthy or famous. For instance, a popular legend that is consistently recounted is that the dark-skinned soccer icon from Brazil, Pelé, successfully deployed the *branqueamento* ideology when he had his birth certificate amended to reflect a White racial classification after achieving world fame.⁴²

In concert with the prejudice of mark and *branqueamento* approaches to racial identification, the Brazilian and Latin American/Caribbean race model advances the cultural practice known as *mestiçagem*, which asserts that race mixture has made racial identification a very indeterminate and unnecessary practice.⁴³ In turn, racial mixture is rhetorically idealized and

³⁷ ELISA LARKIN NASCIMENTO, THE SORCERY OF COLOR: IDENTITY, RACE, AND GENDER IN BRAZIL 18 (2007) (“[T]here is no real distinction between prejudice of mark and of origin.”).

³⁸ TELLES, *supra* note 18, at 139–72.

³⁹ Lovell, *Brazil*, *supra* note 17, at 13.

⁴⁰ See Edith Piza, *Branco No Brasil? Ninguém Sabe, Ninguém Viu . . .*, in TIRANDO A MÁSCARA: ENSAIOS SOBRE O RACISMO NO BRASIL 97, 103 (Antonio Sérgio Alfredo Guimarães & Lynn Huntley eds., 2000) (discussing the whitening ideal in Brazil); see also 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*, in BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATION 3, 8–9 (Arlene Torres & Norman E. Whitten, Jr. eds., 1998) (in Latin America and the Caribbean, “[b]lanqueamiento refers to the processes of becoming increasingly acceptable to those classified and self-identified as ‘white.’ [It] is an ethnic movement—coterminous with socioeconomic advancement governed by the ideology of ‘development’ . . .”).

⁴¹ See Torres & Whitten, Jr., *supra* note 40, at 8–9 (defining *blanqueamiento* and situating it in a sociopolitical context).

⁴² Interview with Anani Dzidzienyo, Professor, Afro-Brazilian Studies, Brown University, Africana Studies Department and Portuguese & Brazilian Studies Department (Feb. 20, 2002) (on file with author) (explaining that Brazilians so frequently set forth Pelé as the proof that “money whitens,” and that it is also thought that Pelé altered his official racial classification on his identity documents).

⁴³ See Torres & Whitten, Jr., *supra* note 40, at 7–8 (defining *mestiçaje* as “the ideology of racial intermingling”).

promoted as the national norm.⁴⁴ But the national representation of racial mixture that Brazilians prefer is closer to White than to Black, and individuals are overtly discouraged from identifying along racial lines in order to maintain the national myth of racial democracy.⁴⁵

An examination of the census context in Brazil reinforces the importance of this transnational comparison. Unlike most of Spanish America, Brazil has included a color identity question on the vast majority of their censuses. The color terms used are White, Yellow, Brown, and Black.⁴⁶ Although the Brazilian census schedules use the term “color categories,” the color categories utilized correspond directly with racial categories.⁴⁷ The “Yellow” color category corresponds with an Asian racial category, while “Black” corresponds with African ancestry, and “Brown” represents persons with mixed Black and White ancestry.⁴⁸

Demographers have noted that since the Brazilian census instituted self-classification for collecting racial data in 1950, a significant number of individuals have changed their color classification from one census enumeration to another.⁴⁹ The racial alterations fell into a specific pattern in which a large proportion of those who classified themselves as Black (*preto*) on the 1950 census, reclassified themselves as brown (*pardo*) on the 1980 census.⁵⁰ Similar reclassification patterns occurred in the census years that followed.⁵¹

Sociological studies of other data collections in Brazil with racial data from both the respondent and an interviewer have more closely examined the practice of fluidity in racial classification, and have noted that the “whitening effect” corresponds to a very specific pattern. Seventy-nine percent of the time interviewers and respondents chose the same color classification for the respondent.⁵² While persons at the light end of the color continuum tend to be consistently classified, ambiguity is greater for those at the darker end. But even that ambiguity has limitations. Interviewers tended to whiten the classification of higher-educated self-

⁴⁴ *Id.* at 7.

⁴⁵ See Rebecca Reichmann, *Introduction to RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY* 1, 1–7 (Rebecca Reichmann ed., 1999) (describing the racial democracy myth that “denie[s] the existence of difference and stifle[s] racial debates and mobilization in Brazil”).

⁴⁶ See Marvin Harris et al., *Who Are the Whites?: Imposed Census Categories and the Racial Demography of Brazil*, 72 SOC. FORCES 451, 453 (1993) (explaining that census respondents could self-identify according to four terms: *branca*, *parda*, *preta*, and *amarela*).

⁴⁷ The only explicit “racial” category on the 1991 Brazilian census was the “Indigenous” category for Brazil’s native populations. MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS*, 104–05 tbl.3 (2000).

⁴⁸ *Id.* at 120–21.

⁴⁹ José Alberto Magno de Carvalho et al., *Estimating the Stability of Census-Based Racial/Ethnic Classifications: The Case of Brazil*, 58 POPULATION STUD. 331, 331 (2004).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Edward E. Telles, *Racial Ambiguity Among the Brazilian Population*, 25 ETHNIC & RACIAL STUD. 415, 425–27 (2002).

identified brown (*pardo*) persons particularly when they lived in non-White regions.⁵³ In contrast, there is much greater consistency in the classification of Whites living in White-dominated regions.⁵⁴ Furthermore, the whitening effect of higher educational status on racial classification is similarly constrained. In the case of the darkest males, education does not vary the color classification. It is people at the lighter end of the color spectrum living in predominantly non-White areas whose classification is more prone to be lightened.⁵⁵ In short, racial democracy rhetoric theoretically enables anyone to whiten themselves, but in practice predetermined social norms circumscribe it. It would seem that only in regions (such as the northeast) where few “actual whites” live, are light-skinned persons of African ancestry with higher-education socially permitted to whiten themselves statistically. Where “actual whites” predominate in a region (such as the south), there is little flexibility for persons of African ancestry to whiten themselves—regardless of their skin shade or educational status. This pattern is even starker for men of African ancestry than for women of African ancestry.⁵⁶

Similarly, the intergenerational whitening of children follows a specific pattern. In a study of the 2005 Brazilian National Household Survey, collected by the Brazilian Institute of Geography and Statistics—the agency also responsible for the census—it was found that a non-White parent with secondary school or primary school education is unlikely to whiten his child from a marriage to a White person.⁵⁷ It is primarily among the infrequent intermarriages between those with higher education in which a child is often statistically whitened.⁵⁸ Intermarriage alone, and thus “one drop of white blood,” is not sufficient to whiten a mixed-race child. Rather, it is the educational status within a mixed marriage that facilitates whitening.

What all these studies of the malleability of racial/color categories in Brazil demonstrate is that while factors other than racial ancestry influence the selection of census color categories, the actual practice of symbolic racial fluidity is restricted to lighter-skinned persons with higher education. For those with unambiguous white and black pigmentation and features, racial classification is more fixed and polarized. Even those studies which have examined the plethora of informal color categories that exist in Brazil have concluded that in practice the variation is all centered on denoting racial mixture, while simultaneously maintaining the polarities in meaning

⁵³ *Id.* at 432.

⁵⁴ *Id.* at 435.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Luisa Farah Schwartzman, *Does Money Whiten? Intergenerational Changes in Racial Classification in Brazil*, 72 AM. SOC. REV. 940, 952–56 (2007).

⁵⁸ *Id.* at 953.

of whiteness and Blackness.⁵⁹ Central to the Brazilian celebration of racial mixture is the notion that African ancestry is inferior and needs to be mixed with whiteness in order to be ameliorated. The Latin American trope of racial mixture as racial utopia continues to have whiteness as the ideal and the presumed locus of power, even while racial mixture is purportedly celebrated.

The White supremacist underpinnings of the racial mixture as racial utopia concept are made even more evident when one considers the intersectional gender and race specificity regarding the discourse of racial mixture.⁶⁰ White elite women are completely precluded from the idealization of racial mixture. Their racial purity and class status are not implicated in the *mestiçagem*/cult of racial mixture; they are meant to continue the production of an elite white class.⁶¹ Instead, it is the intimacy of black women with white men that is the focus of national racial mixture and its presumed ability to decrease the Black presence within the nation.⁶² Further, while interracial intimacy is viewed as the prerogative of all white men, only working-class men are viewed as the appropriate marriage partners of black women.⁶³ The gendered racism of the trope of racial mixture is also prevalent across Latin America.⁶⁴

Challenging the narrative of the Brazilian “post-racial” utopia is the work of Black feminists and Black social justice movement participants.⁶⁵ Both have contributed a great deal to the production of knowledge about

⁵⁹ See, e.g., Roger Sanjek, *Brazilian Racial Terms: Some Aspects of Meaning and Learning*, 73 AM. ANTHROPOLOGIST 1126, 1127, 1138 (1971) (examining racial classification terminology used in a single small fishing village in northeast Brazil, finding some 116 different terms, and concluding that the first learned classification is Black/white); Nelson do Valle Silva, *Morenidade: Modo de Usar*, 30 ESTUDOS AFRO-ASIÁTICOS 79 (1996).

⁶⁰ See KIA LILLY CALDWELL, *NEGRAS IN BRAZIL: RE-ENVISIONING BLACK WOMEN, CITIZENSHIP, AND THE POLITICS OF IDENTITY* 40 (2007) (“While the bodies of Afro-Brazilian women have long been available to white men, interracial sex between Afro-Brazilian men and white women has traditionally been regarded with disdain.”).

⁶¹ See *id.* at 50 (“Women of each color category are placed in social roles that cannot be altered, exchanged, or escaped . . . white women are assigned to the realm of legitimate and honorable sexuality in their roles as wives and acceptable marriage partners . . .”).

⁶² See NASCIMENTO, *supra* note 37, at 70 (“The idea of ‘cleansing the race’ has held enormous weight as a kind of call to civic and social responsibility for young black women.”).

⁶³ See TELLES, *supra* note 18, at 193 (“[I]nter-marriage is most prevalent among poor whites, who are especially likely to be exposed to nonwhites.”).

⁶⁴ PETER WADE, *RACE AND SEX IN LATIN AMERICA* 165–66 (2009) (discussing the “geographical ubiquity and persistence in Latin America today” of racially gendered notions of *mestiçaje*).

⁶⁵ See Luiz Claudio Barcelos, *Struggling in Paradise: Racial Mobilization and the Contemporary Black Movement in Brazil*, in *RACE IN CONTEMPORARY BRAZIL*, *supra* note 45, at 155, 158–61 (discussing contemporary, and early twentieth century racial mobilization in Brazil); Lélia Gonzalez, *The Unified Black Movement: A New Stage in Black Political Mobilization*, in *RACE, CLASS, AND POWER IN BRAZIL* 120, 120 (Pierre-Michel Fontaine ed., 1985) (introducing specific analysis of the Unified Black Movement against Racial Discrimination); João Jorge Santos Rodrigues, *Olodum and the Black Struggle in Brazil*, in *BLACK BRAZIL: CULTURE, IDENTITY, AND SOCIAL MOBILIZATION* 43, 48–49 (Larry Crook & Randal Johnson eds., 1999) (describing the nonviolent struggle of Olodum, in the face of state violence, for Afro-Brazilian cultural legitimacy).

the historical and contemporary existence of racial stratification.⁶⁶ With the growth of the Black social movement, social scientists have begun to document the existing racial disparities in Brazil that contradict the platitudes of post-racial rhetoric.⁶⁷

III. QUANTITATIVE AND QUALITATIVE INDICATORS OF DISCRIMINATION IN BRAZIL

While there are White Brazilians who continue to contend that the absence of Jim Crow segregation in Brazil has obviated the existence of racial discrimination in Brazil, a plethora of social science research indicates the contrary.⁶⁸ This dichotomy is well exemplified by a study indicating that while eighty-seven percent of non-Black Brazilians manifest racial bias in their response to survey questions, only ten percent admit to having any racial prejudice.⁶⁹ Similarly, while eighty-nine percent of all Brazilians admit that racism against Blacks exists, only ten percent admit to harboring anti-Black bias.⁷⁰ In a later study, eighty-nine percent of Brazilians stated that racism exists in Brazil, while at the same time only four percent conceded harboring racial prejudice.⁷¹ Nor can Brazilians imagine an Afro-Brazilian equivalent of President Barack Obama being elected president of Brazil as a self-professed Afro-Brazilian.⁷²

Despite its reputation as a land of “cordial” race relations,⁷³ Brazilians, like

⁶⁶ See Abdias do Nascimento & Elisa Larkin Nascimento, *Dance of Deception: A Reading of Race Relations in Brazil*, in BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES 105, 127–28 (Charles V. Hamilton et al. eds., 2001) (“[P]erhaps the black movement’s most outstanding gain has been progressively legitimating its perspective, namely that the ‘racial question’ is a national issue of citizenship demanding the articulation of specific public policy.”); Edna Roland, *O Movimento de Mulheres Negras Brasileiras: Desafios e Perspectivas* [The Afro-Brazilian Women’s Movement: Challenges and Perspectives], in TIRANDO A MÁSCARA: ENSAIOS SOBRE O RACISMO NO BRASIL [TAKING OFF THE MASK: ESSAYS ON RACISM IN BRAZIL] 237–56 (Antonio Sérgio Alfredo Guimarães & Lynn Huntley eds., 2000) (describing the history of the Black feminist movement in Brazil).

⁶⁷ Rosângela Saldaña Pereira & Xavier Rambla, *Desigualdad Racial en Brasil: La Realidad Desmiente el Mito*, 69 REVISTA MEXICANA DE SOCIOLOGÍA 401 (2007), available at <http://redalyc.uaemex.mx/src/inicio/ArtPdfRed.jsp?iCve=32112593001> (asserting that growing social science data contradicts the Brazilian myth of racial democracy).

⁶⁸ See STANLEY R. BAILEY, LEGACIES OF RACE: IDENTITIES, ATTITUDES, AND POLITICS IN BRAZIL 97–98 (2009) (presenting survey data that demonstrates the growing number of whites and others who now believe that racial prejudice and discrimination exist in Brazil).

⁶⁹ *Datafolha Revela O Brasileiro*, FOLHA DE SÃO PAULO, June 25, 1995, at Especial-2 & 3, available at <http://almanaque.folha.uol.com.br/racismocordial.htm>.

⁷⁰ RACISMO CORDIAL: A MAIS COMPLETA ANÁLISE SOBRE O PRECONCEITO DE COR NO BRASIL 96, 102 (Cleusa Turra & Gustavo Venturi eds., 1995).

⁷¹ RACISMO NO BRASIL: PERCEPÇÕES DA DISCRIMINAÇÃO E DO PRECONCEITO RACIAL DO SÉCULO XXI, 141, 145 (Gevanilda Santos & Maria Palmira da Silva eds., 2005).

⁷² See LUIS FERNANDO VERISSIMO, O MUNDO É BÁRBARO: E O QUE NÓS TEMOS A VER COM ISSO [THE WORLD IS BARBARIC: AND WHAT WE HAVE TO DO WITH THAT] 79 (2008).

⁷³ See DATA FOLHA/FOLHA DE SÃO PAULO, RACISMO CORDIAL: A MAIS COMPLETA ANÁLISE SOBRE O PRECONCEITO DE COR NO BRASIL 12 (1995).

others in Latin America, are acutely aware of color distinctions and their hierarchical significance. As one ethnographer who came to Brazil to study liberation theology, but found racism instead, reports:

The issue of color was, I saw, a constant presence in how men and women looked at each other, chose their lovers and spouses, modeled their bodies. It was there in the daily round of jokes, banter, insults, and accusations. It was there in how people talked to and about each other, in how they touched or did not touch each other.⁷⁴

Socioeconomic indicators show considerable inequalities between black and white Brazilians, despite the fact that Afro-Brazilians were reported as 51.1% of the population in the Census Bureau data for 2009.⁷⁵ Whites on average earn almost two times what non-Whites earn.⁷⁶ Illiteracy among the non-white population is more than double that of Whites.⁷⁷ Even with the advent of university affirmative action policies in the 1990s, Whites today are still admitted to universities at twice the rate of non-Whites.⁷⁸ In addition, there is a consistent pattern of Afro-Brazilian investments in education providing less of an improvement in labor market opportunities as compared to white Brazilians.⁷⁹ To be specific, with just two additional years in the average rate of schooling for Whites (8.5 years as compared to 6.4 years for Afro-Brazilians), white Brazilians average a monthly salary 3.6 times the minimum wage as compared to Afro-Brazilians, who only average a monthly salary of 1.9 times the minimum wage.⁸⁰ When Afro-Brazilians and white Brazilians have the same years of schooling, Whites earn forty percent more than Afro-Brazilians.⁸¹ Wage inequality exists even amongst Afro-Brazilians with the highest level of education, and the disparity is more accentuated in the higher income

⁷⁴ JOHN BURDICK, BLESSED ANASTÁCIA: WOMEN, RACE, AND POPULAR CHRISTIANITY IN BRAZIL, at viii (1998).

⁷⁵ IBGE, 2010, *supra* note 17, at tbl.8.1. It should be noted that Brazilian social scientists collapse the *preto*/Black and *pardo*/mulatto-mixed race census categories into one Afro-Brazilian unit of analysis in order to obviate concerns about the ambiguity between the *preto* and *pardo* color categories, and because the data frequently suggests that prevalent racial disparities exist between whites and non-whites, rather than between *pretos* and *pardos*.

⁷⁶ *Id.* at tbl.8.6.

⁷⁷ *Id.* at tbl.8.2.

⁷⁸ *Id.* at tbl.8.12.

⁷⁹ Samuel Kilsztajn et al., *Concentração e Distribuição do Rendimento por Raça No Brasil* [Concentration and Distribution of Income by Race in Brazil], 9 R. ECON. CONTEMP. 384, 367–84 (2005).

⁸⁰ See INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, ESTUDOS & PESQUISAS: INFORMAÇÃO DEMOGRÁFICA E SOCIOECONÔMICA NUM. 19, SÍNTESE DE INDICADORES SOCIAIS 2006 [STUDIES AND RESEARCH PROJECTS: DEMOGRAPHIC AND SOCIOECONOMIC INFORMATION NO. 19, SYNTHESIS OF SOCIAL INDICATORS 2006] [hereinafter IBGE, 2006] tbl.9.7, available at <http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadoresminimos/sinteseindicsociais2006/default.shtm>.

⁸¹ *Id.*

brackets.⁸² In fact, Brazil's own Census Bureau, *Instituto Brasileiro de Geografia e Estatística* ("IBGE"), specifically states that "education cannot be characterized as a sufficient factor for overcoming racial inequalities in income in Brazil."⁸³

Clearly, the unsatisfactory life circumstances of Afro-Brazilians cannot be attributed solely to an issue of class status.⁸⁴ As family income decreases, the differential disadvantage in access to schooling between students of European and African ancestry increases.⁸⁵ Despite expectations to the contrary, economic development has not improved racial disparities in the educational system.⁸⁶ Some commentators even suggest that periods of socio-economic national development have increased rather than decreased racial inequality, especially for those at the higher end of the social structure.⁸⁷ This matter is only made worse by the racial disparities in university enrollment rates.⁸⁸

Examining Brazilian racial disparity in the educational context reveals startling patterns. A study holding per capita family income constant showed that (1) non-Whites have a lower rate of schooling than Whites, (2) non-white students have a higher likelihood of falling behind in school than white students, and (3) non-white students attend schools that are apt to offer fewer classroom hours than schools attended by white students.⁸⁹ Students of African descent achieved educational levels consistently inferior to those achieved by Whites from the same socioeconomic level, and African-descended students' returns to education were disproportionately lower.⁹⁰ Whites have a greater, and vastly disproportionate, likelihood of completing college compared to non-

⁸² NASCIMENTO, *supra* note 37, at 46.

⁸³ IBGE, 2006, *supra* note 80, at tbl.9.7.

⁸⁴ The only small exception to the stark labor market inequality is the Federal District of Brasília, where the rate of unemployment by race is equivalent, but only for those with higher education. Gilson Santos Silva, *Negros Com Renda Média No Bairro da Pituba* [Blacks with Middle-Class Incomes in the Neighborhood of Pituba] 86 (2007) (M.A. dissertation, Universidade Salvador-UNIFACS) (on file with author).

⁸⁵ Nelson do Valle Silva & Carlos A. Hasenbalg, *Race and Educational Opportunity in Brazil*, in *RACE IN CONTEMPORARY BRAZIL*, *supra* note 45, at 58.

⁸⁶ See Diana DeG. Brown, *Power, Invention, and the Politics of Race: Umbanda Past and Future*, in *BLACK BRAZIL*, *supra* note 65, at 213, 213–14 (explaining that racial discrimination has worsened despite the expectation that it would diminish with economic development).

⁸⁷ Peggy A. Lovell, *Race, Gender, and Work in São Paulo, Brazil, 1960–2000*, *LATIN AM. RES. REV.*, 2006, at 63, 81.

⁸⁸ INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, *ESTUDOS & PESQUISAS: INFORMAÇÃO DEMOGRÁFICA E SOCIOECONÔMICA* NUM. 23, *SÍNTESE DE INDICADORES SOCIAIS 2008* [STUDIES AND RESEARCH PROJECTS: DEMOGRAPHIC AND SOCIOECONOMIC INFORMATION NO. 23, SYNTHESIS OF SOCIAL INDICATORS 2008] [hereinafter IBGE, 2008], available at <http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadoresminimos/sinteseindicsoais2008/default.shtm>.

⁸⁹ Valle Silva & Hasenbalg, *supra* note 85, at 54 (citing to research conducted by the Carlos Chagas Foundation in São Paulo, Brazil).

⁹⁰ *Id.*

Whites.⁹¹

The deficiency of the public primary and secondary school content is magnified by the racialized treatment Afro-Brazilian children receive in school.⁹² For example, social scientists have documented that the majority of Brazilian teachers view Afro-Brazilian students as lacking the potential to learn.⁹³ As one such teacher stated, “[t]hey can’t learn, they’re not disciplined, they’re lazy and they give up too soon. All they want is soccer and samba. *It’s in the blood.*”⁹⁴ Racialized attitudes are also manifested in the textbooks children are assigned, in which Black people are consistently depicted as animal-like, as socially subordinate, and in other stereotyped manners.⁹⁵ When Black children are targeted with racist behavior by classmates who have internalized the societal bias against those with dark skin, school authorities condone the behavior by characterizing it as harmless teasing and joking.⁹⁶ These racialized attitudes may in turn help explain the reasons for the neglect⁹⁷ of public education by the government, and may also help explain why educational specialists observe that in Brazil, the “benefits of ‘universally’ designed programs to improve educational outcomes do not reach the poor adequately.”⁹⁸

Yet, children of African descent encounter in Brazil not only an environment inhospitable for learning, but also racialized access to schooling.⁹⁹ Even though it is compulsory for children aged seven to

⁹¹ See *id.* at 54–55 (referring to data in the 1980s showing a seven-fold greater likelihood for completing college on the part of whites).

⁹² Cleusa Simão, *Mulher Negra: Identidade e Exclusão Social* [Black Woman: Identity and Social Exclusions] 85, 104 (2004) (M.A. dissertation, Universidade São Marcos) (on file with author) (describing racist interactions between black students and school teachers as well as with white students).

⁹³ Rosana Aparecida Peronti Chiarello, *Preconceitos E Discriminações Racias: Um Olhar de Professoras Sobre Seus (Suas) Alunos (as) Negros (as)* [Prejudice and Racial Discrimination: The View of Professors Regarding Their Black Students] 50–53 (2003) (Masters Thesis, Federal University of São Carlos) (on file with author).

⁹⁴ Elisa Larkin Nascimento, *It’s in the Blood: Notes on Race Attitudes in Brazil from a Different Perspective*, in BEYOND RACISM, *supra* note 66, at 509, 518 (emphasis added); see also César Rossato & Verônica Gesser, *A Experiência da Branquitude Diante de Conflitos Racias: Estudos de Realidades Brasileiras e Estadunidenses*, in RACISMO E ANTI-RACISMO NA EDUCAÇÃO: REPENSANDO NOSSA ESCOLA 11, 19 (Eliane Cavaleiro ed., 2001) (detailing how Brazilian school teachers’ assessments of student potential and performance are directly influenced by race).

⁹⁵ Hédio Silva Jr., *Discriminação Racial nas Escolas: Entre a Lei e as Práticas Sociais* [Racial Discrimination in the Schools: Between the Law and Social Practices] 34–38 (2002), available at http://www.fef.br/biblioteca/arquivos/data/Discrimina_racial.pdf.

⁹⁶ *Id.*

⁹⁷ See DAVID N. PLANK, THE MEANS OF OUR SALVATION: PUBLIC EDUCATION IN BRAZIL, 1930–1995, at 6, 8, 10 (1996) (describing the failure of Latin American governments, including Brazil, to act to improve and expand basic education systems).

⁹⁸ LAURENCE WOLFF & CLAUDIO DE MOURA CASTRO, INTER-AMER. DEV. BANK, PUB. NO. EDU-111, SECONDARY EDUCATION IN LATIN AMERICA AND THE CARIBBEAN: THE CHALLENGE OF GROWTH AND REFORM annex 1 (2000), available at [http://www.unicef.org/lac/Secondary_education\(1\).pdf](http://www.unicef.org/lac/Secondary_education(1).pdf).

⁹⁹ *Brazil’s Unfinished Battle for Racial Democracy*, ECONOMIST, Apr. 22, 2000, at 31 (“Access to education is still the greatest obstacle to the advancement of black Brazilians.”).

fourteen to attend school,¹⁰⁰ it is common for Brazilian families to informally adopt children of color—in an unstated exchange for their unpaid labor—and prevent them from attending primary school,¹⁰¹ for school officials do not enforce the compulsory nature of education.¹⁰² The Afro-Brazilian students who do manage to stay in school often encounter a substandard quality of instruction.¹⁰³ For example, in the rural Northeast where the majority of residents are Afro-Brazilian, less than half of the primary school teachers have themselves completed primary schooling.¹⁰⁴ Furthermore, even middle-class Afro-Brazilian children encounter barriers in enrolling in the private schools their parents are able to afford. For instance, when an Afro-Brazilian college-educated professional woman sought to enroll her six-year old in an exclusive São Paulo neighborhood school, another mother asked, “Do you see any other black child here?” as an explanation as to why the child had been rejected.¹⁰⁵

The statistical racial disparity in levels of education is paralleled by the racial segregation of Brazil’s educational system, in which students of African descent are relegated to underfinanced public schools for primary and secondary education, while economically privileged white children attend private schools.¹⁰⁶ This schooling disparity results in a racially segregated public university setting as well, because the public primary and secondary schools fail to prepare their students for the public university entrance examination.¹⁰⁷ In contrast, the white children whose

¹⁰⁰ Valle Silva & Hasenbalg, *supra* note 85, at 55.

¹⁰¹ FRANCE WINDDANCE TWINE, RACISM IN A RACIAL DEMOCRACY: THE MAINTENANCE OF WHITE SUPREMACY IN BRAZIL 37 (1998).

¹⁰² See PLANK, *supra* note 97, at 6 (“[O]fficial estimates suggest that as many as five million children in the ages of compulsory attendance (7 to 14) were not in school in 1989.”); cf. Abraham Lama, *Peru-Education: Market Reforms Come at a Cost to Education*, INTER PRESS SERVICE, Oct. 9, 1997 (observing that although primary education is mandatory in Peru, no authority forces the return of those children who drop out).

¹⁰³ See LINDA LARACH, WORLD BANK, HUMAN DEVELOPMENT NETWORK SECONDARY EDUCATION SERIES, BRAZIL: SECONDARY EDUCATION PROFILE: A SUMMARY OF “SECONDARY EDUCATION: TIME TO MOVE FORWARD” 7 (2001), available at http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2002/09/07/000094946_02082104033872/Rendered/PDF/multi0page.pdf (describing deficiencies in the educational opportunities and resources available to non-wealthy Brazilian students).

¹⁰⁴ PLANK, *supra* note 97, at 7.

¹⁰⁵ Telma Marotto, *Brazilian Secret 93 Million Don't Want to Talk About Is Racism*, BLOOMBERG.COM (June 26, 2008), <http://www.bloomberg.com/apps/news?pid=20601109&refer=news&sid=a1ezjRWRd5Tk>.

¹⁰⁶ Nascimento & Nascimento, *supra* note 66, at 116; see also WOLFF & CASTRO, *supra* note 98, at 10 (describing the class divide between public and private school settings in Latin America and the Caribbean); Michael Smith, *Educational Reform in Latin America: Facing a Crisis*, INT’L DEV. RES. CTR. (Feb. 19, 1999), http://web.idrc.ca/en/ev-5552-201-1-DO_TOPIC.html (quoting Argentinean Senator José Octavio Bordón as saying “[m]ost of the best schools in the region are private and many of them are on par with the best schools world-wide,” but because more than eighty percent of students are forced to attend underfunded public schools, a difference results that “reinforces inequality, poverty, and poor economic performance”).

¹⁰⁷ Nascimento & Nascimento, *supra* note 66, at 117.

parents are better able to pay the fees for the racially exclusive private primary and secondary schools are then better trained for the public university entrance examination.¹⁰⁸ This all results in the free, elite, and well-funded public universities of Brazil disproportionately attended by white students.¹⁰⁹ In turn, the major companies who recruit heavily from the elite public universities for their trainees end up with a racially exclusive white trainee pool.¹¹⁰

Segregated Brazilian residential patterns facilitate continued school segregation.¹¹¹ While Brazilian racial segregation is not statistically as severe as the segregation documented in the United States, the segregation of the Brazilian public sphere is quite noteworthy.¹¹² In fact, Abdias do Nascimento, a significant historic figure in the Brazilian Black Movement, described the de facto racial segregation of Brazil as being of comparable visceral effect to that of apartheid South Africa¹¹³:

Brazilians in disproportionate numbers live in urban shantytowns called *favelas*, *mocambos*, or *palafitas*. To visit Rio de Janeiro's Central Station is to witness dangerously dilapidated trains taking hours to transport mostly black workers from the huge metropolitan area called the Baixada Fluminense to their jobs in the capital city, a scene that recalls black South Africans' commute from segregated townships. The racial contrast between a public school in the Baixada—or in poor suburbs or *favelas* almost anywhere in Brazil—and a university in a rich area like Rio de Janeiro's Zona Sul suggests the difference between a township school and a white university in South Africa.¹¹⁴

While white middle class neighborhoods in Brazil are in closer

¹⁰⁸ See *id.* at 116–17 (noting that private primary and secondary schools in Brazil are available almost exclusively to a white, privileged elite that is able to pay expensive tuition).

¹⁰⁹ See, e.g., Marotto, *supra* note 105 (noting that only 13.4% of students registered at Universidade de São Paulo in Brazil in 2007 were black, up from 12.6% in 2006 and describing an Afro-Brazilian woman's college experience, in which she was one of only five Black individuals at the college she attended).

¹¹⁰ See *id.* (noting that universities from which companies recruit do not reflect the composition of the population).

¹¹¹ See, e.g., Edward E. Telles, *Residential Segregation by Skin Color in Brazil*, 57 AM. SOC. REV. 186, 186 (1992) (analyzing causes of pervasive residential segregation in metropolitan areas).

¹¹² Michael Hanchard, *Black Cinderella? Race and the Public Sphere in Brazil*, 7 PUB. CULTURE 165, 167 (1994) (discussing how “Afro-Brazilians have been accorded a partial and contingent access to the public sphere, a domain which has been defined explicitly and implicitly as white”).

¹¹³ Nascimento & Nascimento, *supra* note 66, at 108; see also Antônio Pitanga, *Where Are the Blacks?*, in BLACK BRAZIL, *supra* note 65, at 31, 31–32 (describing two Brazils—one in the hotels, exclusively white, and another in the streets and *favelas*); Marotto, *supra* note 105 (describing various examples of de facto racial segregation in Brazil as reflected by employment, educational, and residential statistics).

¹¹⁴ Nascimento & Nascimento, *supra* note 66, at 108 (citation omitted).

proximity to black-dominated *favelas*, than the physical distance between white middle class neighborhoods and Black neighborhoods in the United States, the white middle class neighborhoods in Brazil are just as psychologically and symbolically segregated. The segregation is effectuated by the installation of high walled gated communities that keep Afro-Brazilians hidden from view.¹¹⁵ Moreover, those Afro-Brazilians who do manage to integrate themselves into a residential area often experience a high degree of social isolation and ostracism.¹¹⁶ Even the mythical notion of a racially integrated annual Carnival celebration has been debunked by one Brazilian race relations scholar, who observed:

All join together in the world's greatest carnival—everyone participates, “each in his or her place.” There is no social interaction among the groups, and ropes mark the physical limits of each. In view of blacks’ affirmation in carnival, the middle and upper classes, self-identified as whites, react by establishing rigid criteria of social and racial discrimination for participation in their own organizations.¹¹⁷

The segregation of Carnival is exacerbated by the huge numbers of white Brazilians who flee their homes for the duration of the Carnival week in order to avoid the disorder attributed to Afro-Brazilian revelers.¹¹⁸ This segregation exceeds the concern about the presumed criminality of nearby *favelas*, given how extensively Whites organize themselves into insular worlds with extremely limited interaction with Afro-Brazilians outside of the hierarchical employer-servant relationships.¹¹⁹ “The reality is that [Blacks] are not normally incorporated into your life; they are not in your social circles.”¹²⁰ The vigilance of protecting Whites from Blackness is apparent in white parental directives to avoid interactions with Blacks and anyone who could even be perceived as Black simply from time in the sun. “[My mother] wanted me to stay very white, to characterize my Aryan race, right? To stay white. I didn’t go to the beach so that I wouldn’t get dark like other people.”¹²¹

Nor are *favela* (slum dwellings) sites of multiracial inclusion. Ethnographic studies have demonstrated that many Whites who live in *favelas* amongst Afro-Brazilian neighbors retain a sense of white superiority as reflected in one white resident’s remark: “They are gross.

¹¹⁵ SHERIFF, *supra* note 33, at 152.

¹¹⁶ See, e.g., TWINE, *supra* note 101, at 26 (describing the social isolation and ostracism directed at an Afro-Brazilian family).

¹¹⁷ Jefferson Bacelar, *Blacks in Salvador: Racial Paths*, in BLACK BRAZIL, *supra* note 65, at 99.

¹¹⁸ SHERIFF, *supra* note 33, at 151.

¹¹⁹ *Id.* at 151, 161.

¹²⁰ *Id.* at 169.

¹²¹ *Id.* at 163.

They are badly brought up I don't like [Blacks]."¹²² The disdain for Afro-Brazilian neighbors is also evident in the outrage of white parents when their children date Afro-Brazilian neighbors in the *favelas*—"You're going to dirty the family!"¹²³ Consequently, *favela* residents firmly believe that having lighter skin and European features increases the potential for success and a better life.¹²⁴ Surveys in *favelas* indicated that Afro-Brazilians there experience relative disadvantage as compared to white residents who consistently have higher incomes and shorter average rates of residence in a *favela*.¹²⁵ This is mirrored by the racial disparities in living conditions whereby Afro-Brazilian access to sanitation, garbage collection, and running water are greater than can be accounted for by regional differences.¹²⁶

Racial disparity is also prevalent in the labor market and is consistent across sectors.¹²⁷ Indeed, even the hiring practices for television actors reflect racial exclusion and hierarchy whereby the few Afro-Brazilians that are hired portray stereotyped and negative images of Afro-Brazilians.¹²⁸ Similarly, few Afro-Brazilian models are hired to represent "Brazilian" beauty despite the prevalence of persons of African descent in the population.¹²⁹ As a result of the labor market disparities, Afro-Brazilians represent seventy-three percent of the most indigent sector of society and only twelve percent of the most rich. In contrast, white Brazilians represent only twelve percent of the indigent population and eighty-six percent of the higher income population.¹³⁰ It is thus not surprising that Afro-Brazilian children have higher rates of labor market involvement than white children.¹³¹ Even the context of Catholic appointment of priests and bishops is characterized by racial stratification, whereby only 6.3% of Catholic priests in Brazil are Afro-Brazilians, and only 2.5% of Catholic

¹²² *Id.* at 132.

¹²³ *Id.* at 138–39.

¹²⁴ DONNA M. GOLDSTEIN, *LAUGHTER OUT OF PLACE: RACE, CLASS, VIOLENCE, AND SEXUALITY IN A RIO SHANTYTOWN* 108 (2003).

¹²⁵ João H. Costa Vargas, *When a Favela Dared to Become a Gated Condominium: The Politics of Race and Urban Space in Rio de Janeiro*, *LATIN. AM. PERSP.*, July 2006, at 49, 64.

¹²⁶ See NASCIMENTO, *supra* note 37, at 47.

¹²⁷ Fernando Lobo Braga, *Discriminação No Mercado de Trabalho: Diferenças Raciais e Por Sexo No Ano de 2003* [Discrimination in the Labor Market: Race and Gender Differences in the Year 2003] 30 (2005) (unpublished M.A. dissertation, Universidade Católica de Brasília) (on file with author).

¹²⁸ JOEL ZITO ARAÚJO, *A NEGAÇÃO DO BRASIL: O NEGRO NA TELENVELA BRASILEIRA* [THE NEGATION OF BRAZIL: BLACKS IN THE BRAZILIAN SOAP OPERA] (2000).

¹²⁹ Marcelo Sabino Luiz, *A Mulher Negra No Mercado de Trabalho: A Pseudoequidade Marcada Pela Discriminação da Sociedade E a Mídia No Seculo 21*, *P@RTES* (Sept. 9, 2010), <http://www.partes.com.br/politica/mulhernegranotrabalho.asp>.

¹³⁰ IBGE, 2008, *supra* note 88, at tbl.9.10.

¹³¹ Patricia Duarte, *Negros São Maiores Vítimas do Trabalho Infantil no País*, *O GLOBO*, Nov. 18, 2006 (stating more Blacks are victims of child labor in the country).

bishops are Afro-Brazilian.¹³²

The Ministry of Health data similarly suggests a nation of separate spheres for Whites and Afro-Brazilians.¹³³ Specifically, Afro-Brazilian children have a forty-four percent higher risk of dying from infectious diseases before their first birthday than do white children.¹³⁴ Afro-Brazilian children also have a sixty-eight percent higher chance of dying from tuberculosis than white children.¹³⁵ Afro-Brazilian maternal mortality rates are forty-one percent higher than those of white women.¹³⁶ Racial disparities are also prevalent amongst life expectancy rates, housing situations, and access to durable goods and digital communications.¹³⁷

The systemic racial discrimination inherently revealed in the aforementioned statistical data is underscored by the numerous testimonials of racialized treatment in the workplace, schools, and other social settings. Interviews of Afro-Brazilian workers consistently reveal racial discrimination as a set of daily practices that is manifested in all types of jobs from domestic servants to professional workers.¹³⁸ Afro-Brazilians whose job applicant test scores qualify them for white-collar positions are routinely denied such positions and instead directed to lower ranked positions.¹³⁹ As one Afro-Brazilian relates, after having qualified for a store sales position by virtue of his test score, he was then told “that there were no openings at the front counter but that there was an opening in the stockroom, in back. But she didn’t even know my name; later she asked me, ‘What is your name?’ So she didn’t even look [at my test score]”¹⁴⁰ Afro-Brazilians are only welcomed as front counter cashiers in large food grocery stores that are not the purveyors of status, in addition to being welcomed to the low status position of domestic servant.¹⁴¹ When exceptional Afro-Brazilians manage to obtain access to

¹³² Wagner Gomes, *Negros São Minoria Na Igreja* [Blacks Are a Minority in the Church], O GLOBO, May 14, 2007, at 3.

¹³³ *Entidades Criticam “Racismo Institucional”* [Entities Criticize “Institutional Racism”], CORREIO DE SERGIPE (Nov. 20, 2008), <http://correiodesergipe.com/lernoticia.php?noticia=30545> (describing ONG Criola’s study of Ministry of Health statistics by race); Carta Aberta ao Ministro, Secretari@s Estaduais e Municipais de Saude [Open Letter to the Minister of Health, State Secretaries of Health and Municipal Secretaries of Health] (Sept. 27, 2008) (on file with *Connecticut Law Review*).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ INSTITUTO DE PESQUISA ECONÔMICA APLICADA (IPEA), FUNDO DE DESENVOLVIMENTO DAS NAÇÕES UNIDAS PARA A MULHER, & SECRETARIA ESPECIAL DE POLÍTICAS PARA AS MULHERES [PORTRAIT OF GENDER AND RACIAL INEQUALITIES] 11–13 (3d ed. 2008).

¹³⁸ Maria Aparecida Silva Bento, *Silent Conflict: Discriminatory Practices and Black Responses in the Workplace*, in RACE IN CONTEMPORARY BRAZIL, *supra* note 45, at 109, 114 [hereinafter Bento, *Silent Conflict*].

¹³⁹ See SHERIFF, *supra* note 33, at 208–09 (recounting an instance where a Black individual was denied a position despite a qualifying test score).

¹⁴⁰ *Id.* at 208.

¹⁴¹ BURDICK, *supra* note 74, at 46–47.

well-regarded job positions with job mobility within a firm, the racial discrimination actually becomes more intense.¹⁴² It is thus unsurprising that the workplace has been observed to be the context in which racism is most often experienced by Afro-Brazilians.¹⁴³

Nonetheless, the pain of racism asserts itself in other social contexts as well. One Afro-Brazilian athlete was excluded from the swimming pool of the Rio athletic club when he arrived “‘at an hour during which negroes are not permitted to swim in the pool.’”¹⁴⁴ More commonly, Afro-Brazilians are under suspicion when entering stores. “‘People stare at you, give you *mau olhado* (nasty looks) It’s not even that they always think you’ll steal something, although that sometimes happens. It’s like they find you ugly or something like that, like you shouldn’t be there.’”¹⁴⁵

This hyper-vigilance of Blackness also occurs in social gatherings. For instance, “‘when a dark person arrives at a party people keep staring A party that [a dark person was] invited to by another person, full of Whites, where there are more Whites. The *pretinho* [little Black] who arrives always feels that they’re being a little mistreated.’”¹⁴⁶ Similarly, when Brazilians date across color lines, the interracial relationships “not only raise a few eyebrows but may also provoke censure and harassment.”¹⁴⁷

Nor are family structures free from racial bias. The darkest children in many families are often the subject of racialized joking and commentary, while the lightest family member is viewed as the most attractive and intelligent.¹⁴⁸ Ethnographers report that narratives about parents giving preferential treatment to lighter-skinned children are not hard to find. For example, in a family with twin daughters, the dark-skinned girl was treated like a servant in the house while the lighter-skinned girl was pampered and allowed various privileges.¹⁴⁹

Unfortunately, such racial bias is not contained to the private sphere. Police violence is also riddled with racial bias. The police harassment of Afro-Brazilians is manifested in an explicitly racial manner, whereby racial slurs are uttered while the abuse occurs.¹⁵⁰ One typical police practice includes entering city buses and ordering young Black men to get off for a *revista* (review) to be frisked and interrogated based simply upon the

¹⁴² Bento, *Silent Conflict*, *supra* note 138, at 115.

¹⁴³ *Id.* at 110.

¹⁴⁴ SHERIFF, *supra* note 33, at 207.

¹⁴⁵ *Id.* at 91.

¹⁴⁶ *Id.* at 92.

¹⁴⁷ *Id.* at 140.

¹⁴⁸ *Id.* at 143–44.

¹⁴⁹ BURDICK, *supra* note 74, at 43.

¹⁵⁰ NIYI ALFOLABI, *AFRO-BRAZILIANS: CULTURAL PRODUCTION IN A RACIAL DEMOCRACY* 186 (2009); SHERIFF, *supra* note 33, at 94.

suspicion of being Black.¹⁵¹ Moreover, the extremities of police violence are targeted against Afro-Brazilians with the seeming sanction of the general population.¹⁵² For instance, it has been documented that the Rio de Janeiro police alone kill more than 2.5 times as many persons in a month as the New York City Police Department kills in a year, and that the majority of the victims are Afro-Brazilians.¹⁵³ Systematic interviews and focus group research in Rio de Janeiro *favelas* indicate that the police so closely align Blackness with criminality that they make no effort to distinguish law abiding *favela* residents from the law breakers when raiding the *favelas* with violent police tactics.¹⁵⁴ Other studies similarly document a pattern of racially disproportionate police violence throughout Brazil.¹⁵⁵

These racialized attitudes are infused throughout the law enforcement context of Brazil. In a seminal study of all criminal actions for robbery in the city of São Paulo that were resolved in the first instance in 1993, it was shown that almost twice as many Whites were released on bail as compared to Afro-Brazilians (twenty-seven percent versus fifteen percent).¹⁵⁶ The study also found that racial disparity in conviction rates with a conviction rate of 59.4% for white defendants, and 68.8% for Blacks.¹⁵⁷ One study published in 2003 confirms this tendency towards the greater punishment of Afro-Brazilians, both in terms of their disproportionate arrest and their conviction.¹⁵⁸

Experiences of racism are prevalent even amongst the emerging Black middle-class of Brazil. In an ethnographic study of persons self-identifying as Black/"negro" in the middle-class neighborhood of Pituba, Salvador, in the predominantly Black northeast of Brazil, seventy-one percent indicated that they had experienced racial discrimination.¹⁵⁹ Indeed, the only Afro-Brazilian justice on the Federal Supreme Court, Justice Joaquim Barbosa, has stated that in comparison to his travels abroad to Europe and the United States, Brazil was the location where he

¹⁵¹ SHERIFF, *supra* note 33, at 109.

¹⁵² Michael J. Mitchell & Charles H. Wood, *Ironies of Citizenship: Skin Color, Police Brutality, and the Challenge to Democracy in Brazil*, 77 SOC. FORCES 1001, 1007–09 (1999).

¹⁵³ Vargas, *supra* note 125, at 56 ("The ubiquity of police misconduct is part of a persistent pattern of the widespread antiblack racism that pervades Brazilian society.").

¹⁵⁴ INSTITUTO BRASILEIRO DE ANÁLISES SOCIAIS E ECONÔMICAS, ROMPENDO O CERCEAMENTO DA PALAVRA, *A Voz dos Favelados em Busca de Reconhecimento* [*Breaking the Silence: The Voice of Favela Dwellers in Search of Recognition*] (Nov. 11, 2007), <http://www.ibase.br/modules.php?name=Conteudo&pid=2077&print=1>.

¹⁵⁵ Cynara Menezes, *Ecos da Escravidão*, CARTA CAPITAL, Mar. 9, 2011, at 24.

¹⁵⁶ Sérgio Adorno, *Discriminação Racial e Justiça Criminal em São Paulo*, 43 NOVOS ESTUDOS CEBRAP 45–63 (1995).

¹⁵⁷ *Id.*

¹⁵⁸ Renato Sérgio de Lima et al., *Mulheres Negras: As Mais Punidas Nos Crimes de Roubo*, 125 BOLETÍN DEL NÚCLEO DE PESQUISAS IBCCRIM 3 (2003).

¹⁵⁹ Santos Silva, *supra* note 84, at 75.

had actual experiences of racial discrimination.¹⁶⁰ In fact, not only is middle class standing not a shield from racial discrimination, it can aggravate matters when middle class Afro-Brazilians attempt to enter social spaces understood as only for white elites.¹⁶¹ For instance, an Afro-Brazilian who worked in the financial market of São Paulo for twenty-six years as an economic planning manager and dressed in the professional attire of a suit and tie, reported that every single day he observed white women “tighten[] the grip on their handbags as he passed.”¹⁶²

In short, a growing number of qualitative and quantitative studies of race in Brazil challenge the culturally embedded notion that race has no social or economic relevance. An examination of the intersectional position of Afro-Brazilian women further highlights the role of race in “post-racial” Brazil and the growing opposition to the rhetoric of post-racialism.

IV. THE INTERSECTIONAL POSITION OF AFRO-BRAZILIAN WOMEN

The social indicators for Afro-Brazilian women paint a devastating picture of intersectional racial exclusion and bias,¹⁶³ as is also the case for African American women in the United States.¹⁶⁴ Afro-Brazilian women have the worst socio-economic indicators given the more intensive social barriers at the intersection of race and gender.¹⁶⁵ The most recent government statistics reveal that Afro-Brazilian women are worse off in the labor market than white women and men of all races because they disproportionately work in the informal labor market without rights to unemployment insurance and maternity leave.¹⁶⁶ Indeed, they are the most indigent group of the entire population.¹⁶⁷ The median salary for Afro-

¹⁶⁰ Frederico Vasconcelos, *Situações de Discriminação Só Tive No Brasil, Diz Ministro do STF [Incidents of Discrimination I Have Only Had in Brazil, Says a Minister of the Federal Supreme Court]*, FOLHA DE SÃO PAULO ONLINE, (Nov. 23, 2008), <http://www1.folha.uol.com.br/folha/brasil/ult96u470662.shtml>.

¹⁶¹ CALDWELL, *supra* note 60, at 69.

¹⁶² Marotto, *supra* note 105.

¹⁶³ See Helen I. Safa, *Racial and Gender Inequality in Latin America: Afro-descendent Women Respond*, 7 FEMINIST AFRICA 49, 50–51 (2007), available at http://www.feministafrica.org/uploads/File/Issue_7/06_issue7_feature_article3.pdf (“Afro-descendent women accuse the mainstream feminist movement of neglecting their concerns and, like the state, adopting a culturally homogenous view of women that fails to do justice to their cause. Afro-descendent women have also had to negotiate a place within the larger black movement, traditionally led by men.”).

¹⁶⁴ AFRICAN AMERICAN WOMEN’S HEALTH AND SOCIAL ISSUES (Catherine Fisher Collins ed., 2006); LATINAS AND AFRICAN AMERICAN WOMEN AT WORK: RACE, GENDER AND ECONOMIC INEQUALITY (Irene Browne ed., 1999).

¹⁶⁵ See Rosana Heringer, *Diversidade Racial e Relações de Gênero no Brasil Contemporâneo*, in O PROGRESSO DAS MULHERES NO BRASIL 142 (CEPIA ed., 2006); Peggy A. Lovell, *Gender, Race, and the Struggle for Social Justice in Brazil*, LATIN AM. PERSP., Nov. 2000, at 85, 98 [hereinafter Lovell, *Gender, Race, and the Struggle*] (“Thus Afro-Brazilian women suffered the combined effects of gender and racial wage discrimination.”).

¹⁶⁶ IBGE, 2010, *supra* note 17, at tbl.9.4.

¹⁶⁷ See Luiz, *supra* note 129.

Brazilian women is half that of white women.¹⁶⁸ Even when Afro-Brazilian women have the same years of schooling as white women, white women still earn forty percent more than they do.¹⁶⁹ Moreover, Afro-Brazilian women have the highest unemployment rate in the nation, despite the fact that they enter the labor market earlier than all other groups and retire the latest.¹⁷⁰ Analyses of labor market changes during periods of rapid industrialization demonstrate that white women still gain access to higher education and better-paying occupations in much greater numbers than Afro-Brazilian women.¹⁷¹ In addition, white women continue to be paid higher wages in every occupation. In fact, when socio-demographic differences such as educational level and occupational placement are controlled in statistical studies, Afro-Brazilian women are still shown to be paid less than similarly qualified white women.¹⁷² Furthermore, "Afro-Brazilian women who rose to the top of the occupational hierarchy experienced increased inequality."¹⁷³

Even in São Paulo, the most economically dynamic region of the country, Afro-Brazilian women remain overwhelmingly concentrated as domestic workers in the labor market, and are paid less than white women and Afro-Brazilian men in all educational categories.¹⁷⁴ Furthermore, the occupational mobility of Afro-Brazilian women in São Paulo is significantly stagnant in contrast to white women and Afro-Brazilian men.¹⁷⁵

For Afro-Brazilian women, racial discrimination often takes the form of sexual objectification as prostitutes or direction to service entrances as presumed domestic servants despite the apparel and trappings of middle class status.¹⁷⁶ They also experience exclusion from job positions explicitly and implicitly requiring "boa aparência" (a good appearance), widely understood as a white appearance.¹⁷⁷ Even in the context of the Afro-Brazilian dominated domestic service sector, Afro-Brazilian

¹⁶⁸ See Maria Aparecida Silva Bento, *A Mulher Negra No Mercado de Trabalho*, OBSERVATÓRIO SOCIAL, Mar. 2004, at 29.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Peggy A. Lovell, *Women and Racial Inequality at Work in Brazil*, in RACIAL POLITICS IN CONTEMPORARY BRAZIL, *supra* note 25, at 138, 149 (analyzing the structural transformations that took place between 1960 and 1980 which increased labor opportunities for women and raised wages but did not reduce racial and gender differentiation).

¹⁷² *Id.* at 150.

¹⁷³ *Id.*

¹⁷⁴ Lovell, *Gender, Race, and the Struggle*, *supra* note 165, at 95.

¹⁷⁵ See TELLES, *supra* note 18, at 143–45 (comparing rates of occupational mobility by race and gender in São Paulo and stating that, "[i]n sum, while nonwhite males encounter a glass ceiling that prevents them from entering middle-level professional jobs and above, nonwhite women seem to be stuck in boots that are glued to the floor of the occupational structure").

¹⁷⁶ See CALDWELL, *supra* note 60, at xviii–xix (describing how the author was mistaken for a prostitute or a domestic servant while conducting field research).

¹⁷⁷ *Id.* at 66–67.

applicants find that “[t]hey prefer white [empregadas] over black ones (pretas).”¹⁷⁸ For those Afro-Brazilians who do get hired as domestic servants, they observe a pattern of white employers designating separate plates, utensils, and foods, seemingly motivated by a fear of racial contamination.¹⁷⁹ In fact, the racial motivation of the employers is often quite explicit as demonstrated by such employer comments as: “No, you can’t [work here]. No, my husband doesn’t like black people” and “Oh, I don’t want you [here], no, because my children don’t get along with negras.”¹⁸⁰

Rather than hire Black women as maids, some Brazilians prefer to informally adopt young Black girls who can attend to the domestic chores. “In this practice of ‘criação’ (which I translate as “informal paperless adoption”), upper and middle-class Brazilian families take in Afro-Brazilian girls and care for them in an unstated exchange for their unpaid labor. As one such woman explains:

I needed an extra maid. I asked Jose Costa . . . to find me a young girl from the rural area near Alianca. And so he drove to the villa during his lunch hour and he knocked on the door of a woman to whom he had been referred I have not made her into a slave the way some of the wealthy treat their foster children or the way our grandmothers and great grandmothers treated their adoptive children My own mother kept a black girl as a kind of slave, and when my mother died, I inherited her as a middle-aged woman, a childlike adult who had never married and didn’t know anything other than taking care of my mother I kept her until she died.”¹⁸¹

In contrast, formal adoption leaves most Afro-Brazilian children languishing in institutional care facilities because they are not wanted by white adoptive parents.¹⁸² With the informal adoption system of criação,

[t]he unpaid workload of cleaning, cooking, and caring for children that the adoptive families impose upon their Afro-Brazilian charges does not permit them to attend school. When one such girl was asked whether she had chosen to

¹⁷⁸ SHERIFF, *supra* note 33, at 101.

¹⁷⁹ *Id.* at 102.

¹⁸⁰ *Id.* at 103.

¹⁸¹ Tanya Kateri Hernández, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683, 692 (2005) [hereinafter Hernández, *To Be Brown in Brazil*] (quoting TWINE, *supra* note 101, at 35).

¹⁸² Elizabeth Cezar Nunes, *Discriminação da Criança Negra no Processo de Adoção* [Discrimination Against the Black Child in the Adoption Process] (2008) (unpublished J.D. dissertation, Centro Universitário de Brasília) (on file with author).

stop attending primary school she responded:

“No. I left because I was obliged to leave, understand? I had to work. I used to have to cook [for my adoptive family]. And this didn’t leave me the time to go to school and to do the same things [as my adoptive sister].”¹⁸³

It is thus not so surprising that Afro-Brazilian women have the lowest literacy rates in the population and are not well served by the under-resourced public school systems primarily populated by Afro-Brazilian children.¹⁸⁴

Even the health care context reveals the intersectional discrimination against Afro-Brazilian women. When hospitalized for pregnancy, Afro-Brazilian women have much higher rates of not receiving anesthesia when compared to white pregnant women (21.8% and 13.5% respectively).¹⁸⁵ It is also believed that Afro-Brazilian women are disproportionately sterilized.¹⁸⁶

In short, a wealth of qualitative and quantitative research confirms that Brazil is a racially stratified society in which Afro-Brazilians experience both explicit and subtle discrimination, and Afro-Brazilian women experience intersectional discrimination. The Organization of American States has stated that the pervasive existence of racial discrimination in Brazil will hinder its ability to meet the goals of the United Nations Millennium Development Goals for 2015, which it committed to as a precise and measurable manner of diminishing social exclusion in the nation.¹⁸⁷ In the attempt to address the pervasive racial inequality of Brazilian society, the law has become an arena for change in Brazil.¹⁸⁸

¹⁸³ Hernández, *To Be Brown in Brazil*, *supra* note 181, at 692–93 (quoting TWINE, *supra* note 101, at 43).

¹⁸⁴ TELLES, RACE IN ANOTHER AMERICA, *supra* note 18, at 129 (explaining that historically, black women have had the lowest literacy rates in the Brazilian population); *see also* Hernández, *To Be Brown in Brazil*, *supra* note 181, at 688 (discussing the racialized neglect of Brazilian public schools).

¹⁸⁵ *Negras Recembem Menos Anestesia do Que Brancas*, O GLOBO, Nov. 26, 2006 (noting that black women receive less anesthesia than white women).

¹⁸⁶ *See* BURDICK, *supra* note 74, at 2 (“We know that nonwhite women, and especially *pretas*, continue to be sterilized, and their children continue to die from disease and violence at rates far exceeding those for analogous groups of whites”); CALDWELL, *supra* note 60, at 163 (discussing the mass sterilization of black women in Brazil); Jurema Werneck, *The Beautiful and the Pure? Racism, Eugenics and New (Bio)technologies*, in UNDER THE SIGN OF BIOPOLITICS: CRITICAL VOICES FROM CIVIL SOCIETY 51, 57 (Alejandra Rotania & Jurema Werneck eds., 2004) (noting that the sterilization of Black women and others considered inferior was used to control population growth in several countries).

¹⁸⁷ Roberta Lopes, *Discriminação Racial Pode Fazer Com Que Brasil Não Cumpra Metas do Milênio [Racial Discrimination May Mean That Brazil Will Not Meet the Millennium Goals]*, AGÊNCIA BRASIL (Nov. 23, 2006) (on file with *Connecticut Law Review*).

¹⁸⁸ Most recently, Brazil enacted a national Statute of Racial Equality that issues a federal government mandate to administer programs and specific measures for reducing racial inequality. Statute of Racial Equality, Law No. 12.288 (July 20, 2010), *available at* <http://www.portaldaindualdade.gov.br/arquivos/Estatuto%20em%20ingles.pdf>. Title 1 states that it is

The *Tiririca* case, discussed in the next section, is one example of the ways in which social justice organizations are using the law to respond to the Brazilian post-racial myth of racial democracy.

V. THE INTERSECTIONAL CASE OF TIRIRICA

Francisco Everado Oliveira Silva, whose stage name is Tiririca, is a Brazilian entertainer who in 1996 released a song with the Sony Music company entitled *Veja os Cabelos Dela* (*Look at Her Hair*). The song was in essence a long tirade against the inherent distasteful animal smell of Black women and the ugliness of their natural hair.¹⁸⁹ The lyrics stated in significant part:

When she passes she calls my attention, but her hair,
there's no way no. Her *catinga* [African] (body odor) almost
caused me to faint. Look, I cannot stand her odor. Look,
look, look at her hair! It looks like a scouring pad for
cleaning pans. I already told her to wash herself. But she
insisted and didn't want to listen to me. This smelly *negra*
(Black woman) . . . Stinking animal that smells worse than a
skunk.¹⁹⁰

The lyrics struck a violent cord with Afro-Brazilian feminists. This is because the lyrics embody an absolute denigration of Black women. Moreover, the public message of disgust for Black women was a reflection of the troublesome but longstanding disinterest in Black women as marriage partners.¹⁹¹ The Black feminist NGO Criola, and a number of other social justice organizations, sued the singer and Sony Music company.¹⁹²

The civil action was filed pursuant to Article Three of Brazil's Constitution, which states the national objective is "to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any

the goal of the statute "to assure to the afro Brazilian population the achievement of equal opportunities, the support of individual collective and diffuse ethnic rights and the struggle against discrimination and other forms of ethnic intolerance." *Id.* Yet, the statute has been criticized by Afro-Brazilian activists for being purely aspirational and failing to provide concrete rights to enforce equality such as affirmative action policies. See, e.g., Jaime Alves, *Ouro de Tolos: O Estatuto da Igualdade e a Submissão Política Negra* II, ÍROHIN (June 21, 2010) (on file with *Connecticut Law Review*).

¹⁸⁹ Tanya Kateri Hernández, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PENN. J. INT'L L. 805 (2011) [hereinafter Hernández, *Hate Speech*] (citing TELLES, *supra* note 18, at 154, 241).

¹⁹⁰ *Id.* (citing CALDWELL, *supra* note 60, at 82) (translating Portuguese lyrics).

¹⁹¹ See TELLES, *supra* note 18, at 191 ("[B]lack women are disproportionately passed up in romance and marriage by white, brown, and black men. This seems to account for their greater likelihood of being single throughout their lives or of having late marriages.").

¹⁹² Hernández, *Hate Speech*, *supra* note 189, at 831.

other form of discrimination.”¹⁹³ The case was a civil action to protect the diffuse and collective rights of Black women to be free of discrimination.¹⁹⁴ Free of the criminal context which in Brazil requires a finding of demonstrated intent to discriminate, the civil court held that the defendant’s authorship of the lyrics was discriminatory in and of itself because the words inherently provoke feelings of humiliation in black women.¹⁹⁵ The court took note that because the singer Tiririca, who was often nationally televised in a clown costume, was a popular entertainer for children, the insulting and injurious content of the song was also prejudicial to the formation of Black youth. As compensation for the moral damages of collective emotional harm to dignity, in 2008, the court ordered payment of 300,000 *reais* in addition to attorney’s fees and costs (approximately USD 162,000).¹⁹⁶

The monetary payment for the damage to the collective equality interest of Black women was directed towards the Ministry of Justice’s Fund for the Defense of Diffuse Rights, for “the creation of educational anti-racism youth programs disseminated through radio, television, film, and printed materials for elementary schools in the state.”¹⁹⁷

With the judge’s conclusion that the popular song lyrics were inherently discriminatory, the official image of Brazil as a post-racial

¹⁹³ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 3, cl. IV (Braz.). Authorization to litigate a public civil action is obtained pursuant to the Lei de Ação Civil Pública, Lei No. 7347/85. In an earlier criminal court action, the plaintiffs filed a complaint of racism, but lost because the judge found that there was no criminal intent to offend black women. See 23 Vara Criminal do Rio de Janeiro, Feb. 18, 1998, Juiz Carlos Flores da Cunha; Hernández, *Hate Speech*, *supra* note 189, at 831–35 (discussing the details of the *Tiririca* criminal court action).

¹⁹⁴ Diffuse rights are a category of legal rights that provide guarantees to a group of individuals who have common legal interests despite being dispersed within the political community. Adilson José Moreira, *Equality for Same-Sex Couples: Brazilian Courts and Social Inclusiveness*, HARV. REV. LATIN AM., Spring 2007, at 46, 48 (“Diffuse rights are a category of rights to provide guarantees to a group of individuals dispersed within the political community who have common legal interests but are only circumstantially connected.”). The public civil action for the protection of diffuse and collective rights was created by Lei No. 7.347, de 24 de Julho de 1985, Diário Oficial da União [D.O.U.] de 25.07.1985, as amended by Lei Nos. 8.078 de 11 de Setembro de 1990; 8.884 de Junho de 11 de 1994; 9.494 de Setembro de 10 de 1997; and Provisional Measure No. 2.102-28 de Fevereiro de 23 de 2001.

¹⁹⁵ T.J.R.J., Embargos Infringentes No. 2005.005.00060, CEAP v. Sony Music Entertainment Brasil, 11 Câmara Cível do Tribunal de Justiça do Estado do Rio De Janeiro, Acórdão de 14 dez. 2005.

¹⁹⁶ See Bank of Canada Currency Converter Calculator, <http://www.bank-banque-canada.ca/en/rates/exchform.html> (indicating an approximately 0.54 U.S. dollar exchange rate for the Brazilian real on September 26, 2008 [the date of the *Tiririca* civil damages award judgment]). In civil law systems, moral damages are non-pecuniary damages that compensate for the injury of emotional distress from harm to one’s honor or reputation. Often, moral damages are not available for every sort of tort action, but only for those that create dignitary harm. See Saul Litvinoff, *Moral Damages*, 38 LA. L. REV. 1, 1 (1977) (explaining that “moral damages” means “damage to an interest for which a current market-value cannot be readily ascertained, as is always the case when the injury sustained consists, in whole or in part, in the experience of a negative state of emotional distress”); Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico. Are These Damages Equivalent to U.S. Punitive Damages?*, 35 U. MIAMI INTER-AM L. REV. 183, 188 (2004) (noting that “moral damages” have been compared to U.S. punitive damages, exemplary damages, or loss of consortium).

¹⁹⁷ Hernández, *Hate Speech*, *supra* note 189, at 832.

democracy begins to erode.¹⁹⁸ What the case immediately begins to deconstruct is the notion that Brazil's racial situation is less severe than that of the United States due to its predisposition for recognizing racial mixture and fluidity in racial identity, in contrast to the restrictive black-white racial binary of the United States. In other words, how significant is it to live in Brazil's "racial democracy" or racially mixed paradise, when Black women are targeted as objects of ridicule because of deeply racialized stereotypes regarding their Blackness?

Thus, by looking at the operation of Brazilian racial democracy from the intersectional position of Black women, the mystique of its own "post-racialism" is dispelled, and the common subordinated plight of Afro-descended women in the United States and Brazil is revealed. In effect, a critical intersectional examination of Brazilian post-racial/racial democracy, diminishes the promise of post-racialism as the end of U.S. racism. Bluntly stated, a critical examination of the Brazilian "racial democracy" delivers the powerful message of "don't believe the hype,"¹⁹⁹ for a U.S. audience otherwise subject to the deceptive allure of "post-racial" discourse. Furthermore, the Brazilian case study also illustrates how resistance to post-racialism can be possible even after decades of post-racial rhetoric.²⁰⁰ In short, comparative CRT clarifies the commonalities in subordination that varied racial ideologies can share, but appear opaque in isolation. Comparative law can be yet another CRT tool for revealing and addressing racial subordination.

¹⁹⁸ For this reason, the *Tiririca* case is an important intervention in earlier judicial uses of racial democracy that misapprehended the manifestation of racial discrimination. See Seth Racusen, *The Ideology of the Brazilian Nation and the Brazilian Legal Theory of Racial Discrimination*, 6 SOC. IDENTITIES 775, 789–90 (2004) (describing how before the enactment of the hate speech provisions of the antidiscrimination law in Brazil most incidents of racism were treated as *injúria*; that is, an injury to one's honor parallel to racial insult for which officials tended to dismiss the claims as personal problems rather than enforcing the law).

¹⁹⁹ PUBLIC ENEMY, *Don't Believe The Hype on IT TAKES A NATION OF MILLIONS TO HOLD US BACK* (Def Jam/Columbia/CBS Records 1988).

²⁰⁰ Mala Htun, *From "Racial Democracy" to Affirmative Action: Changing State Policy on Race in Brazil*, 39 LAT. AM. RES. REV. 60 (2004) (detailing how after decades of defending the myth of racial democracy the Brazilian State has shifted to acknowledging the salience of race and racism).

